

12-CV-01761-MEM

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WESTERN WASHINGTON

GEORGE JONES (Father)
C/o Law Offices of O. Yale Lewis III, LLC
1511 3rd Ave., Ste. 1001
Seattle, WA 98101

No:

C12-1761

MEMORANDUM OF LAW IN
SUPPORT OF PETITION FOR WRIT
OF HABEAS CORPUS

On Behalf of [REDACTED] Minor Child
Petitioner,

V.
Lummi Tribal Court

Respondent,

And

Jackie Jones (Mother)

Respondent.

I. JURISDICTION / AUTHORITY

This court has jurisdiction over a habeas corpus petition requesting relief from a tribal court order per the Indian Civil Rights Act, as follows:

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe.

28 USC 1303.

This court may grant a writ of habeas corpus in favor of a parent to enforce the rights of and protect a child. RCW 7.36.020.

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ORIGINAL

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3 **II. RELIEF REQUESTED**

- 4 1. Quash / vacate all tribal court orders; and
5 2. Immediately return custody of the child to her father.

6 **III. STATEMENT OF FACTS AND PROCEDURE**

7 The Petitioner / mother is enrolled Northern Cheyenne. She was in Whatcom County
8 Jail from June 15, 2012 – September 20, 2012 on drug charges. She is now in rehab. Her rap
9 sheet includes 21 arrests and convictions as follows: 1 felony, 1 gross misdemeanor, 12
10 misdemeanors, and on classification unknown.

11 The father is not enrolled in any federally recognized Indian Tribe and does not have one
12 drop of Indian blood. He lives in Oak Harbor and has never lived on the Reservation.

13 The child is not enrolled at Lummi or elsewhere. She has never lived on the
14 Reservation. Until the mother went to jail, the child lived with their father and mother in Oak
15 Harbor, though their mother was frequently absent, either in jail or in pursuit of drugs.

16 While the child has had some contact with her maternal aunt, it was occasional and
17 sporadic. The child is not especially close to the Aunt.

18 The mother filed a Petition for Order for Protection on September 18th. The mother is
19 represented by a staff attorney at Lummi free of charge.

20 The court issued an ex parte order the next day. The order requires the respondent to
21 release the child to the custody of the petitioner or her designee. The mother's sister filed a
22 Non-parental child custody petition and motion for temporary orders September 20th. The
23 mother's sister is represented by the same staff attorney. Lummi Tribal Court issued an order
24 an ex parte order the same day.

25 The order was then duly served by the Island County Sheriff. The sheriff's deputies

1 arrived at the child's home on September 20th, just as she was coming home from her first day
2 at Headstart where they took her into custody.

3 The child has not seen their father since. Since the mother is in rehab, it is unlikely that
4 she has seen her either. The child is now living with her maternal aunt in Bellingham. The
5 maternal aunt is enrolled Northern Cheyenne.

6 The court scheduled a return hearing on the domestic violence protection order
7 September 24, just four days after he was served. At the hearing, respondent obtained a
8 continuance until October 8.

9 The father filed a Notice of Appearance with the Clerk of the Court and the tribal attorney
10 on Thursday, October 4. The following day, he provided the following documents to the clerk of
11 the court and the mother's attorney:

- 12 1. Motion to Dismiss Petition for Lack of Subject Matter Jurisdiction;
- 13 2. Declaration of George Jones;
- 14 3. Motion to Dismiss Non-Parental Child Custody Petition for Lack of Subject Matter
Jurisdiction; and
- 15 4. Motion to Quash Temporary Non-Parental Child Custody Order.

16 At the hearing on October 8, the father argued that the court should hear the motions to
17 dismiss because the mother and the aunt both stated in their respective petitions that the child
18 was a non-tribal member and lived with her father in Oak Harbor.

19 The tribal attorney made an oral motion for a continuance. The court granted the
20 continuance until October 29.

21 The father also asked for visitation with the child. The court told him that it had issued
22 an order allowing him 2 hours of supervised visitation per week at Catholic Community Services
23 after he had left the court room. The father asked for a phone number. Neither the court nor
24 the tribal attorney provided one.

25 The father then found the correct phone number on his own and called. Catholic

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Community Services informed him that he could not see his child under its auspices until the Aunt completed an intake. The aunt has not contacted Catholic Community Services.

IV. STATEMENT OF THE ISSUES

1. Whether this Court Should Grant the Petition Because Tribal Court Lacks Jurisdiction Per General Principles of Federal Indian Law; and
2. Whether this Court Should Grant the Petition Because Tribal Court Lacks Jurisdiction Over the Child per the Indian Child Welfare Act.
3. Whether this Court Should Grant the Petition Because the Tribal Court Lacks Jurisdiction Per the Uniform Child Custody Jurisdiction Enforcement Act;
4. Whether this Court Should Grant the Petition Because the Tribal Court Orders Violate the Father's Fundamental Constitutional Rights

V. ARGUMENT

1. This Court Should Grant the Petition Because Tribal Court Lacks Jurisdiction Per General Principles of Federal Indian Law.

