Appeal No. 09-4113, 09-4129

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRITNEY JANE LITTLE DOVE NIELSON,

Petitioner - Appellee,

vs.

SUNNY KETCHUM and JOSHUA KETCHUM,

Respondents - Appellants,

CHEROKEE NATION,

Intervernor - Appellee.

Appeal from the United States District Court
for the District of Utah, No. 2:08-CV-00490-TS
Honorable Ted Stewart

APPELLANT'S BRIEF

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PRIOR OR RELATED APPEALS. There are no prior or related appeals.

II. JURISDICTIONAL STATEMENT

The Tenth Circuit Court of Appeals has jurisdiction to consider this appeal based on the following:

A. Basis for District Court's Subject Matter Jurisdiction: The claims raised by the Petitioner, Britney Jane Little Dove Nielson, hereafter "Nielson" arise under sections 1914 and 1913(d) of the Indian Child Welfare Act. (25 U.S.C. 1914, 1913(d)). The District Court has jurisdiction to consider Nielson's claims pursuant to 25 U.S.C. §1914 and 28 U.S.C. §1331.

B. Basis for Court of Appeals Jurisdiction: The Court of Appeals has jurisdiction to consider this appeal pursuant to 28 U.S.C. §1291 because it is an appeal of a final order from the U.S. District Court.

C. Timeliness of Appeal: Appellant's initial Notice of Appeal was filed on June 6, 2009, two days after the Court's judgment was entered (June 4, 2009). (Aplt. App. at 469). Appellant's amended notice of appeal was filed on July 6, 2009, within 30 days of the Court's Order Amending Judgment (June 15, 2009). (Aplt. App. at 512). Both notices were filed within the time period set forth in Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

D. Appeal from Final Judgment. The orders of the District Court from which this appeal are taken constitute final orders in the case. There are no other

issues remaining before the District Court.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The primary issue on appeal is whether the District Court erred in granting Nielson's motion for summary judgment and denying the Ketchum's motion for partial summary judgment by concluding that the minor child in this case was an "Indian child" as that term is used in the Indian Child Welfare Act (25 U.S.C. 1901 et. seq.), hereafter "ICWA" and whether the ICWA applies. The following related issues will be presented:

1. Did the District Court err in failing to rely on the Cherokee Register and Cherokee Constitution to determine whether the minor child was a member of the Cherokee Nation at the time Nielson consented to C.D.K.'s adoption?

2. Did the District Court err in concluding that Nielson descended from an "original enrollee" of the Cherokee Nation on the Dawes Commission Rolls?

3. Did the District Court err in finding that the minor child was a member of the Cherokee Nation under the Cherokee Nation Citizenship Act?

IV. STATEMENT OF THE CASE

On November , Nielson gave birth to C.D.K., the child who is the subject of this action. On November 6, 2007, Nielson appeared before the Hon. Rodney S. Page, Second District Court, Davis County, State of Utah and

consented to the adoption of the child by Joshua and Sunny Ketchum, Respondents, hereafter "Ketchums." (Aplt. App. at 70-85,145). At the time she relinquished the child for adoption, Nielson was not a member of an Indian Tribe and her non-member status was disclosed to Judge Page at the hearing. (Aplt. App. at 77). On May 13, 2008, a decree of adoption was entered in favor of the Ketchums. (Aplt. App. at 93, 94).

On June 25, 2008, Nielson filed a petition in the U.S. District Court for the District of Utah, Central Division, asking that the voluntary termination of her parental rights be invalidated pursuant to section 1914 of the ICWA (25 U.S.C. §1914)[1] and, in the alternative, that the final decree of adoption be vacated under Section 1913(d) of the ICWA.[2] (Aplt. App. at 10-25). The Cherokee Nation subsequently intervened. Nielson argued that C.D.K. was an "Indian child"[3] as

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[1]Section 1914 allows the parent of an "Indian child" to "petition any court of competent jurisdiction to invalidate [an action terminating parental rights] upon a showing that such action violated any provision of sections 1911, 1912 and 1913 of this Title." 25 U.S.C. §1914.

[2]Section 1913(d) provides that "[a]fter the entry of a final decree of adoption of an Indian child in any state court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree.
25 U.S.C. §1913(d).

[3]To be considered an "Indian Child," C.D.K. must be either (a) a member of an Indian Tribe, or, (b) . . . eligible for membership in an Indian Tribe and . . . the

defined by the ICWA and that the requirements of the Act were not followed when she gave her consent.[4] She based her claims on the Cherokee Nation Citizenship Act which purports to make any child who is a direct descendant of an "original enrollee" of the Cherokee Nation on the Dawes Commission Rolls an automatic member of the Tribe for a period of 240 days after birth. (Aplt. App. at 274).

The Ketchums filed an answer contesting Nielson's claims and also asserted a counter claim seeking reimbursement of the amounts spent to support the child in the event the adoption was voided. (Aplt. App. at 26-32).

On January 5, 2009, Nielson filed a motion for summary judgment and asked the Court to invalidate the state court's termination of her parental rights pursuant to 25 U.S.C. §1914. (Aplt. App. at 35-94). Nielson claimed that pursuant to the Cherokee Nation Citizenship Act, C.D.K. was an automatic member of the Cherokee Nation for the first 240 days of his life because he descended from original enrollees of the Tribe[5]. Nielson further claimed that

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biological child of a member of an Indian Tribe." 25 U.S.C. §1903(4).

[4]Under the Act, a birth mother cannot consent to the adoption of an "Indian child" until ten days after the child's birth. 25 U.S.C. §1913(a). Here, Nielson gave her consent the day after the child's birth, as allowed by Utah adoption law. (U.C.A. §78B-6-125).

[5]Nielson claimed that Lonita Rowe and Thomas Eugene Seabolt, C.D.K's maternal grandmother and great grandfather were original enrollees, a claim which

C.D.K.'s membership gave him "Indian Child" status under the ICWA and that her consent to the adoption was rendered invalid because it was not given in accordance with the Act.

In responding to Nielson's motion and in support of their own motion for partial summary judgment requesting a dismissal of Nielson's case, the Ketchum's argued that C.D.K. is not and has never been an "Indian Child" under the ICWA because he has never been a member of the Cherokee Nation. (Aplt. App. at 111-228). He never filed an application for membership or had an application filed on his behalf, as required by the Constitution of the Cherokee Nation, and his descendancy from an original enrollee on the Dawes Commission Rolls had not be proven, also a constitutional prerequisite to membership. Moreover, the Ketchum's argued that the Cherokee Nation Citizenship Act cannot be used to provide C.D.K. with "Indian child" status for several reasons:

1. The Cherokee Nation does not have the power or authority to force membership on a child without parental consent, especially when the parent is not a member of the Tribe.

2. The "temporary automatic citizenship" provisions of the Act constitute an unauthorized attempt by the Cherokee Nation to expand the reach of the ICWA.

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the Court ultimately determined to be false. (Aplt. App. at 463).

3. The Citizenship Act conflicts with the express membership requirements set forth in the Constitution of the Cherokee Nation.

4. The Cherokee Nation Citizenship Act constitutes an impermissible invasion of Parental Rights.

5. The Cherokee Nation Citizenship Act creates substantial problems in adoption cases.

On June 3, 2009 in a memorandum decision, the Court granted Nielson's motion and invalidated her consent to the termination of her parental rights. The Court denied the Ketchum's motion. The Court found that even though Nielson had failed to identify the original enrollees from which C.D.K. descended, as required by the Tribe Constitution and the Cherokee Nation Citizenship Act, that indirect evidence supported such a finding. In making its ruling, the Court relied on Nielson's unsworn documents concerning C.D.K.'s genealogy and construed the evidence in her favor. (Aplt. App. at 457-467). The Court rejected the Ketchum's arguments and entered its judgment on June 4, 2009. (Aplt. App. at 468).

The Ketchums appealed the entirety of the Court's ruling on June 6, 2009 by filing a Notice of Appeal. (Aplt. App. at 469).

On June 15, 2009, the Court, *sua sponte*, amended its judgment, clarifying

that Nielson's motion was granted as to her claim under 25 U.S.C. §1914, but denied under 25 U.S.C. §1913(d). (Aplt. App. at 470,471).

At a hearing held on June 17, 2009, the Court considered the Respondent's motion for stay pending appeal and approval of supersedeas bond and Nielson's motion for writ of execution and motion to expedite a hearing on the return of custody. The Court denied all motions. In order to clarify the status of the case for appeal, the Court dismissed the Ketchum's counter claim without prejudice and stated that Nielson's fraud and duress claims under Section 1913(d) had also been dismissed. (Aplt. App. at 496).

In response to the Court's amended judgment, the Ketchums filed an amended notice of appeal on July 6, 2009. (Aplt. App. at 512). The filing of the amended notice resulted in the opening of a separate case (09-4129), which was consolidated with the original appeal (09-4113), on August 24, 2009.

The parties participated in appellate mediation on August 20, 2009. None of the issues were resolved.

V. STATEMENT OF FACTS

1. The minor child C.D.K. was born to Nielson on November . (Aplt. App. at 12).

2. Nielson appeared before Judge Rodney S. Page, Second District Court,

Davis County, State of Utah, on November 6, 2007, and consented to the adoption of C.D.K. by the Ketchums. (Aplt. App. at 70-85,145).

3. At the time she relinquished C.D.K. for adoption, Nielson was asked by Judge Page about her Indian ancestry. Judge Page was informed by Nielson's mother, that Nielson was not a member of an Indian tribe. (Aplt. App. at 77).

4. The adoption of C.D.K. by the Ketchums was finalized on May 13, 2008. (Aplt. App. at 93, 94).

5. C.D.K. was not an enrolled member or citizen of the Cherokee Nation on November 6, 2007. (Aplt. App. at 138).

_____3. C.D.K. has never been an enrolled member or citizen of the Cherokee Nation. (Aplt. App. at 138).

4. C.D.K. was not included in the Cherokee Register on November 6, 2007. (Aplt. App. at 139).

5. C.D.K. has never been included in the Cherokee Register. (Aplt. App. at 139).

6. Nielson was not an enrolled member or citizen of the Cherokee Nation on November 6, 2007. (Aplt. App. at 77, 139).

7. The Cherokee Nation had no record of the existence of C.D.K. on November 6, 2007. (Aplt. App. at 139).

8. The Cherokee Nation had no record of the existence of Nielson on November 6, 2007. (Aplt. App. at 139).

9. Nielson had never filed an application for membership/citizenship in the Cherokee Nation on or prior to November 6, 2007. (Aplt. App. at 140).

10. An application for membership/citizenship in the Cherokee Nation has never been filed by, for or on behalf of C.D.K. (Aplt. App. at 140).

11. On November 6, 2007, Nielson did not have a membership, citizenship, enrollment or registration number with the Cherokee Nation. (Aplt. App. at 140).

12. On November 6, 2007, C.D.K. did not have a membership, citizenship, enrollment or registration number with the Cherokee Nation. (Aplt. App. at 140).

13. C.D.K. has never had a membership, citizenship, enrollment or registration number with the Cherokee Nation. (Aplt. App. at 140).

14. The Cherokee Nation does not have a list of those designated "temporary citizens" under Chapter 2, Section 11A of the Cherokee Nation Citizenship Act. (Aplt. App. at 171).

15. The Cherokee Nation does not include those designated "temporary citizens" under Chapter 2, Section 11 of the Cherokee Nation Citizenship Act, in its membership lists, census of members, or any reports or statistics prepared or used concerning the number of its citizens. (Aplt. App. at 141).

16. The Cherokee Nation does not send notices of Cherokee Nation business or events to those it considers "temporary citizens" under Chapter 2, Section 11 of the Cherokee Nation Citizenship Act. (Aplt. App. at 141,142).

17. The Cherokee Nation does not know the identity or number of those persons designated "temporary citizens" under the Cherokee Nation Citizenship Act. (Aplt. App. at 142).

VI. SUMMARY OF ARGUMENT

The District Court erred in finding that C.D.K. was a member of the Cherokee Nation at the time he was relinquished for adoption. First, the District Court failed to defer to the Cherokee Nation's own membership records and Tribal Constitution when determining C.D.K.'s membership status. Significantly, C.D.K. has never gone through the citizenship process mandated by the Cherokee Constitution. He never filed an application or had an application filed on his behalf, and never had his qualifications reviewed by the Registration Committee. He has never been included in the Cherokee Register (a list of Tribal members), and has never received a membership number. In fact, when Nielson relinquished her rights to the child, the Cherokee Nation had no knowledge that Nielson and C.D.K. existed.

