

**United States District Court
for the
Western District of Washington**

SHILA EATON and JAKE EATON,

Plaintiffs,

v.

MICHAEL and FRANCINE MAIL,

Defendants.

Civil Action No. **3:08-cv-5538-FDB**

AMENDED (REDACTED)
MOTION FOR PROTECTIVE
ORDER

NOTE ON MOTION CALENDAR:
09/26/2008

1. Relief Requested

Come now the Plaintiffs, Shila and Jake Eaton, by and through counsel, and respectively move the Court to enter a Protective Order prohibiting the Defendants, Francine and Mike Mail, or anyone acting under their direction or control, from taking any action of any nature whatsoever intended to enforce or advance any orders pertaining to the parties entered under Quinault Tribal Court cause CV 06-037, pending final resolution of the Complaint for Declaratory Judgment herein.

2. Background

1 Defendants Mail brought suit against Plaintiffs Eaton on or about December 28,
2 2005 in the Quinault Tribal Court against Plaintiffs Eaton, seeking an order granting
3 grandparent visitation rights pursuant to provisions of the Quinault Tribal Code.

4 Defendants Mail are the paternal grandparents of the minor child ME. Plaintiff Shila
5 Eaton is the mother and custodian of ME. The natural father of ME, Jordon Mail, is
6 deceased. Shila and Jordon were never married to each other. Plaintiff Jake Eaton is
7 the present husband of Shila.

8 Defendants Mail are enrolled Quinault tribal members and reside on the Quinault
9 Indian Reservation. ME has been adopted into the Quinault tribe and is an enrolled
10 member. Plaintiffs Shila and Jake Eaton are both non-Indians and reside off-
11 reservation or other tribal lands.

12 ME was born on July 27, 2001 and is now just seven (7) years of age. The last
13 actual visit between ME and Defendants Mail was in approximately February, 2005,
14 when ME was just three and one-half (3 ½) years of age. Visits ceased because the
15 Defendants Mail refused to visit on the terms proposed by Plaintiff Shila Eaton. Given
16 ME's age and the length of time since he has even seen Defendants Mail, it seems
17 unlikely that ME will even recognize Defendants Mail, let alone be comfortable around
18 them.

19 Shila Eaton, in 2005, did restrict Defendants Mail to short visits, in a public place,
20 under close supervision. Shila did this not only because of ME's young age, but also
21 because of a history of problems interacting with the Mail family. At one point, Jordon
22 attempted to physically take ME from Shila's custody, with the knowledge and

1 assistance of Defendant Francine Mail. On numerous occasions there have been both
2 direct and implied threats from various members of the Mail family directed toward
3 Shila. Shila has long feared that if ME were taken onto Indian lands, she would have
4 great difficulty getting him back.

5 Further, Defendants Mail and various members of their family have repeatedly
6 made derogatory and disparaging remarks about each of the Plaintiffs herein. They
7 have repeatedly refused to acknowledge the role of Plaintiff Jake Eaton as ME's father
8 figure. They have repeatedly published ads in the local newspaper, made postings on
9 the internet, and sent letters to the editor of the local newspaper referring to ME as if
10 he were a member of only their family.

11 Since the tribal court action was filed, Defendants Mail have been apprised of
12 Shila's fears and concerns, but neither Defendants nor their counsel have done
13 anything to either alleviate those fears and concerns. In fact, Defendants Mail have
14 aggravated Shila's fears and concerns by participating in an event advertised to "Free
15 ME Mail" (impliedly from his non-Indian custodial mother), **Attachment A**, and made
16 unreasonable demands for a first visit under the recent tribal court order. **Attachment**
17 **B**. Recently, Mike Mail personally contacted the pastor of Plaintiff Eatons' church, and
18 attempted to have Jake Eaton ousted from that church because of Jake's involvement
19 with ME.