This court should grant the petition because, per federal case law, tribal courts lack jurisdiction over non-members. *Montana v. United States*, 450 U.S. 544, 565 (1981). This general rule is subject to two exceptions: 1) where the non-member has a consensual relationship with the tribe, and 2) where the non-member's conduct threatens the political integrity, economic security, or health of welfare of the tribe. *Id. Accord, Plains Commerce Band v. Long Family Land and Cattle Co.*, 544 U.S. 316 (2008).

The consensual relationship exception only applies if the suit arises from the consensual relationship itself. *Phillip Morris v. King Mountain Tobacco*, 569 P.3d 932, 941 (9th Cir. 2009). The political integrity / economic security exception only applies in extreme cases where the non-member's conduct imperils the very existence of the tribe. *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, Fn. 12 (2001).

Here, the exceptions do not apply. The child is not a member. The father is not a member. The child is a minor and cannot consent to tribal court jurisdiction. The father does

1 not consent. Therefore, the cause should be dismissed.

2 **2. This Court Should Grant the Petition Because Tribal Court Lacks Jurisdiction Per**
 3 **the Indian Child Welfare Act.**

4 The Indian Child Welfare Act does not apply to this case for two reasons. First, it only
 5 applies to child custody proceedings. 25 USC 1911. A child custody proceeding refers to
 6 "foster care placement, termination of parental rights, pre-adoptive placement, or adoptive
 7 placement." 25 USC 1903(1). Moreover, ICWA does not apply to custody in a divorce
 8 proceeding. *Id.*

9 Here, the matter before the court is not foster care or adoption. Rather, it is an order for
 10 protection and a third-party custody petition. In addition, while the parties are not getting
 11 divorced in Lummi Tribal Court, they are getting divorced in King County Superior Court. Any
 12 child custody dispute between the parents should be handled in Superior Court.

13 The father intends to obtain an *ex parte* custody order in King County Superior Court
 14 that will expire after the mother gets out of rehab. He will file in King County, because it is more
 15 convenient, but will stipulate to a change of venue to Island County if the mother so requests.

16 Second, ICWA only applies to children who are enrolled in a federally recognized Indian
 17 tribe or are eligible for enrollment and are the biological child of a member. 25 USC 1903(4).
 18 Here, the child is neither a member nor eligible for membership. To be eligible for membership
 19 at Lummi, the child must possess $\frac{1}{4}$ or more Indian blood and be born to a member. *Lummi*
 20 *Tribal Code* 3.04.020.

21 Here, the mother is $\frac{1}{2}$ Northern Cheyenne and has no Lummi blood. The father has no
 22 Indian blood. Thus, the child meets the $\frac{1}{4}$ requirement. However, the child was not born to a
 23 member. The mother is enrolled Northern Cheyenne, not Lummi. Lummi does not permit dual
 24 enrollment. Thus, the child is not eligible for enrollment. *Lummi Tribal Code* 34.04.030(a).

25 **3. This Court Should Grant the Petition Because Tribal Court Lacks Jurisdiction Per**

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the Uniform Child Custody Jurisdiction Enforcement Act.

Per the UCCJEA, the state where a child happens to be located does not have jurisdiction to make an initial custody determination unless that state was the home state of the child when the petition was filed or has resided in that state for the past six months. *RCW* 26.27.201.

Here, the child was removed from the physical custody of her father in one venue within the State – Island County – and then taken to another venue within the State – Whatcom County. Thus, the child has always been with the jurisdiction of the State of Washington. Lummi has no claim to home state or even emergency jurisdiction based on the UCCJEA.

4. This Court Should Grant the Petition Because the Tribal Court Orders Violate the Father's Fundamental Constitutional Rights.

The father has a fundamental right to make decisions regarding the care, custody, and control of his child. *Troxel v. Granville*, 530 U.S. 57,66, 120 S.Ct. 2053 (2000). State interference with a fit parent's fundamental right to autonomy in child-rearing decisions is subject to strict scrutiny. *Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006). Thus, for a non-parent to gain custody of a child, he or she must prove that the parent is either 1) unfit, or 2) that placement of the child with the parent will cause actual detriment to his/her growth and development. *Id.* at 150. The burden of proof is on the non-parent. *Id.*

Here, the petitioner has not met her burden. She does not allege that the father is unfit. Rather, she merely alleges that he is not suitable. While she *does* allege that the father has committed domestic violence against the mother, she does not make any specific allegations that the father has committed domestic violence against the child. Instead, she merely speculates about what he might do once he is served with the domestic violence protection order.

Such speculation cannot be the basis for violation of the father's Constitutional rights,

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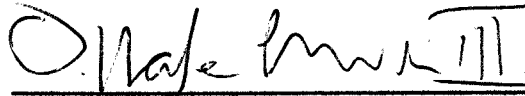
1 especially on an *ex parte* basis, before the father can even be heard. This court should grant
2 the petition for the writ of habeas corpus, thus quashing the tribal court orders and restoring
3 physical custody of the child to her father.

4 **VI. EVIDENCE RELIED UPON**

5 Declaration of George Jones with attachments; and

6 Declaration of Cathy McNaughton

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8 DATED in SEATTLE, this 9th day of OCTOBER, 2012

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11 O. Yale Lewis III
12 Attorney for Respondent
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