Second, in order to become a member of the Cherokee Nation, both the

Tribe's Constitution and the Cherokee Nation Citizenship Act require that C.D.K. must be a direct descendant of an original enrollee of the Tribe. Nielson altogether failed to establish the identity of the original enrollee from which C.D.K. descends, a defect fatal to her claim. In ruling on this issue, the District Court improperly construed the facts and inferences in favor of Nielson in violation of the rules governing the consideration of summary judgment motions.

Finally, the District Court erred in concluding that C.D.K. acquired "Indian child" status pursuant to the temporary automatic citizenship provisions of the Cherokee Nation Citizenship Act. The Act cannot be applied to this case for several reasons. First, the Citizenship Act violates C.D.K.'s constitutional right to freely associate with whomever he chooses. The Cherokee Nation cannot force membership on a non-member child born to a non-member without the consent of the child's parent. Additionally, the Act conflicts with the Tribe's own rule which prohibits the processing of a child's membership application absent parental consent and is contrary to the fundamental right given parents to direct the upbringing of their children as guaranteed by the U.S. Constitution.

Second, the temporary automatic citizenship provisions of the Cherokee Nation Citizenship Act impermissibly attempt to expand the reach of the ICWA. The ICWA specifically provides "Indian child" designation to children eligible for

membership who are born to a member of a tribe. 25 U.S.C. §1903(4)(b). The ICWA does not extend "Indian child" status to eligible children born to non-members. The Cherokee Nation, by its Citizenship Act, has attempted to do what Congress refused to do: extend "Indian child" status to eligible children born to non-members by making them "temporary members" of the Tribe for the first 240 days of their lives. The ICWA does not and was not intended to provide "Indian child" status for temporary members of a Tribe, especially when such membership is imposed without parental consent.

Third, the temporary automatic citizenship provisions of the Citizenship Act are in direct conflict with the Cherokee Constitution which requires that membership in the Tribe be based on an application process. Here, C.D.K. has never applied for membership in the Tribe and is not listed on the Cherokee Register.

Finally, the automatic membership provisions of the Cherokee Nation Citizenship Act create unreasonable problems when applied to adoption cases. A person adopting a child from a birth mother who has Cherokee ancestry but is a non-member and has had no involvement with the Tribe would have no reason to believe that the newborn child to be adopted is a tribal member and an "Indian child" under the ICWA.

For the above reasons, C.D.K. was not a member of the Cherokee Nation at the time he was relinquished for adoption and as a consequence, the ICWA does not apply.

VII. APPLICABLE STANDARD OF REVIEW

The standard of review for all issues raised is "de novo" review. "Summary Judgment orders are reviewed de novo, using the same standards as applied by the district court. . . . Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Fed.R.Civ. Pro. 56(c)." Pitman v. Blue Cross and Blue Shield of Oklahoma, 217 F.3d 1291, 1295 (10th Cir. 2000).

VIII. ARGUMENT

A. C.D.K. IS NOT AND HAS NEVER BEEN AN "INDIAN CHILD" UNDER THE ICWA.

The Indian Child Welfare Act cannot be applied to this case unless C.D.K. is found to be an "Indian child" as defined by the Act. To be considered an "Indian child," C.D.K. must be either (a) a member of an Indian Tribe, or, (b) . . .

eligible for membership in an Indian Tribe and . . . the biological child of a member of an Indian Tribe." 25 U.S.C. §1903(4).

C.D.K. cannot be considered an "Indian child" under the definition set forth in 25 U.S.C. §1903(4)(b) because Nielson was not a member of the Cherokee Nation when she relinquished C.D.K. for adoption. Thus, whether the ICWA applies to this case rests solely on the determination of whether C.D.K. was, himself, a member of an Indian Tribe at the time Nielson relinquished her parental rights.

1. PURSUANT TO THE CONSTITUTION OF THE CHEROKEE NATION AND THE TRIBE'S MEMBERSHIP RECORDS, C.D.K. HAS NEVER BEEN A MEMBER OF THE CHEROKEE NATION.[6]

In ruling on the question of whether C.D.K. was a member of the Cherokee Nation, the District Court correctly noted that Indian tribes have "inherent power to determine tribal membership" and that a Tribe's determination of membership is entitled to "great deference." (Aplt. App. at 463). The Court erred, however, in concluding that C.D. K. was a member of the Tribe because the Tribe's membership records and Constitution clearly exclude him as a member.

[6]Issue raised: Aplt. App. at 118-124; 138-141, 149, 164-228, 375-377, 390-411; Issue Ruled on: Aplt. App. at 464,465.

The Constitution of the Cherokee Nation contains the following requirements for becoming a citizen of the Tribe:[7]

> Article IV. Citizenship
>
> Section 1. All citizens of the Cherokee Nation must be original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls. . . .
>
> Section 2. There shall be established a Cherokee Register, to be kept by the Registrar, for the inclusion of any Cherokee for citizenship purposes in the Cherokee Nation who presents the necessary evidence of eligibility for registration. The Council may empower the Registrar to keep and maintain other vital records.
>
> (a) A Registration Committee shall be established. It shall be the duty of the Registration Committee to consider the qualifications and to determine the eligibility of those applying to have their names entered in the Cherokee Register. The Registration Committee shall consist of a Registrar and two (2) assistants. All members shall be appointed by the Principal Chief and confirmed by the Council.
>
> (b) There shall be a number assigned to every name, which is approved and entered into the Cherokee Register. This number shall be preceded by three words, "Cherokee Registry Number."
>
> * * *

[7]In the Cherokee Nation, the term "citizen" denotes a member of the Tribe. The terms are used interchangeably. (Aplt. App. at 167).

> Section 3. Registration as used in this Article refers to the process of enrolling as a citizen of the Cherokee Nation and is not the same as registration for voting purposes.

C. N. Const. art. IV, §§1,2. (Aplt. App. at 148-161).

In addition to the above referenced constitutional requirements, a child cannot apply for citizenship without the consent of his/her parent or guardian. (Aplt. App. at 170).

When interpreting the membership provisions of the Constitution, "the Court must look at the plain language of the document." Allen v. Cherokee Nation Tribal Council, (Judicial Appeals Tribunal 2006, (JAT-04-09, p.5)). (Aplt. App. at 174-206). Tribal membership requirements cannot be redefined "absent a constitutional amendment." Id. at p. 3. (Aplt. App. at 176).

The importance of following the application process set forth in the Constitution was affirmed by Jana Leach,[8] an assistant in the Cherokee Nation Registration Department, when questioned at her deposition:

> Question: You're not aware of any other process or procedure by which a person can be admitted as a citizen of the Cherokee Nation other than filing an application?

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[8]Lela Ummertskee, Registrar of the Cherokee Nation, was not available at the time set for her deposition due to health problems. The Cherokee Nation stipulated that Jana Leach could represent the Tribe concerning the registration process. (Aplt. App. at 164,165).

Answer: I'm not.

Question: And you've been trained in this area, correct?
Answer: Yes.

Question: Are there any other membership lists other than the register?

Answer: No.

Question: Have you ever heard of anything -- have you ever heard of a temporary membership?

Answer: No.

Question: Are you aware of a list of temporary members?

Answer: No.

Question: So just to clarify, the only list to your knowledge of Cherokee citizens is the register?

Answer: Yes.

Question: Your answer was yes?

Answer: Yes.

Question: And that register is compiled of those who have submitted applications?

Answer: Yes.

Question: And whose applications have been approved?

Answer: Yes.

(Aplt. App. at 171).

In the present case, C.D.K. cannot be considered a member of the Cherokee Nation because he has not met the prerequisites for membership as contained in the Cherokee Constitution. C.D.K. has never filed an application for membership, has never had an application reviewed by the Registration Committee, has never been included in the Cherokee Register, and has never been given a Registration number, all requirements for citizenship. (Aplt. App. at 138-141). Moreover, C.D.K. was unknown to the Cherokee Tribe when Nielson relinquished her parental rights. (Aplt. App. at 139). Furthermore, there is no evidence that the Petitioner ever gave her consent that C.D.K. become a member of the Tribe. (Aplt. App. at 398). The above information provides conclusive evidence from the Cherokee Nation itself that C.D.K. was not a member of the Tribe when the Petitioner relinquished her rights.

Neither Nielson nor the Cherokee Nation have provided any admissible evidence to support a different conclusion.[9] First, neither filed affidavits declaring that C.D.K. was a member of the Cherokee Nation at the time Nielson

[9]This argument was raised below at Aplt. App. at 376, 377.

relinquished her parental rights.[10] In both their responses, rather, they have provided a copy of a letter to Jim Hanks dated May 28, 2008 from Myra C. Reed. (Aplt. App. at 372,373,288,289). The letter is inadmissible because it is unsworn and without adequate foundation.[11] Moreover, the letter is absent any declaration that C.D.K. is or was a member of the Tribe, stating, rather, that "the child [is] eligible for membership . . ." by virtue of his relationship to Thomas Eugene Seabolt. (Emphasis added). In addition, although Ms. Reed claims that the Cherokee Nation Membership Act provides for the "temporary automatic membership of newborn children who are the Direct Descendant of an Original Enrollee of the Tribe," she fails to identify the original enrollee from whom C.D.K. descends. Ms. Reed's reference to the Cherokee Nation Citizenship Act is made further dubious, given that Jana Leach, an employee authorized to speak for

[10]In her affidavit, Nielson indicates that her mother and grandfather were members of the Cherokee Nation and that she became a member on August 5, 2008, approximately nine months after she placed C.D.K. for adoption. Her affidavit does not establish C.D.K.'s ancestry to an original enrollee on the Dawes Commission Rolls. (Aplt. App. at 95-110).

[11]There is no indication in the letter that Myra C. Reed has authority to speak for the Tribe on membership issues.

the Cherokee Nation on registration issues,[12] had never heard of a temporary member or of temporary membership status. (Aplt. App. at 409,410).

2. THE IDENTITY OF AN ORIGINAL ENROLLEE HAS NEVER BEEN PROVEN.[13]

Pursuant to the Constitution of the Cherokee Nation, members of the Tribe must be "original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls. . . ." (C. N. Const. art. IV, §1).[14] The Cherokee Nation Citizenship Act also requires descendancy from "an Original Enrollee." (C. N. Cit. Act, Ch. 2, §11(A).[15] Both Nielson and the Cherokee Nation have yet to identify the "original enrollee" from which C.D.K. descends, only submitting unsworn documents listing the names of purported ancestors. The Petitioners have had substantial time to research this issue and the District Court expressed frustration at their failure to provide "documentary evidence [identifying the] original enrollees . . . ." (Aplt. App. at 465). Nielson's failure to support her

[12]Ms. Leach "process[es] and determine[s] [the] eligibility of applicants for the registration department." (Aplt. App. at 165).

[13]Issue raised: Aplt. App. at 121,122,130,138,142,149,377; Issue Ruled on: Aplt. App. at 463,464.

[14]Aplt. App. at 149.

[15]Aplt. App. at 274.

claims with sufficient evidence is fatal to her claims. Quinn v. Walters, 881 P.2d 795, 801 (Oregon 1993).[16]

In spite of their failure to identify an original enrollee, the District Court ruled that indirect evidence supported such a finding:

> Petitioner has claimed that the Grandmother and Great Grandfather are original enrollees of the Cherokee Nation. It is not in dispute that both the Grandmother and Great Grandfather were enrolled members of the Cherokee Nation, but in order to be an original enrollee, as defined in the Constitution of the Cherokee Nation, an individual must be listed on the Dawes Commission Rolls. The Dawes Commission Rolls contain names collected by the United States government from 1898 to 1914, and neither the Grandmother nor the Great Grandfather were alive in 1914. Petitioner cannot, therefore, rely solely on the enrolled status of the Grandmother and Great Grandfather. However, Petitioner has provided genealogical evidence that indicates that her great-great grandfather, J.G., and great-great grandmother, E.G., were enrolled members of the Cherokee Nation. Petitioner argues that J.G.'s and E.G.'s

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[16]In Quinn, the Oregon Supreme Court refused to apply the ICWA to an adoption case because of insufficient evidence that the child was " 'eligible for membership' in the Cherokee Nation so as to be an Indian child within the meaning of 25 USC §1903(4)." Id. There, although it was established that the child's grandfather was a member, "[n]o evidence linked that fact . . . with tribal membership on the part of his daughter or eligibility for tribal membership on the part of her biological child. To the contrary, there was evidence that some of Child's ancestors are non-Indian and that the Cherokee Nation requires that particular facts be established for eligibility, including enrollment of certain ancestors by 1906, enrollment of a natural parent, and a particular degree of 'Indian blood'." Id.