20 Throughout the course of the tribal court action, which lay dormant and under
21 advisement for more than nineteen months, the Eatons asserted lack of civil
22 jurisdiction over non-Indians who reside off-reservation. The Eatons' objections fell on

1 deaf ears in the Quinault Tribal Court. On August 25, 2008, that Court issued an Order
2 that allowed Defendants Mail to take ME from his mother's custody every Saturday,
3 without restrictions, for an unspecified duration. There has not yet been a visit under
4 the Order.

5 In the last week counsel for the respective parties have twice conferred. Counsel
6 for the Mails indicated that the Eatons should seek a restraining order and that the
7 Mails would be pursuing contempt of court charges in tribal court.

8 The requested protective order would merely maintain the status quo of no
9 visitation until the jurisdictional issues are fully resolved.

10 3. Authority

11 In addition to the potential psychological impact on ME should he suddenly be
12 forced to spend all day every Saturday away from his mother and step-father with
13 people he does not even know, and the impact on Shila Eaton given her personal
14 history with the Mail family, this Court should briefly consider the likelihood of Plaintiffs
15 Eaton prevailing on their Complaint for Declaratory Judgment.

16 In general, a tribal court has civil jurisdiction over non-Indians only if one of three
17 tests is met: (1) "express congressional delegation," (2) "taxation, licensing, or other
18 means [regulating] the activities of nonmembers who enter into consensual
19 relationships with the tribe or its members, through commercial dealing, contracts,
20 leases or other arrangements," or (3) "conduct of non-Indians on fee lands within [the]
21 reservation when that conduct threatens or has some direct effect on the political
22

1 integrity, the economic security, or the health or welfare of the tribe.” Montana v.
2 United States, 450 U.S. 544, 564-566 (1981).

3 Only the first test is arguably applicable here. The *Indian Child Welfare Act (ICWA)*,
4 25 U.S.C. 1901-1963, expressly grants tribal courts jurisdiction in the matters of
5 adoption and custody of Indian children. As is acknowledged by the Quinault Tribal
6 Court Judge in his orders, jurisdiction in this case is, at best, concurrent with the
7 jurisdiction of the state of Washington.

8 It is conceded that the Quinault Tribal Code, at all times material herein, has
9 contained a section authorizing grandparent visitation orders. QTC 19.04, and later,
10 19.08. However, under Washington law, no grandparent or third party visitation order
11 is possible because the only statutory authority, Revised Code of Washington
12 26.09.240, has been declared unconstitutional. See, Troxell v. Granville, 530 U.S. 57
13 (2000).

14 The *ICWA*, at 25 U.S.C. 1921, provides that the rights of a parent of an Indian
15 child are the greater of whatever rights shall be afforded under any applicable state or
16 federal law. Obviously the inability of Washington State courts to impose a third party
17 visitation order is a greater protection of a parent’s rights than when a third party
18 visitation order is imposed.

19 4. Argument and Summary

20 Thus, Plaintiffs Eaton first assert that there is no congressional grant of under the
21 *ICWA* or otherwise to order third party visitation under these facts against non-Indians
22 residing off-reservation.

1 Further, whether or not ICWA establishes a basis for tribal court jurisdiction,
2 since the visitation order could not issue under concurrent Washington State law, the
3 ICWA precludes jurisdiction for the Quinault Tribal Court to issue any third party
4 visitation order.

5 Under either analysis, Plaintiffs Eaton seem likely to prevail on their Complaint for
6 Declaratory Judgment herein. A Protective Order should issue so that the minor child
7 is not potentially traumatized, and the desires of the mother are respected.

8 Dated this 10th day of September, 2008.

9 Presented by:

10 Jack B. Micheau, WSBA #13784
11 Attorney for Plaintiffs
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14 Verification Affidavit

15 SHILA EATON, being first duly sworn on oath, deposes and says: I am a
16 named Plaintiff herein; I have read the foregoing Motion for Protective Order; I know
17 the contents thereof; and I believe all statements in factual background section are
18 true and correct.

19 SHILA EATON

20 SUBSCRIBED AND SWORN TO before me this 10th day of September, 2008.

21 NOTARY PUBLIC in and for the State of Washington, residing at _____
22