> mothers, Petitioner's great-great-great grandmothers, were original enrollees of the Cherokee Nation. There is not clear and conclusive evidence to support these final claims, which are central to the question of whether C.D.K. was a member of the Cherokee Nation under the Membership Act.
>
> The Court notes with some frustration that Petitioner or Intervenor could have greatly simplified the present inquiry by providing, at any point, documentary evidence that J.G.'s and E.G.'s mothers were original enrollees, listed as members of the Cherokee Nation on the Dawes Rolls. However, there is indirect evidence that J.G. and E.G. were both full-blooded Cherokee, indicating that their mothers would have been eligible for enrollment at the time that the Dawes Rolls were being compiled. The Court, therefore, finds that no reasonable fact finder could conclude that C.D.K. is anything other than a direct descendant of an original enrollee of the Cherokee Nation and that C.D.K. was a member of the Cherokee Nation, pursuant to the Membership Act, at the time of the Relinquishment Hearing.

(Aplt. App. at 463,464). (Emphasis added).

Because of the absence of "clear and conclusive evidence" on the question of C.D.K.'s lineage, it was inappropriate for the Court to grant her motion for summary judgment. "The Court is required to construe all facts and reasonable inferences in the light most favorable to the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (l986);

Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288,1292 (10th Cir. 1991)). (Aplt. App. at 458).

3. THE CHEROKEE NATION CITIZENSHIP ACT DOES NOT PROVIDE C.D.K. WITH MEMBERSHIP STATUS.

The District Court erred in ruling that C.D.K. obtained membership status by virtue of the Cherokee Nation Citizenship Act. The "temporary automatic citizenship of newborn children" provisions of the Cherokee Nation Citizenship Act (C. N. Cit. Act, Ch. 2, §11A)[17] cannot be applied in this case to confer citizenship on C.D.K. for several reasons. First, the provisions violate an individuals right of association under the United Sates Constitution. Second, the provisions impermissibly attempt to expand the reach of the ICWA; the Indian Child Welfare Act was never intended to apply to unregistered, unknown, unenrolled "temporary citizens." Third, the provisions are not found in the Cherokee Constitution and are contrary to its express requirements. Fourth, the provisions violate fundamental parental rights secured by the United States constitution. Fifth, the Cherokee Nation Citizenship Act creates unreasonable problems in adoption cases.

[17]Aplt. App. at 274.

a. THE CHEROKEE NATION CANNOT IMPOSE MEMBERSHIP ON C.D.K. ABSENT PARENTAL CONSENT.[18]

Nielson and the Cherokee Nation argue that the Cherokee Nation has the absolute right to determine its' membership and that its' determinations are conclusive. Although this assertion is generally correct, it has obvious limitations. First, the Cherokee Nation cannot, with impunity, impose membership on a person without the person's consent. Taken to the extreme, the Petitioners' argument would allow the Cherokee Nation to force membership on any person, regardless of their background or desire. Such an act would constitute a serious and unauthorized breach of an individual's fundamental liberty interest of association under the United States Constitution. Roberts v. United States Jaycees, 468 U.S. 609, 617-618 (1984).

A person eligible for membership in an Indian tribe has the absolute freedom to join or withdraw from a Tribe - it is his decision, not the Tribe's. "Tribal membership is a bilateral relation, depending for its' existence not only upon the action of the Tribe but also the action of the individual concerned. Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses." Felix S. Cohen, Handbook of Federal Indian Law, 22

[18]Issue raised: Aplt. App. at 128,170, 378-380,409. Issue Ruled on: Aplt. App. at 464-466.

(1982 Ed.) (cited in Thompson v. County of Franklin, 180 F.R.D. 216, 225 (D.C. N.D.N.Y. 1998)). A member of an Indian tribe "possess[es] the clear and God given right to withdraw from his tribe and forever live away from it as though it had no further existence." United States ex. rel. Standing Bear v. Crook, 25 F. Cas. 695, 649 (Cir. Ct., D. Neb.1879). Consistent with the above, membership in the Cherokee Nation requires the consent of the applicant. Membership is obtained by filing a voluntary application. (Aplt. App. at 149). If the application is approved, the applicant is placed in the Cherokee Register and given a Registry number. (Aplt. App. at 149). A child cannot apply for membership without the consent of a parent or guardian. (Aplt. App. at 170).

In the present case, when the Petitioner relinquished C.D.K. for adoption, she was not, by her own choosing, a member of the Cherokee Nation. She had never filed an application for membership. (Aplt. App. at 140). She had never resided on the Cherokee Reservation. (Aplt. App. at 398). She had never filed a membership application for C.D.K. and did not give her consent that C.D.K. become a member of the Tribe. (Aplt. App. at 140). At the time she relinquished her parental rights to C.D.K., the Cherokee Nation had no knowledge that the Nielson and C.D.K. existed. (Aplt. App. at 139). The Petitioner's sole intent was to place C.D.K. for adoption with the Ketchums. (Aplt. App. at 400). Without her

consent at the time, the Cherokee Nation has no legal basis for declaring that C.D.K. was a member of the Tribe.

b. THE CHEROKEE NATION CITIZENSHIP ACT VIOLATES THE INDIAN CHILD WELFARE ACT.[19]

The Indian Child Welfare Act provides "Indian Child"[20] status to all children born to a member of an Indian Tribe if the child is also eligible for membership. 25 U.S.C. §1903(4)(b). A child born to a non-member is not considered an "Indian Child" under the ICWA unless the child is, himself, a member. 25 U.S.C. §1903(4)(a). The ICWA deliberately uses the word "member" and nowhere speaks of "temporary membership." In addition, the Cherokee Nation Constitution nowhere recognizes a "temporary membership" or any form of membership that does not square with the requirements of Art. IV of the Cherokee constitution.[21]

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[19]Issue raised: Aplt. App. at 129,130; 380-382,413-456. Issue Ruled on: Aplt. App. at 466.

[20](4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian Tribe. 25 U.S.C. §1903(4).

[21]Membership in the Cherokee Nation is governed by the "plain language" of the Constitution. Allen, JAT-04-09, at 5. (Aplt. App. at 178). "Neither the Secretary nor the Indians themselves, may ignore the express provisions of the [tribal] constitution." The Seminole Nation of Oklahoma, 223 F. Supp 2d at 139.

In an attempt to broaden the reach of the ICWA, the Cherokee Nation enacted the Cherokee Nation Citizenship Act which purports to extend automatic temporary membership to all children who are linked to an original enrollee, regardless of whether the child's parent is a member of the tribe or whether the parent wants the child to become a member. (Aplt. App. at 274). Not only does the Citizenship Act violate a parent's fundamental right to control the destiny of its child,[22] it also violates the Tribe's own rule that a child cannot become a member without the consent of a parent or guardian. Most significantly, the act violates Congress' intent. A prior draft of what would become the ICWA had no definition of "Indian child" and defined "Indian" as "any person who is a member of or who is eligible for membership in a federally recognized Indian tribe."[23] This language scheme could conceivably have accommodated the Cherokee Nation Citizenship Act language. However, after considering serious constitutional issues,[24]

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[22]A parent has a fundamental right to direct the upbringing of its child. Troxel v. Granville, 530 U.S. 57, 66 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49, 57 (2000).

[23]123 Cong. Rec. 37223 (1972). (Aplt. App. at 414).

[24]H. R. Rpt. 1386 at pp. 12-19, 38-39 (July 24, 1978). (Aplt. App. at 425-428, 436-438). Among other things, see language in letter by Patricia M. Wald, Assistant U.S. Attorney General, Department of Justice, p38: "For reasons stated above, we consider that part of S. 1214 restricting access to state courts to be constitutional as applied to tribal members living on reservations and is of

Congress amended the definition of "Indian" and added the definition of "Indian child"[25] which remained in the ultimate statute. Congress, thus, deliberately determined that "Indian child" would not include children who were descendants by blood where the children's parents were not tribe members. Being hopelessly in conflict with the ICWA, as well as hopelessly in conflict with the Cherokee Nation's Constitution membership provisions, the Citizenship Act is unlawful. Moreover, as applied to this case, the Cherokee Nation Citizenship Act is, without question, impermissibly discriminatory because it imposes restrictions on Nielson's ability to place her child for adoption, solely based on her race and thereby violates her right to equal access to state courts.

c. CITIZENSHIP ACT VIOLATES THE CHEROKEE CONSTITUTION.[26]

Article IV of the Constitution of the Cherokee Nation sets forth the procedure for becoming a tribal citizen. The process requires an application, a

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doubtful constitutionality as applied to nontribal members living on reservations and would almost certainly be held unconstitutional as applied to nonmembers living off reservations." (Aplt. App. at 438).

[25]Congressional Record, 95th Congress, Second Session, October 14, 1978, p. 38109. (Aplt. App. at 453).

[26]Issue raised: Aplt. App. at 125-127,149,174-228. Issue Ruled on: Aplt. App. at 464,465.

review of the applicant's qualifications, and, upon verification of meeting membership requirements, assignment of a registry number and entry on the Cherokee Register. Only after approval is a person given a mandatory registry number and placed in the Cherokee Register. (Aplt. App. at 149).

The Cherokee Nation Citizenship Act violates the Constitution by purporting to provide an automatic "temporary" membership for newborn children outside of the clear application/enrollment process mandated by the Constitution. Creating a class of unidentified, unregistered, temporary members, who receive none of the benefits of enrolled members, was never authorized by the Constitution of the Cherokee Nation. Although the Council of the Cherokee Nation[27] has the power to enact laws and regulations to implement constitutional directives, the enactments must not be "contrary to the provisions of the Constitution." (Aplt. App. at 149). For example, in Allen v. Cherokee Nation Tribal Council, (Judicial Appeals Tribunal 2006 (JAT-04-09)), the Tribal Court struck down a law enacted by the Cherokee Council which provided that in order to become a tribal member, an applicant must be "Cherokee by blood." Id. at 1.[28]

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[27]The Council of the Cherokee Nation is the legislative branch of the Cherokee Nation. (C. N. Const. Art. VI, §1). (Aplt. App. at 150).

[28]Aplt. App. at 174.

The Judicial Appeals Tribunal ruled that "[t]he Council lacks the power to redefine tribal membership absent a constitutional amendment. The Council is empowered to enact enrollment procedures, but those laws must be consistent with the 1975 constitution." Id. at 3.[29] Further, the Tribal Court stated that "when interpreting legislation or constitutional provisions, this Court must look at the plain language of the document. If this Court can reach its conclusions by looking at the plain language alone, there is no need to look to additional sources." Id. at 5.[30]

Federal courts, including Tenth Circuit courts, have also enforced and defered to the express language of tribal constitutions. "*Neither the Secretary nor the Indians themselves, may ignore the express provisions of the [tribal] constitution*." The Seminole Nation of Oklahoma v. Norton, 223 F. Supp. 2d 122, 139, 144 (D.D.C. 2002), quoting Milam v. United States Dep't of the Interior, 10 ILR 3013, 3017 (D.D.C. Dec 23, 1982), emphasis added. *See also*, The Seminole Nation of Oklahoma, 223 F. Supp. 2d at 135-36, quoting Ransom v. Babbitt, 69 F. Supp. 2d 141,151 (D.D.C. 1999): "The court found that 'the plain language of the [tribal] Constitution indicated that . . .'"; United States of America v. Murdock,132

[29]Aplt. App. at 176.

[30]Aplt. App. at 178.

F.3d 534, 541 (10th Cir. 1997): "The [tribal] Constitution thus makes clear . . .";

Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1214 (9th Cir. 2001): "Article III [of the tribal constitution] is clear . . . ."

The Citizenship Act obviously violates the plain language of the Constitution.[31] Similar to Allen, where the Tribal council unlawfully attempted to restrict membership contrary to the plain language of the tribal constitution, here the Tribal council overstepped its powers to attempt to create a class of temporary membership not authorized by, and wholly inconsistent with, Article III of the 1976 Constitution. The Citizenship Act continues to violate Article IV of the

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[31]The 1976 constitution was in effect when the Cherokee Nation Citizenship Act was enacted in 1992 and later amended in 1993 to add Section 11(A) (Temporary Automatic Citizenship of Newborn Children). Accordingly, the Cherokee Nation Citizenship Act should be tested against the then-governing 1976 constitution (Article III, Sec. 2) which contained essentially the same membership provision as exists today. The 1976 Constitution was subsequently amended by the 1999 constitutional convention, 2003 tribal vote, and 2006 enactment ("1999/2003 Constitution"). See www.cherokee.org/Government/CCC/Default.aspx. The 1999/2003 Constitution, while renumbering the membership provision as Article IV, Sec. 2, did not change the requirements for membership. See Cherokee Nation's *The 1999 Constitution of the Cherokee Nation. A review and comparison between the 1976 and 1999 Constitutions of the Cherokee Nation in preparation for the Ratification Vote on July 16, 2003*." Both the 1976 constitution (Art. V, Sec. 8) and the 1999/2003 constitution (Art. VI, Sec. 8) state, "No laws passed by the Council shall have retroactive effect or operation." (Aplt. App. at 214-228).

1999/2003 Constitution. Accordingly, the Cherokee Nation Citizenship Act is invalid as violating the clear provisions of the Cherokee Nation Constitution.

d. THE CHEROKEE NATION CITIZENSHIP ACT CONSTITUTES AN IMPERMISSIBLE INVASION OF PARENTAL RIGHTS.[32]

The 14th amendment to the United States Constitution guarantees parents "the fundamental right to make decisions concerning the care, custody and control of their children." Troxel v. Granville, 530 U.S. 57, 66 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49, 57 (2000):

> The liberty interest at issue in this case -- the interests of parents in the care, custody and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control. . . ."

Id. at 65. The Cherokee Nation's rule prohibiting children from applying for citizenship without the consent of their parent or guardian is consistent with this right.

[32]Issue raised: Aplt. App. at 128; Issue Ruled on: Aplt. App. at 465,466.

The Cherokee Nation's automatic membership provision for newborn children is a direct violation of Nielson's constitutional right to control the destiny of her child. On November 6, 2007, Nielson exercised her fundamental right, as a parent, to place her newborn child for adoption. That was her intent and desire at the time. The Ketchums relied on her decision and on her ability to make decisions concerning the child. The Cherokee Nation cannot control the actions of a non-citizen birth mother and impose membership upon her newborn child without her prior consent. Had Nielson desired C.D.K. to become a citizen of the Tribe, she could have easily filed an application on his behalf. Her decision to place C.D.K. for adoption is beyond Tribal control.

e. THE CHEROKEE NATION CITIZENSHIP ACT CREATES UNREASONABLE PROBLEMS IN ADOPTION CASES.[33]

The automatic membership provisions in the Cherokee Nation Citizenship Act create substantial problems when applied to adoption cases. If the Act is allowed to stand, adoptive families will always be at risk when adopting a child. For example, if a birth mother hides her Cherokee ancestry or does not know that she has Cherokee blood, she or the Tribe could disrupt an otherwise valid adoption simply because the child is a direct descendant of an original enrollee. The only

[33]Issue raised: Aplt. App. at 382,383.

way to avoid such a problem would be to treat every adoption case as if the child is an "Indian child," i.e. never take a birth mother's consent until ten days after the child's birth. If every Indian Tribe were to have a rule similar to the Citizenship Act, no adopting parent could ever feel secure without conducting extensive genealogical research on each birth mother, adding to the already expensive procedure of adopting a child.

In the present case, Nielson was not a member of the Cherokee Nation when she voluntarily relinquished her rights to C.D.K. The Ketchums had no reason to believe that Nielson's one day old child could possibly be a member of the Cherokee Nation when she, herself, was not a member. The Ketchums and the Utah Court presiding over the adoption relied on Nielson's non-member status when proceeding with the adoption. To allow the disruption of C.D.K's adoption based on an obscure rule which was obviously formulated to interfere with a non-member mother's decision to place her child for adoption is blatantly unfair, contrary to the ICWA and wholly disregards the best interests of the minor child.

IX. CONCLUSION

Based on the arguments set forth above, the District Court's order granting Nielson's motion for summary judgment should be reversed. The Court's order

denying Ketchum's motion for summary judgment should also be reversed and Nielson's case should be dismissed with prejudice.

X. REQUEST FOR ORAL ARGUMENT

The Ketchums request oral argument on their appeal due to the complexity of the issues in this case and the substantial impact which the Court's decision will have on the parties and the minor child.

Dated this 5th day of December, 2009.

HANKS & MORTENSEN, P.C.

/s/_____
James B. Hanks
Attorney for Appellants

XI. CERTIFICATE OF COMPLIANCE

This brief contains 8,357 words, inclusive of headings and footnotes, and exclusive of attachments. It complies with the 14,000 word limitation set forth in Fed. R. App. P. Rule 32(7)(B).

Respectfully submitted this 5th day of December, 2009.

HANKS & MORTENSEN, P.C.

/s/_____
James B. Hanks
Attorney for Appellants

CERTIFICATE OF SERVICE

This certifies that I caused a true and correct copy of the within and foregoing

APPELLANT'S BRIEF to be delivered:

[x] via Electronic filing/service using ECF System
[ ] via facsimile transmission, and/or
[ ] via the United States first-class mail, postage prepaid, and/or
[ ] via hand-delivery,

on the 8th day of December, 2009, to the following:

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I further certify that on the same date I served identical copies of all materials submitted to the Court in digital form or scanned PDF, that privacy redactions have not

been necessary, that every document submitted in digital form or scanned PDF is an exact copy of the written document filed with the Court and that digital submissions have been scanned with the most recent version of a commercial scanning program, Norton Antivirus 2005, and according to the program are free from viruses.

/s/_____
James B. Hanks
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IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN THE MATTER OF THE ADOPTION OF C.D.K., a minor child	MEMORANDUM DECISION AND ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND DENYING RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT Case No. 2:08-CV-490 TS

This matter is before the Court on Petitioner's Motion for Summary Judgment, joined by Intervenor Cherokee Nation, on her Petition to invalidate an adoption, and on Respondents' Motion for Partial Summary Judgment. The underlying case arises out of a relinquishment hearing which occurred in November 2007 (the "Relinquishment Hearing"), at which Petitioner relinquished her parental rights to her biological child, C.D.K., in the Second Judicial District Court of Davis County.

In her Motion, Petitioner claims that, as a matter of law, C.D.K. is an Indian Child, as defined by the Indian Child Welfare Act ("ICWA")[1], and that the Relinquishment Hearing did not comply with the requirements of the ICWA. Respondents, the adoptive parents, argue in their Motion that Petitioner has failed to establish that C.D.K. is an Indian Child. Because the Court finds that Petitioner has provided sufficient evidence to establish that C.D.K. is an Indian Child pursuant to the ICWA and that the Relinquishment Hearing did not comply with the procedural requirements

[1]25 U.S.C. §§ 1901-1963.

of the ICWA, the Court will grant Petitioner's Motion for Summary Judgment and deny Respondents' Motion for Partial Summary Judgment.

I. STANDARD OF REVIEW

Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.[2] In considering whether genuine issues of material fact exist, the Court determines whether a reasonable factfinder could return a verdict for the nonmoving party in the face of all the evidence presented.[3] The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party.[4]

II. BACKGROUND

The following undisputed facts are taken from Petitioner's Petition, the affidavits of the parties, and the records of the adoption proceedings, including the transcript of the Relinquishment Hearing. In November 2007, Petitioner gave birth to C.D.K., a minor. The next day, Petitioner, accompanied by her mother (the "Grandmother"), and Respondents appeared in the Second Judicial District Court of Davis County, State of Utah. During the Relinquishment Hearing, Respondents were represented by counsel, but Petitioner was not. The transcript of the Relinquishment Hearing reveal that, after being placed under oath, Petitioner acknowledged that she understood that she had a right to counsel, but indicated that she did not wish to retain counsel. Petitioner also indicated,

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[2]*See* Fed. R. Civ. P. 56(c).

[3]*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991).

[4]*See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991).

among other things, that she could read, write, and understand English, that she had read the documents relinquishing parental rights to C.D.K., and that she had been presented with sufficient opportunity to have any questions answered.[5] Petitioner also affirmed that she understood that, once she signed the documents relinquishing parental rights, and the court accepted that document, that she would not be allowed to withdraw the relinquishment.[6]

During the Relinquishment Hearing, the state court judge asked the Grandmother if she was "of Indian extraction."[7] The Grandmother indicated that she was enrolled, but that she had not enrolled her children, and had planned to "look at" it in the following months.[8] The Grandmother affirmed that Petitioner was "not a member of a Native American tribe at [that] time."[9] The state court judge found that the natural mother had appeared and signed the relinquishment of her own free will and choice. The state court judge then accepted the relinquishment, reviewed the pre-

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[5]In her Petition, Petitioner argues that she was given very little time to review the termination papers, that no one explained them to her, and that Respondents' counsel pushed on with the proceedings. Docket No. 1, ¶ 13. However, at the Relinquishment Hearing, under oath, Petitioner answered questions from both Respondents' counsel and the state court judge that she had read the documents and that she "already asked all the questions [she] had." Docket No. 12-3 at 32.

[6]In direct contrast to her statements to the contrary at the Relinquishment Hearing, Petitioner alleges in her Petition that no one inquired as to whether she understood what she was signing. Docket No. 1, ¶ 18. Petitioner also alleges that the consent form was invalid because it was not accompanied by the type of certificate required by 25 U.S.C. § 1913(a). Section 1913(a) does not specify the form the certificate must take, and the state court judge did issue oral findings of fact that included findings required by § 1913(a). Because the Court will find that the ICWA applies, and because all parties agree that the Relinquishment Hearing took place before the ten-day waiting period prescribed by § 1913(a) had ended, the Court need not reach the issue of whether the state court judge's oral findings of fact meet the requirements of § 1913(a).

[7]Docket No. 12-3 at 29.

[8]*Id.*

[9]*Id.*

placement adoption study, and approved temporary custody of C.D.K. with the Respondents. The adoption was finalized in May 2008.

Petitioner's grandfather (the "Great Grandfather") had been an enrolled member of the Cherokee Nation, a federally recognized Indian tribe.[10] The Grandmother became an enrolled member of the Cherokee Nation on June 4, 2008.[11] Petitioner became an enrolled member of the Cherokee Nation on August 5, 2008. Respondents are not a member of any federally recognized Indian tribe. C.D.K. is not, and has never been, an enrolled member of any federally recognized Indian tribe.

Petitioner seeks invalidation of the adoption of C.D.K. by the Respondents because the Relinquishment Hearing allegedly did not meet the procedural requirements of the ICWA. Alternatively, Petitioner argues that the adoption should be vacated, pursuant to the ICWA, because it was induced through fraud and duress. While there is some dispute regarding other procedural requirements of the ICWA, all parties agree that the Relinquishment Hearing took place within ten days of birth, which is prohibited by the ICWA, and Respondents therefore concede that the procedural requirements of the ICWA were not fully complied with. Respondents argue, however, that the ICWA is inapplicable because C.D.K. is not an Indian Child within the meaning of the ICWA.

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[10]Petr.'s Aff., Attachment D.

[11]*Id.*, Attachment C.

III. DISCUSSION

A. DOES THE ICWA APPLY?

The ICWA establishes "minimum Federal standards for the removal of Indian children from their families."[12] In order for the ICWA to apply in the present case, the Relinquishment Hearing must have been an adoptive placement and C.D.K. must have been an Indian Child at the time of the Relinquishment Hearing. It is undisputed that the Relinquishment Hearing qualifies as an adoptive placement under the ICWA.[13] The ICWA defines an Indian Child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[14]

Petitioner and Intervenor base their arguments solely upon the argument that C.D.K. was an actual member of the Cherokee Nation,[15] pursuant to the Cherokee Nation Membership Act, § 11A (the "Membership Act"). That Act provides for automatic admission into the Cherokee Nation of "every newborn child who is a Direct Descendant of an Original Enrollee . . . for a period of 240 days following the birth of the child."[16] Petitioner argues that C.D.K. is a direct descendant of an

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[12]25 U.S.C. § 1902.

[13]*Id.*, § 1903(1)(iv).

[14]*Id.*, § 1903(4).

[15]Petitioner originally argued that C.D.K. was an Indian Child because Petitioner had, subsequent to the Relinquishment Hearing, been enrolled as a member of the Cherokee Nation. Docket No. 12-2 at 7. However, Petitioner has apparently abandoned this line of argument, so the Court will deal solely with whether C.D.K. was a member of the Cherokee Nation at the time of the Relinquishment Hearing.

[16]Docket No. 32, Ex. B at 5.

Original Enrollee and was therefore an automatic member of the Cherokee Nation at the time of the Relinquishment Hearing.

Petitioner and Intervenor also argue that the Cherokee Nation determined that C.D.K. was, at the time of the Relinquishment Hearing, a member of the Cherokee Nation, pursuant to the Membership Act, and that the Cherokee Nation's determination of C.D.K.'s membership is conclusive, essentially depriving this Court of any jurisdiction over the question of whether C.D.K. is a member of the Cherokee Nation. The Court disagrees that it has no jurisdiction.

The ICWA makes clear that a petition to invalidate an adoption under the ICWA is to be made to a court of competent jurisdiction, including this Court.[17] It is therefore the responsibility of the Court, not the relevant Indian tribe, to determine whether the ICWA applies, including the determination as to whether the child is an Indian Child under the ICWA.[18] Petitioner and Intervenor make much of Supreme Court precedent that "Indian tribes retain their inherent power to determine tribal membership"[19] and Bureau of Indian Affair Guidelines that a "determination by a tribe that a child . . . is or is not eligible for membership in that tribe . . . is conclusive."[20] However, such

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[17]25 U.S.C. § 1914.

[18]*See In re Baby Boy Doe*, 849 P.2d 925, 930 (Idaho 1993) ("[T]he . . . court must make the necessary determinations regarding application of ICWA. This includes determining whether the child meets the definition of an Indian child contained in 25 U.S.C. § 1903(4).").

[19]*Montana v. United States*, 450 U.S. 544, 564 (1981); *See also Matter of Petition of Philip A.C.*, 149 P.3d 51, 56 (Nev. 2006) ("Whether a person is a member of a Native American Tribe for ICWA is for the tribe itself to determine.").

[20]44 Fed. Reg. 67,584 (1979).

determinations in proceedings under the ICWA are intended "merely to aid . . . courts in deciding whether to apply ICWA."[21]

However, the Court finds that the Indian tribes' "inherent power to determine tribal membership"[22] entitles determinations of membership by Indian tribes to great deference. Respondents argue that Petitioner and the Cherokee Nation have failed to provide any evidence that C.D.K. was an Indian Child. The Court disagrees.

Petitioner has claimed that the Grandmother and Great Grandfather are original enrollees of the Cherokee Nation. It is not in dispute that both the Grandmother and Great Grandfather were enrolled members of the Cherokee Nation, but in order to be an original enrollee, as defined in the Constitution of the Cherokee Nation,[23] an individual must be listed on the Dawes Commission Rolls.[24] The Dawes Commission Rolls contain names collected by the United States government from 1898 to 1914, and neither the Grandmother nor the Great Grandfather were alive in 1914. Petitioner cannot, therefore, rely solely on the enrolled status of the Grandmother and Great Grandfather. However, Petitioner has provided genealogical evidence that indicates that her great-great grandfather, J.G., and great-great grandmother, E.G., were enrolled members of the Cherokee Nation.[25] Petitioner argues that J.G.'s and E.G.'s mothers, Petitioner's great-great-great

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[21]*Baby Boy Doe*, 849 P.2d at 931.

[22]*Montana*, 450 U.S. at 564.

[23]*See* Docket No. 23, Appendix C.

[24]Constitution of the Cherokee Nation, Art. IV, sec. 1.

[25]Docket No. 33, Ex. E.

grandmothers, were original enrollees of the Cherokee Nation.[26] There is not clear and conclusive evidence to support these final claims, which are central to the question of whether C.D.K. was a member of the Cherokee Nation under the Membership Act.

The Court notes with some frustration that Petitioner or Intervenor could have greatly simplified the present inquiry by providing, at any point, documentary evidence that J.G.'s and E.G.'s mothers were original enrollees, listed as members of the Cherokee Nation on the Dawes Rolls. However, there is indirect evidence that J.G. and E.G. were both full-blooded Cherokee,[27] indicating that their mothers would have been eligible for enrollment at the time that the Dawes Rolls were being compiled. The Court, therefore, finds that no reasonable factfinder could conclude that C.D.K. is anything other than a direct descendant of an original enrollee of the Cherokee Nation and that C.D.K. was a member of the Cherokee Nation, pursuant to the Membership Act, at the time of the Relinquishment Hearing. Therefore, C.D.K. was an Indian Child and the procedural requirements of the ICWA are applicable to the Relinquishment Hearing. Because the parties agree that the procedural requirements of the ICWA were not fully complied with, the adoption of C.D.K. by Respondents must be invalidated, pursuant to 25 U.S.C. § 1914.

B. RESPONDENTS' OTHER ICWA ARGUMENTS

Respondents make other arguments related to the ICWA and the Membership Act. Specifically, Respondents argue that the Membership Act is in violation of the Constitution of the Cherokee Nation by providing for other avenues for membership other than those expressly listed

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[26]Docket No. 33 at 5.

[27]*Id.*, Ex. E.

in the Constitution of the Cherokee Nation.[28] Petitioner responds that this Court is "not the proper forum for determining a political decision by the Tribe."[29] Petitioner argues that Respondents are attempting to use the Court to mandate how the Cherokee Nation must enroll members. This is overstating their case, because Respondents' argument, on its face, is merely an attempt to require the Nation to abide by its own Constitution. However, because the Constitution of the Cherokee Nation does not explicitly prohibit the Membership Act, this Court is an improper forum for determining whether the Membership Act violates the Constitution.

Respondents also argue that the Membership Act is violative of the United States Constitution because it allows the Nation to impose tribal membership on anyone without the consent of parents or the child. Respondents argue that doing so would be a violation of the individual's fundamental liberty interest of association.[30] However, there is no case law to support the application of that principle to Indian tribes and otherwise legitimate members of those tribes, especially as applied to a rule intended to provide Indian birth parents with protection for their children during the period in which they could put together the paperwork to be granted full membership. Courts have typically enforced an individual's right to disassociate themselves from an Indian tribe,[31] and it could be argued that the right extends to a parent disassociating their child

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[28]*Allen v. Cherokee Nation Tribal Council, Lela Ummertskee, Registrar and Registration Committee*, Cherokee Nation Judicial Appeals Tribunal 2006 (JAT-04-09, p.5) (holding that the tribe may not violate its constitution to define membership contrary to constitutional provisions. *See also Seminole Nation of Oklahoma*, 223 F. Supp. 2d at 139 ("Neither the Secretary, nor the Indians themselves, may ignore the express provisions of the [tribal] constitution.").

[29]Docket No. 31 at 10.

[30]*Roberts v. United States Jaycees*, 468 U.S. 609, 617-618 (1984).

[31]*See, e.g., Thompson v. County of Franklin*, 180 F.R.D. 216, 225 (N.D.N.Y. 1998) ("Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so

from and Indian tribe by placing the child with a non-Indian family. However, the express language of the ICWA places limitations on the right of the parent to dissassociate their child from the tribe and Respondents' argument fails.

Finally, Respondents argue that the Membership Act is an unlawful attempt to broaden the ICWA. Specifically, the ICWA defines Indian child as one who is either a member or is eligible for membership in a tribe and whose parent is a member of a tribe. Respondents argue that Congress, in considering the ICWA, rejected language that would have extended the ICWA to all children with Native American ancestry, and opted for the two discreet categories currently listed in the ICWA. Respondents argue that the Membership Act is an attempt by the Cherokee Nation to expand the the scope of the ICWA into areas expressly rejected by Congress. The Court finds that the ICWA applies to children who are "members" of a tribe, but does not constrain how membership is to be defined. Therefore, the Court finds that the Membership Act does not improperly expand the scope of the ICWA.

C. PETITIONER'S FRAUD AND DURESS CLAIMS

Petitioner also seeks to vacate the Relinquishment Hearing based on fraud and duress. Because the Court will grant summary judgment on Petitioner's ICWA procedural claims, it need not reach Petitioner's fraud and duress claims.

IV. CONCLUSION

Because the Court finds that C.D.K. was an Indian Child at the time of the Relinquishment Hearing, and because the parties agree that the ICWA's procedural requirements were not strictly complied with during the Relinquishment Hearing, it is therefore

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chooses.").

ORDERED that Petitioner's Motion for Summary Judgment (Docket No. 12) is GRANTED and Respondents' Motion for Partial Summary Judgment (Docket No. 24) is DENIED. Petitioner's consent to termination of her parental rights over C.D.K. is hereby invalidated.

DATED June 3, 2009.

BY THE COURT:

TED STEWART
United States District Judge

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

Central Division for the District of Utah

In the matter of the Adoption of C.D.K.

JUDGMENT IN A CIVIL CASE

Case Number: 2:08 cv 490 TS

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the petitioner's consent to the termination of her parental rights over C.D.K. is invalidated.

June 4, 2009
Date

D. Mark Jones
Clerk of Court

(By) Deputy Clerk

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN THE MATTER OF THE ADOPTION OF C.D.K., a minor child	ORDER AMENDING JUDGMENT Case No. 2:08-CV-490 TS

On June 4, 2009, the Court entered an Order granting Summary Judgment to Petitioner. In that Order, the Court held that C.D.K. was an Indian Child under the Indian Child Welfare Act ("ICWA"),[1] and that the procedural requirements of the ICWA were not followed. The Court therefore invalidated Petitioner's consent to termination of her parental rights pursuant to 25 U.S.C. § 1914. Petitioner had requested, in the alternative, that the Court vacate the adoption proceedings under 25 U.S.C. § 1913(d) based on Petitioner's claims of fraud and duress. The Court, however, did not reach Petitioner's § 1913(d) claims.[2]

Petitioner has filed a Motion for Writ of Execution, requesting immediate return of C.D.K. Such relief is unavailable to Petitioner under § 1914, but could be available to her under § 1913(d). As noted, the Court's June 4, 2009 Order did not address Petitioner's § 1913(d) claims. However, Petitioner's statements regarding fraud and duress were unsupported by evidence or law, and were, in large part, directly contradicted by the official record of the November 2007 relinquishment

[1]25 U.S.C. §§ 1901-1963.

[2]Docket No. 36 at 10.

proceeding.[3] Petitioner now argues that, because summary judgment was granted on her Petition, she is entitled to the relief authorized under § 1913(d). However, the Court restates its intention to award summary judgment only on Petitioner's § 1914 claims. In order to clarify the remedies available to Petitioner, and to clarify any issues for appeal, it is therefore

ORDERED that the Court's Memorandum Decision and Order Granting Petitioner's Motion for Summary Judgment and Denying Respondents' Motion for Partial Summary Judgment (Docket No. 36) is AMENDED to reflect that Petitioner's Motion for Summary Judgment (Docket No. 12) is GRANTED IN PART (§ 1914 Claims) AND DENIED IN PART (§ 1913(d) Claims), as described above.

DATED June 15, 2009.

BY THE COURT:

TED STEWART
United States District Judge

[3] *Id.* at 3.

A P P E A R A N C E S

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SALT LAKE CITY, UTAH; WEDNESDAY, JUNE 17, 2009; 9:00 A.M.

PROCEEDINGS

THE COURT: We are here this morning in the case of Nielson vs. Ketchum, et al. This is case 08-CV-490. We have representing the petitioner in this case Ms. Taralyn Jones, on behalf of the Cherokee tribe Brandy Inman by telephone.

Ms. Inman, can you hear me?

MS. INMAN: Yes, I can hear you.

THE COURT: And representing the respondents in this case Mr. James Hanks.

Counsel, the purpose of this hearing today is to hear oral argument on the three issues that were raised by this Court in its order wherein it set forth a request that you brief and then be prepared to argue the following three questions: Whether or not 25 U.S. Code, Section 1916 permit this Court to order the immediate return of CDK in this case; second, whether or not this Court would have jurisdiction over a Section 1916 determination of whether that must of necessity be conducted in state court; and, finally, whether this Court should agree to stay any return of CDK pending the Tenth Circuit's determination of the appeal from this Court's previous order finding that CDK was, in fact, a member of the Cherokee tribe and therefore the statute had not been complied with.

What I would like to do is begin with you, Mr. Hanks, and ask you to respond to those three questions in turn. I will then allow Ms. Jones the same opportunity, and then Ms. Inman.

Ms. Inman, as I think I told you when we had the last hearing, if at any time you have trouble hearing, you think that something is being said that you had need to hear, please do not hesitate to let the Court know.

MS. INMAN: Thank you, Your Honor.

MR. HANKS: Thank you very much, Your Honor.

Your Honor, with respect to the first question as set forth in our brief, we believe that Section 1916 does not provide for the immediate return of the child. The section is clear that if an adoption is vacated or set aside, then the petitioner may file a petition seeking return and a hearing will be held to determine the best interest of the child at that time.

And I think there are a couple of points that are pertinent here in this case. Number one, as I read this Court's order, there has never been -- the decree of adoption is still in full force and effect. As the Court is well aware, it's filed in Davis County. Your decree, as I read, did not set that final decree of adoption aside.

Under Section 1914, that provision allows the Court to invalidate a consent, but it doesn't talk about

vacating an adoption decree. Vacation of an adoption decree is set forth in Section 1913(d), which this Court did not -- well, the Court denied petitioner's motion under 1913(d).

So before we can even get to filing a petition for the return of custody, we have to have an adoption decree that's been vacated or set aside. That initial -- that first prong has not happened. That hasn't happened. A petition for return of the child hasn't happened. We haven't had a hearing to consider the best interest of the child.

The other thing that I think is important, Your Honor, and I know in the petitioner's papers they talk a lot about what is best for the child. Well, certainly I can't imagine it would be best for this child to have an immediate transfer of custody without any concern regarding this child's best interest. The proceeding that is set forth in Section 1916 provides for an orderly process where those issues can be considered and the child's best interest can be determined.

Now going to the question does this Court have jurisdiction, as I've indicated in our memorandum, I couldn't find a whole lot of law dealing with that question one way or the other, but I did find a lot of law that indicated that issues regarding children and family relations, best interest kinds of determinations really are

not best dealt with here in the federal court. And a lot of cases dealing with abstention on those issues, the federal court ought to abstain, even if it has subject matter jurisdiction, abstain from those, send them to the district court, which is a court of general jurisdiction, let the district court hear those matters.

And so that would be our request, Your Honor, that those questions be left to the district court, that it be sent back to Judge Page.

With respect to our request for a stay of execution, it seems like nothing is really clear in this case, Your Honor. As I read the statute on stays -- in fact, let me just grab that. Rule 62 of the Federal Rules of Civil Procedure discusses stays of proceedings to enforce judgments. And certainly Rule 62(a) deals with an automatic stay. And I believe, in any event, we would have a stay from the entry of your amended order for ten days.

But beyond that, the only rule that I could find that really would apply to this case was 62(d) which talks about stay with bond on appeal. That statute says -- or that rule says, if an appeal is taken, the appellate may obtain a stay by supersedeas bond except in an action described in Rule 62(a)(1) or (a)(2). And let me just indicate that Rule 62(a)(1) or (2) deal with cases involving injunctions. So I don't see that those exceptions apply to

this case. The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The state takes effect when the Court approves the bond.

I would think that if this kind of a case did not apply or if you couldn't obtain a stay with supersedeas bond on a case of this nature, there would have been another exception set forth in Rule 62(d). Well, there just isn't.

Now I would acknowledge to the Court that a supersedeas bond, typically you would find that in a case with a money judgment. That's where you typically hear a supersedeas bond. Well, this certainly isn't a case involving money. But the rule doesn't say you can't.

THE COURT: Mr. Hanks, you would agree, however, that I would have to go through the process of examining the issues, such as the likelihood of success on appeal and the other factors; would you not?

MR. HANKS: That's an interesting question. That's one of these other questions that I really was trying to find an answer to. And the case law -- under 62(d) it appeared that if you file a bond, you get a stay, and there isn't a review of those factors. That's how I understand Rule 62(d).

Let me just add this to Rule 62(d). In a normal case involving a supersedeas bond where you have payment of

money, well, the bond is to assure the petitioner that at the end of the appeal, if the appeal is denied, there is that money available to satisfy the judgment.

Well, in this case, we don't have money, but we have a child. You can't put this child -- you can't pay the child into court. But this child will be there at the end of this case. It's not like a money case where they could go bankrupt or their money wouldn't be there. We're going to have this child. The child certainly will be there. So we don't have that kind of concern about not being able to pay a judgment.

Since the rule does call for a supersedeas bond, we've proposed, okay, we could put money in to pay costs on appeal. Let me just address the questions you've raised on those factors, that when I've read the case law dealing with the factors do we have a good chance on appeal, will there be irreparable harm. I've seen that dialogue typically under some of these other subsections of Rule 62. But let me just address those.

The first issue would be whether we have a reasonable probability of success on appeal. I gave this some thought and it may not be the easiest issue to argue before Your Honor because you denied our request on summary judgment, but I think this case here is ripe for appeal, Your Honor. The issues here are -- they are unique. This

isn't a typical Indian Child Welfare Act kind of a case. It would be very easy if the birth mother here had been a member of the Indian tribe. That would be easy to know what to do. Here it isn't easy because this birth mother wasn't, wasn't a member. And the Cherokee Nation has a very interesting law on their books, the Cherokee Nation Citizenship Act, which provides this automatic citizenship for any child who can prove lineage to someone on the Dawes rolls, no matter what their parent wants to do.

And I think that it is ripe for appeal for an appellate court to consider whether or not that Cherokee Nation Citizenship Act really can impose membership on a child against the wishes of a parent, whether or not the Cherokee Nation Citizenship Act, a temporary membership really was what the Congress intended when they enacted the Indian Child Welfare Act.

We have an issue whether or not the petitioner has actually proven her lineage. They have some evidence that indicates that -- well, certainly they have evidence that shows that the petitioner is related to members of the Cherokee Nation. And I still think this is quite amazing, they still haven't indicated who her relative is that's on the Dawes Commission rolls. And both the Cherokee Nation Constitution and the Citizenship Act require in order to be a member, you have to have that lineage tie. That hasn't

been proven.

There are other issues here. I don't want to belabor these because the Court knows our points, but I think that we -- Your Honor, I believe we have an even chance, if not better, on appeal here. These are novel issues. They should be heard by the appellate court so that other cases that come forward later have some guidance.

Some other factors that are to be considered are whether or not there will be irreparable harm. Certainly to this child, I believe if a stay is not entered there is a possibility of grave harm to this child because if the child is returned at this stage and we are successful on appeal, this child will be transferred twice, whereas if the child is left where he is and if we lose on appeal, there will be just one transfer. And certainly the chance of grave harm to this child if a stay is not granted, there is a great probability of that.

There is certainly -- well, petitioner mentioned we hadn't raised the issue of harm to my client. Well, I think that goes without saying that let's do this -- let's do this once, if at all, not have it happen twice. There is probability, possibility for emotional harm, a great chance of that if a stay is not entered at this time.

THE COURT: Mr. Hanks, let me ask you this. I did not ask you to brief this, but give me your thoughts on the

question whether or not even the issue of a stay ought to be determined by a state court assuming the Court agrees with you that the state court should deal with this matter from this point forward.

MR. HANKS: Well, I assume -- I don't know -- reading the rules of federal procedure, I know that I can ask for a stay here in federal court and the Tenth Circuit. Those are my options at this point. I don't know that I can in the district court, state district court, Your Honor. I haven't looked at that yet.

The problem I would have, I would think, is that that order is this Court's order and it wouldn't be Judge Page's order. So I don't know that I could legitimately ask him for a stay -- I don't think I could ask him for a stay of your order. I think that has to come from Your Honor.

THE COURT: Again, I have to conclude, as you do, that my order did not vacate the adoption. The order I think was phrased saying it should be vacated contemplating that it would be vacated subsequently either by this Court or by the state court, so the vacation has not yet occurred.

MR. HANKS: Correct.

THE COURT: My question would be if I conclude it should be sent back to state court, a state court judge agrees and vacates, can he or she then stay his or her own order pending the Tenth Circuit's decision? If you don't

know, just say so. I don't know the answer to that, so without having given you warning, I can't expect you to give me a substantive answer either. I just wondered if by chance you had researched that or had thoughts on it.

MR. HANKS: Your Honor, I just don't know the answer to that. It's like a lot of issues in this case. Unfortunately, there isn't a whole lot of case law on a lot of these issues. I wish I could be of more help on that.

Your Honor, do you have any other questions for me?

THE COURT: I don't believe I do, Mr. Hanks.

MR. HANKS: Thank you very much.

THE COURT: Thank you.

Ms. Jones.

MS. JONES: Your Honor, just to address Mr. Hanks' concerns about the best interest of the child, I think it's important to note that the reason Congress enacted the Indian Child Welfare Act was actually to protect the long-term best interest of the child, which they have found the best interest of the child is to remain with the tribe and with the Indian family and to be able to maintain those cultural ties.

Additionally, Your Honor, under Section 1916, I think that it specifically provides an avenue for the Indian tribe or an Indian parent who has suffered harm by the state

court's proceedings where they have not followed the Indian Child Welfare Act to come to the federal court or a court of competent jurisdiction, whether that be the state court of appeals or the federal court, and ask for a remedy.

I think the purpose is consistent with even what the Tenth Circuit was saying in Morrow v. Winslow, which is, you know, there needs to be a quick resolution of the case rather than a prolonged resolution. I think what Mr. Hanks is asking for is a stay and even to be remanded back to state court is contrary to what ICWA is saying.

First of all, he's filed an appeal in this case, and like you were addressing, the whole fact with, no, we have an appeal in this case that should be remanded back to state court, inevitably, that child is going to be in limbo for how long. It's not fair to the child and that is not in the best interest of the child.

It seems appropriate that under Section 1916, and it specifically says that absent or unless a petition showing that the provisions of Section 1912 have been met, which is serious emotional and physical harm or danger to the child, the child should be returned. That has not happened in this case. There have been no proceedings to say or suggest that the child is going to suffer emotional or physical damage -- serious emotional or physical damage, according to the provisions of 1912.

We're asking the Court that since there is an avenue under ICWA for the Court to look at the proceedings under 1912 and invalidate them, that the Court also provide the remedy here in order to stay consistent with the terms of ICWA, which is to have a quick resolution. And I think that is clear in Morrow v. Winslow, even though the Tenth Circuit refused to hear the case because of abstention in Younger, and even the fact that that case had been on appeal in the Utah court and the courts were looking at it saying we don't want a case going on in the state court and in the federal court, it seems contrary to the purposes of ICWA, and we need to have a quick resolution. We're asking the Court to see that the best interest of the child is to have a quick resolution in this case.

Even -- I'm sorry, Your Honor. Do you have a question?

THE COURT: I was going to say, Ms. Jones, wouldn't you have to acknowledge that the language in Section 1912, for example, as well as elsewhere in ICWA, contemplates that the issues of determining the best interest of the child, et cetera, are to be done by state courts? Would you not agree that not only is it contemplated by that language, but also the facilities, the personnel to make those types of determinations are not found in the state court system -- excuse me, the federal

court system?

MS. JONES: Your Honor, I think that in a regular adoption case that might be true. In a state court proceeding, that might be true. But I think that Congress has actually seen there have been state court violations of ICWA. For that reason, they've said that federal courts have rights to review these cases. Not only that, but in Section 1901, Congress sets out that the federal courts have a trust responsibility, that Congress has plenary power over Indian tribes. And the trust assets of Indian tribes being children, they have plenary power. I think that gives the Court federal question jurisdiction under 28 U.S.C, Section 1331.

THE COURT: Will you slow down a little bit, please.

MS. JONES: I'm sorry. I do get a little bit excited sometimes.

I think if you look at the reasoning of the Ninth Circuit in saying that federal courts have jurisdiction under ICWA, and I think that's even clear in Section 1921 where it says specifically if there is a federal or a state statute that tends to give the benefit to the Indian tribe, the federal or state court has the right to use the federal or state standard. Whichever one is favorable to Indian tribes, that's the one that should be used.

Not only that, but if it's unclear still at this point whether the Court has jurisdiction, I think the Court needs to look at the canons of construction, which specifically says that it needs to be construed favorably toward the Indian tribes.

And I think that under ICWA, it's important to note that that child should not stay in limbo. Additionally, I want to bring up, under 1916, it does not give the Indian Nation a right to petition for return of the child in custody.

So in this case this Court is asked to set a precedent here. I think that needs to be a consideration. What happens if there is not a petition for return of custody, what is the Court going to do then? What would be the remedy? Specifically if the tribe is asking for return of the child or to have jurisdiction over a custody proceeding, is the state court -- or is the federal court then going to remand it back to state court to make the decision before turning it over to the Nation? Or what will happen with the child in that proceeding when there hasn't been a petition for return of custody, because it's contrary to the terms of ICWA that that child remain in limbo.

THE COURT: You just asked a hypothetical because that's not what has happened here, correct?

MS. JONES: Right, it has not happened here. But

I'm saying that there is a case here for the Court to set a precedent, which what happens when somebody brings -- like an Indian tribe or an Indian parent brings a case under 1914 for the Court to invalidate a proceeding, and then what would happen in that case. And I understand that that is a hypothetical. I was just putting it out there.

Additionally --

THE COURT: Ms. Jones, I have enough trouble dealing with the real issues. I don't want to go out and try to capture some hypothetical ones unless I have to. I hope you can understand that.

MS. JONES: I can. Thank you, Your Honor.

But again, back to the best interest of the child and the purposes of ICWA, I think that Congress has made it clear it's the best interest of the child to be returned to the petitioner and returned to the Indian custodian or the Indian parent. Otherwise, I don't think there would be a provision in ICWA for the federal courts to address state court wrongs. I think that would be -- the procedure would be just to go to state court appeals as in a regular adoption. But this --

THE COURT: Ms. Jones, though, I will acknowledge that easily the statute could be interpreted to say that the presumption should be the return of the child to the Native American parents, but you have to acknowledge that Section

1916 contemplates a separate hearing wherein other factors can be considered, doesn't it? By referring us back to 1912, those two together obviously permit consideration of something to rebut that presumption; would you not agree?

MS. JONES: I would agree, Your Honor, if there's been a petition filed under 1912 for the best interest of the child, that possibly could be remanded back to state court, but that is not the case here. And I think that that is more in line with when there has been a petition filed.

In this case, you are asking to look at this case, and I think that the important thing to remember is he's filed an appeal to the motion for summary judgment. He's not filed for a petition under 1912 in state court. If that's what he wants to do later, he's free to do that. But I don't think the child should remain in limbo.

Even at that time, Your Honor, the child is not going to remain with the Ketchums. Under ICWA, it has to be a 1912 proceeding where then the Cherokee Nation has a right to even step in and determine where they want the child to be placed.

So I think that a stay would only be prolonging what Holyfield is also trying to avoid and Morrow v. Winslow is trying to avoid. And I don't think that a bond between the adoptive parent and the child is what best interest of the child means. And I think that's clear in Holyfield as

well because the court said even though this adoption has been for so many years, it's not according to ICWA and it needs to be invalidated.

THE COURT: Anything else?

MS. JONES: No, Your Honor. That's it.

THE COURT: Thank you, Ms. Jones.

Ms. Inman.

MR. INMAN: Yes, Your Honor.

THE COURT: Would you like to address the issues, please.

MS. INMAN: Yes, Your Honor. I would like to start just by thanking you and the Court again for allowing being me to appear telephonically. I am going to go ahead and address the issues in the order that you submitted them to us, beginning first with the petition for return of custody.

I believe that we are all in agreement, from my understanding, that the child cannot be returned to the biological mother without a petition for return of custody. My understanding of the proceedings thus far is that this Court has invalidated the mother's consent to the adoption. And my understanding of what would happen then is that it would be remanded back to the state district court for further proceedings on that issue. But without a petition for return of custody filed, that there is no mandate for an

immediate return of this child.

As far as whether this Court would have subject matter jurisdiction over a petition for return of custody, I would agree with Mr. Hanks that there is not very much law regarding this issue, if there is any law at all. It would be my opinion that this Court would probably not have subject matter jurisdiction for the reason given in my brief, that under Section 1911 of the ICWA is where jurisdiction is addressed. Section 1911 gives Indian tribes exclusive jurisdiction as to any state over certain child custody proceedings except where jurisdiction is otherwise vested in the state. I would read this to say that if a tribe does not have jurisdiction, then a state does, over child custody proceedings.

The only other place where jurisdiction is mentioned under the ICWA is in Section 1914 which allows for a petition to a board of competent jurisdiction, is the only other place in the ICWA where a state or tribe exclusive jurisdiction is not mentioned. Therefore, it would be my understanding of the ICWA that the only time a federal court would have jurisdiction over an issue under the ICWA would be under a petition to invalidate an action, which this Court has done, and that is the section under which this Court assumed jurisdiction. Therefore, it would be my position that the subject matter jurisdiction under a

petition for return of custody which does not fall under Section 1914 would lie with the state district court.

As far as whether this Court should grant the stay of execution, I would request that this Court does not grant the stay. Mr. Hanks stated if you file a bond, you get a stay. However, pursuant to my brief, under Rand-Whitney Containerboard Limited Partnership v. Town of Montville, the court's role is not to represent whatever bond the judgment debtor presents and that before the court approves such a bond, there must be a showing the bond is sufficient.

It is my position that the bond presented by Mr. Hanks and the Ketchums is not sufficient and has no purpose. The purpose of such a bond is to preserve the status quo while protecting the non-appealing party's rights. The status quo is currently protected. There has been no order returning the child. There has been no proceedings determining the best interest of the child. Therefore, it's hard to see how the approving of this bond would preserve the status quo when the status quo is not in question.

Furthermore, if this Court were to order the stay, then the petitioner, who's the non-appealing party, would not be able to proceed with her rights granted to her under the ICWA. Simply because she would file a petition for return of custody in state district court does not necessarily mean she is going to have the child back or that

there will be an immediate return. And I believe that in order to protect her rights, it would be advisable for this Court to not grant the stay requested by the Ketchums.

Furthermore, as Mr. Hanks has stated, a supersedeas bond typically involves a money judgment and is made or applied to ensure that whatever the judgment is, that the appealing party will pay it. There is no opportunity for the Ketchums to pay anything in this case and it is difficult for me to see how this bond would bind the Ketchums to pay any judgment.

Finally, I would like to address whether the Ketchums can meet the standard for obtaining the stay, and I believe that they cannot. I do not believe they have a reasonable probability of success on appeal. At this point I am not going to address any of the issues raised by Mr. Hanks regarding the Cherokee Nation Membership Act or the Cherokee Nation Constitution. I am simply going to point to case law that the standard of appellate review to findings of fact is clearly erroneous, Anderson v. City of Bessemer City.

This Court issued its ruling on motions for summary judgment stating that there were no material issues of fact. And this Court based its determination that CDK was a member of the Cherokee Nation at the time of his birth and therefore the ICWA would apply based upon written

documentation provided by the Cherokee Nation. Under the Federal Rules of Civil Procedure 52(a)6), findings of fact based on documentary evidence may not be set aside unless clearly erroneous. It is therefore my opinion that this Court's findings of fact are supported by the evidence and the Ketchums do not have a reasonable probability of success on appeal.

The Ketchums have failed to allege any irreparable harm that would be caused to them if the stay were denied. They have attempted to allege harm that would be caused to the child and to the petitioner, but they have not alleged and have even failed to do so in this hearing, allege any harm that would be caused to them.

The possibility of harm to other parties is significant. The petitioner will suffer, again, from the lack of ability to pursue her rights that are granted to her under the ICWA. The child would suffer from this from the fact that the Ketchums have no legal right to custody over him and he has continued to be kept away from his biological mother.

Finally, Your Honor, it is in the public interest to deny the request for the stay because the public interest lies with the best interest of the child. Under the ICWA, there is a rebuttal presumption that the child's best interest is to be returned to the biological mother. In

order to rebut this presumption, there must be a proceeding subject to Section 1912. This has not happened.

In order for the child's best interests to be determined conclusively, it is imperative that the child and the petitioner have an appropriate forum in which to address these issues. Therefore, it's in the public interest that the stay not be granted so that a proceeding in state court to determine the best interest of the child can be had.

And that is pretty much my position on the issues raised by Your Honor.

THE COURT: Thank you, Ms. Inman.

Counsel, do any of you wish to address the Court on anything else before the Court takes the matter under advisement?

Mr. Hanks.

MR. HANKS: If I could, Your Honor.

THE COURT: Go ahead.

MR. HANKS: In fact, Your Honor, there are a couple of issues that I would like to address that deal with your order in this case, that if I could just take a minute after the argument on these issues. I just want to make sure the order -- well, to clarify some issues to make sure this is a final judgment for purposes of appeal. We had filed -- maybe I can just address those now or would you like me to wait until after we argue the matter?

THE COURT: Anything you want to say, this is the time to say it.

MR. HANKS: Okay. Very good.

Your Honor, certainly to file an appeal, I have to file an appeal on a final order. And it occurred to me that we had some counterclaims that we had filed that really hadn't been addressed in this matter. And I suppose if the Court is closing out this case, my proposal would be that those be dismissed without prejudice. So we need to deal with those counterclaims.

Also, I know the Court has granted the petitioner's petition with respect to invalidation under Section 1914. I don't know if the Court could clarify with respect to the claims under 1913(d). Are those dismissed, Your Honor?

THE COURT: I'm sorry. Your question is?

MR. HANKS: Well, again --

THE COURT: The question of the fraud and duress?

MR. HANKS: Yes.

THE COURT: The Court issued a ruling -- an order a few days ago wherein it said that the Court could not find sufficient basis for those and therefore they were dismissed.

MR. HANKS: Okay. They were dismissed then?

THE COURT: Yes.

MR. HANKS: And then with respect to our counterclaims, then, dismissal without prejudice, is that acceptable to the Court on those?

THE COURT: The Court will have to look at that, but I understand what you are doing is trying to clean this up so you do have a final, and that's certainly reasonable. The Court will try to make certain that happens.

MR. HANKS: Thank you very much.

Let me just get back to the issues that the Court is considering right now. The stay pending appeal, the issues raised by the Cherokee Nation, they indicate, well, the status quo is preserved, the child is still with the Ketchums. Well, that's true right now, but if a stay isn't granted, they are going to be trying to change that status quo. To maintain the argument that, hey, status quo is maintained, well, it is for right now, but they are going to try as hard as they can to change it. And that will -- if they are successful in that, we have the possibility of this double transfer of the child. And that's what we're trying to prevent. And if we're talking about best interest of this child and harm to not only the child but to my clients, that would be the worst scenario for this child to have a transfer now and then if we succeed on appeal to have that child pulled right back.

And another issue, the findings of fact, the

Cherokee Nation argued that our chances on appeal are not good because the findings of fact were clear and can't be disputed. Well, there are issues regarding those findings of fact because one of the findings dealt with the question of lineage and, quite frankly, the Cherokee Nation and the petitioner never did establish that lineage. We certainly have issues to argue there.

Then we have multiple issues of law, Your Honor, on appeal that deal with whether or not this child was a member of the Cherokee Nation at the time the relinquishment was granted. So we're just not talking about issues of findings of fact. We've got multiple issues of law that will be before the Tenth Circuit that we believe we have a more than even chance of success on.

A point was made the Ketchums have no legal right to custody. Well, that is not correct. They have rights of custody under the adoption decree, which has not been satisfied.

I think those are the points I would like to make, Your Honor.

THE COURT: Thank you, Mr. Hanks.

MR. HANKS: Thank you.

THE COURT: Ms. Jones.

MS. JONES: Your Honor, just to address the jurisdictional question again, you asked me specifically

whether this Court has jurisdiction to hear a child custody proceeding, and I think the one thing that Congress found a reason for enacting ICWA was to curtail state authority, especially when there were violations of the Indian Child Welfare Act.

Again, I think that it's important to remember in this case there has not been a petition filed for any proceedings under 1912, whether in state or federal. And the statute is clear there that if the parent asks for return of a child under 1916, then the Court shall grant such petition unless there is a showing in a proceeding subject to the provision of 1912 of this title that such return of custody is not in the best interest of the child. It does not set out that the Court must wait for such a petition to be filed. It does not set out that there must be a hearing on the best interest of the child. It demonstrates that only a petition for return of the child must be filed and unless there is a showing otherwise, the Court must grant the petition.

And I know there has been argument that the Court has not invalidated the adoption or has not set it aside. We're asking the Court, also pursuant to Section 1914, to find that remedy and state it here. There shouldn't be a reason to go back to state court and wait for the appeal to be finalized in order for the state court to hear it.

Additionally, even if the state court did not wait for the appeal to be finalized, there is still going to be that time frame where the child is in limbo. It is our contention that the petitioners are not going to be successful even on a 1912 petition because it's not going to be found in the best interests of the child to remain with them.

And also under Mr. Hanks' argument for the stay, I would agree with the Cherokee Nation counsel and the fact that he's not going to be able to meet his burden on appeal, he's not going to be successful and he's not met that burden. And I think that's clear in our brief.

But, additionally, again, for the purpose of ICWA and for policy limits, it's important that the Court I think enact -- well, take the necessary measures to enforce its own orders. And I think that that is even consistent with federal law, with the All Writs Act, and other contentions that the Court has the power to enforce any writs necessary to enforce its orders. And I think that an invalidation of a consent determination of parental rights means there's only one other possible situation that can result, and that is the adoption is invalidated. Again, I think it's contrary to purposes of ICWA to have that child remain in limbo.

THE COURT: Thank you.

Ms. Inman, do you have anything else?

MS. INMAN: Yes, Your Honor. I would just like to quickly address the two points raised by Mr. Hanks. He first stated that while the status quo is currently preserved, the Cherokee Nation will be trying as hard as they can to regain the child back. I would like to point out that under Section 1916 of the ICWA, only a biological parent or prior Indian custodian may petition for return of custody. There is no jurisdiction or anything granted to the Cherokee Nation under Section 1916 to attempt to regain custody of the child back for the biological mother.

Secondly, Mr. Hanks stated that there are questions of law that will be heard on appeal. I would disagree with him when he states that the membership of CDK is a question of law. In fact, in Mr. Hanks' own motion for partial summary judgment, he stated there is no question of fact that CDK was not a member of the Cherokee Nation. It is an admission, it is a statement and question of fact, and therefore I stand by my prior statement that the appellate review will be clearly erroneous and that the documents provided by the Cherokee Nation and the petitioner have supported this Court's ruling and therefore the chances of success on appeal is not probable.

Thank you, Your Honor.

THE COURT: Thank you, Ms. Inman, and Mr. Hanks,

Ms. Jones, thank you all. The Court will take the issues under advisement and will issue a ruling as soon as it can.

We'll be in recess.

MR. HANKS: Thank you very much.

(Whereupon, the proceeding was concluded.)

C E R T I F I C A T E

I hereby certify that the foregoing matter is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.

PATTI WALKER, CSR-RPR-CP
Official Court Reporter
350 South Main Street, #146
Salt Lake City, Utah 84101
801-364-5440

DATED:

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN THE MATTER OF THE ADOPTION OF C.D.K., a minor child	MEMORANDUM DECISION AND ORDER DENYING RESPONDENTS' MOTION FOR STAY PENDING APPEAL, DENYING PETITIONER'S MOTIONS FOR WRIT OF EXECUTION AND TO EXPEDITE A HEARING ON THE RETURN OF CUSTODY, AND DISMISSING RESPONDENTS' COUNTERCLAIM WITHOUT PREJUDICE Case No. 2:08-CV-490 TS

This matter is before the Court on Petitioner's Motion for Writ of Execution and Motion to Expedite a Hearing on the Return of Custody, and on Respondents' Motion for Stay of Execution Pending Appeal and Approval of Supersedeas Bond. Petitioner, in her Motion for Writ, requests that her biological child, C.D.K., be returned to her immediately, pursuant to her reading of the Court's June 4, 2009 Order granting Summary Judgment. Petitioner also requests, in her Motion to Expedite, that the Court hold a hearing to determine return of custody. Respondents request a stay of execution pending their appeal to the Tenth Circuit. Because the Court finds that it has no further jurisdiction in this case, and because the Court's previous orders do not provide sufficient grounds for immediate return of C.D.K. to Petitioner, the Court will deny Petitioner's Motions. Because the

Court does not believe that Respondents are entitled to an injunction of state court proceedings pending appeal, the Court will deny Respondents' Motion, as well.

I. BACKGROUND

Petitioner filed her Petition to Invalidate Adoption, pursuant to the Indian Child Welfare Act (the "ICWA"),[1] on June 2, 2008. Petitioner requested that the Court invalidate the adoption of her biological child by Respondents under § 1914,[2] which provides that "any parent . . . from whose custody such [Indian] child was removed . . . may petition any court of competent jurisdiction to invalidate such action upon a showing [the relevant placement proceedings] violated any provision of sections 1911, 1912, and 1913 of this title."[3] Petitioner also requested that the Court immediately return the child to her custody.[4]

After briefing and oral argument, the Court held, in a June 4, 2009 Order,[5] that the child was an Indian Child under the ICWA and that the procedural provisions of the ICWA were not met in the adoption of the child by the Respondents. The Court, therefore, granted summary judgment in favor of Petitioner and invalidated Petitioner's consent to termination of her parental rights over the child.[6] The Court's Order was limited to invalidation of Petitioner's consent to termination of her parental rights under § 1914, and expressly refused to reach Petitioner's fraud and duress claims,

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[1]25 U.S.C. §§ 1901-1963.

[2]*See* Docket No. 1 at 1.

[3]25 U.S.C. § 1914.

[4]Docket No. 1 at 16.

[5]Docket No. 36.

[6]*Id.* at 11.

which may have allowed for immediate return of C.D.K. under § 1913(d). In her Motion for Writ, however, Petitioner argued that the Court, in granting her summary judgment, had granted her plea for relief, which included a request for immediate return of custody.

Respondents appeared to agree with Petitioner that immediate return of custody was an available remedy, and filed a Motion to Stay under Fed. R. Civ. P. 62(d), offering a bond of $1,000 to "cover the Petitioner's court costs on appeal."[7]

The Court issued an Order on Briefing on June 9, 2009,[8] restating that the Court's June 4, 2009 Order had granted summary judgment only on Petitioner's procedural claims under ICWA, pursuant to § 1914, and indicated the Court's understanding that once Petitioner's relinquishment of parental rights had been invalidated, the remedies available to Petitioner were limited to those listed in § 1916. The Court requested that the parties submit briefs prior to a June 17, 2009 hearing on three questions: "(1) whether § 1916 permits immediate return of the Child to Petitioner; (2) whether the Court would have subject matter jurisdiction over a petition for return of custody under § 1916; and (3) whether the Court should stay execution of judgment pending appeal if the only effect of the Court's June 4, 2009 Order is to open the door for a petition for return of custody by the Petitioner."[9]

Petitioner subsequently filed her Motion to Expedite, again reiterating her belief that the Court had granted her plea for relief, including for immediate return of custody. In order to clarify

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[7]Docket No. 44 at 2.

[8]Docket No. 50.

[9]*Id.* at 2-3.

the remedies available to Petitioner, the Court issued a June 15, 2009 Order Amending Judgment,[10] which expressly rejected Petitioner's fraud and duress claims. Those claims, and any remedies under § 1913(d) are, therefore, unavailable to Petitioner.

The issues have been fully briefed, and the Court heard oral arguments on the motions and related matters on June 17, 2009.

II. DISCUSSION

A. RETURN OF CUSTODY

At the June 17, 2009 hearing, Respondents, Petitioner, and Intervenor all agreed that return of custody could not be ordered by the Court without compliance with the requirements of § 1916, which provides that:

> Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provision of section 1912 of this title, that such return of custody is not in the best interests of the child.[11]

Section 1916 establishes a multi-step process prior to the return of custody: (1) the final decree of adoption, issued in state court, must be vacated; (2) the Petitioner, as biological parent, must file a petition for return of custody; and (3) a court of competent jurisdiction must make a determination regarding the best interest of the child, subject to the procedural requirements of § 1912.

Before any other action may take place, then, there must first be a determination on the issue of vacating the final decree of adoption. In its June 4, 2009 Order, the Court acted pursuant to §

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[10]Docket No. 55.

[11]25 U.S.C. § 1916.

1914, which grants the Court the authority to invalidate certain actions related to state court child placement proceedings. In this case, the Court was asked to invalidate Petitioner's consent to relinquishment of her parental rights over C.D.K., and the Court acted within the narrow authority granted by § 1914 to do so. Contrary to the Petitioner's assertions, none of the Court's prior Orders presumed to go beyond the narrow authority of § 1914 to vacate the final adoption decree. As set forth below, such a decision may be made only in a state court of competent jurisdiction. The Court, therefore, finds that it is without authority to order immediate return of custody.

B. SUBJECT MATTER JURISDICTION

The Court requested briefing from the parties on the issue of subject matter jurisdiction over the remaining steps required by § 1916 before custody may be returned to Petitioner. As an initial matter, the Court notes that issues of family relations have historically been addressed in state courts.[12] Petitioner argues, however, that Congress intended federal courts to have jurisdiction over adoption proceedings when Indian children are involved,[13] and that a primary purpose of the ICWA was to curb the problems with state court proceedings that involved Indian children.[14] However, Petitioner fails to identify an express statement of jurisdiction within the ICWA and argues that any ambiguity should be resolved in favor of Indian tribes.

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[12]*Morrow v. Winslow*, 94 F.3d 1386, 1397 (10th Cir. 1996) (holding that "family relations are a traditional area of state concern").

[13]25 U.S.C. § 1901(1) and (2) ("Congress has plenary power over Indian affairs" and "Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes").

[14]*Id.*, § 1901(5) ("the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families").

The Court finds, however, that the ICWA is not ambiguous with regard to the jurisdiction of federal courts over adoption proceedings. Subchapter I of the ICWA, which deals exclusively with child custody proceedings, regularly references "State court proceedings." Section 1916, which governs the return of custody, permits a hearing on the best interests of the child, and references § 1912 for the procedural requirements of such a hearing. Section 1912, in turn, describes the requirements for proceedings in State court. Nowhere in the ICWA did Congress expressly grant federal courts the right to intervene in state child custody proceedings, and only an action under § 1914 can be said to involve a federal question, as it will often require an interpretation of federal law. The Court finds that § 1914 is inapplicable to the remaining issues required for a resolution of the parties' dispute and, therefore, finds that it lacks subject matter jurisdiction over the further relief requested.

C. RESPONDENTS' REQUEST FOR STAY OF EXECUTION

Respondents filed their Motion for Stay under Rule 62(d), which allows for a stay of judgment pending appeal. This rule is designed to "preserve the status quo while protecting the non-appealing parties' rights pending appeal"[15] in cases of money judgment. The Court finds that the rule is inapplicable in a case such as this, where the judgment does nothing more than open the door for Petitioner to pursue appropriate remedies in Utah state court. In this case, Respondents are essentially requesting that the court enjoin state court proceedings during appeal, pursuant to Rule 62(c).[16] Respondents' Motion, therefore, raises issues related to the application of the Anti-

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[15]*Rand-Whitney Containerboard Ltd. P'ship v. Town of Montville*, 245 F.R.D. 65, 68 (D. Conn. 2007).

[16]Fed. R. Civ. P. 62(c).

Injunction Act.[17] Even if the Anti-Injunction Act were not applicable, the Court would still have to deny the request for a stay.

Under Rule 62(c), the party seeking an injunction must show: (1) a likelihood of prevailing on the merits on appeal; (2) irreparable harm to the party seeking an injunction; (3) that others will not be harmed by the granting of an injunction; and (4) that the public interest will be served if an injunction is issued.[18] The Court finds that Respondents are unlikely to prevail on appeal, and that the public interest in keeping Indian children within their culture, as expressed by Congress when enacting the ICWA, argues against issuance of an injunction. The Court also finds that an injunction would harm Petitioner, in that it would delay the return of C.D.K. to her custody, but also that failure to issue the injunction would harm Respondents and, potentially, C.D.K. Therefore, the Court finds that the balance of harms does not argue for or against issuance of the injunction. When the Court considers that two elements argue against issuance of the injunction, and the remaining two elements do not argue for or against the injunction, the Court finds that Respondents have failed to make the necessary showing for an injunction to issue. The Court will deny Respondents' Motion for Stay.

D. OTHER ISSUES

At the June 17, 2009 hearing, Respondents requested additional clarification from the Court regarding the disposition of a counterclaim asserted in Respondents' Answer.[19] The Court finds that the counterclaim, which demands reimbursement from Petitioner for the support rendered by Respondents to C.D.K. since November 2007, are not properly before the Court because the

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[17]28 U.S.C. § 2283.

[18]*Securities Investor Protection Corp. v. Blinder, Robinson & Co., Inc.*, 962 F.2d 960, 968 (10th Cir. 1992).

[19]Docket No. 3 at 5.

adoption of C.D.K. has not yet been vacated and custody returned to Petitioner. The Court will therefore dismiss Respondents' counterclaim without prejudice.

III. CONCLUSION

It is therefore

ORDERED that Petitioner's Motion for Writ of Execution Allowing Petitioner to Execute on Judgment Entered 6/3/09 (Docket No. 38) is DENIED. It is further

ORDERED that Respondents' Motion to Stay Execution and Approve Supersedeas Bond (Docket No. 43) is DENIED. It is further

ORDERED that Petitioner's Motion to Expedite a Hearing on the Return of Custody (Docket No. 52) is DENIED. It is further

ORDERED that Respondents' Counterclaim is DISMISSED WITHOUT PREJUDICE.

DATED June 17, 2009.

BY THE COURT:

TED STEWART
United States District Judge

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

IN THE MATTER OF THE ADOPTION OF)

C.D.K., a minor child) Case No. 2:08-CV-490TS

_____)

BEFORE THE HONORABLE TED STEWART

June 17, 2009

Motion Hearing

REPORTED BY: Patti Walker, CSR, RPR, CP

350 South Main Street, #146, Salt Lake City, Utah 84101