

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ASA' CARSARMIUT TRIBAL COUNCIL,)
)
 APPELLANT,)
)
 vs.)
)
 JOHN D. WHEELER III,)
 JEANETTE MYRE,)
) Case No.: S-15318
 APPELLEES.)
) Trial Case No. 3AN-12-4581 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ANDREW GUIDI PRESIDING

BRIEF OF APPELLEE

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Filed in the Supreme Court of
The State of Alaska, this 1
day of may, 2014
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TEXT OF STATUTES AND COURT RULES
PRINCIPALLY RELIED UPON

25 U.S.C. §1903 Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term -

(1) "child custody proceeding" shall mean and include - (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship; (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, and including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

AS 25.24.150(c)

The court shall determine custody in accordance with the best interests of the child under AS 25.20.060-25.20.130. In determining the best interests fo the child the court shall consider

- (1) the physical, emotional, mental, religious, and social needs of the child;
- (2) the capability and desire of each parent to meet these needs;
- (3) the child's preference if the child is of sufficient age and capacity to form a preference;
- (4) the love and affection existing between the child and each parent;
- (5) the length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity;
- (6) the willingness and ability of each parent to

facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child.

(7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;

(8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;

(9) other factors that the court considers pertinent.

STATEMENT OF THE CASE

On December 3, 2007 the Asa'carsarmiut Tribal Court (ATC) issued an order assuming jurisdiction over the parties minor child, J.W., solely upon Ms. Myre's petition. (Exc. 71) Ms. Myre and the minor child are members of the Asa'carsarmiut Tribe and Mr. Wheeler is not. ATC awarded primary physical custody to Ms. Myre on February 7, 2008. (Exc. 72-75) During Mr. Wheeler's visitation with J.W. in December 2011 Mr. Wheeler became concerned about returning J.W. to Ms. Myre's care. As a result, Mr. Wheeler contacted ATC through Jerry Reichlin on December 30, 2011, requesting a hearing to seek full custody of his son. (Exc. 76-78) Mr. Reichlin replied on January 3, 2012 and informed Mr. Wheeler nothing was currently before the tribal court in their custody matter and that he would need to make any requests in writing. (Exc. 79-80)

On January 11, 2012, Mr. Wheeler filed his complaint for custody in the Anchorage Superior Court. (Exc. 81) Filed with Mr. Wheeler's complaint was Mr. Wheeler's child custody jurisdiction affidavit. (Exc. 83-85) In Mr. Wheeler's child custody jurisdiction affidavit Mr. Wheeler provided information that J.W. and Ms. Myre had resided in Anchorage since June 2011. (Exc. 83) Ms. Myre did not object to this information or provide contrary information. Ms. Myre's counsel entered his appearance into the custody case on February 3, 2012. (Exc. 86)

Out of safety concerns for the minor child, himself, and his family, Mr. Wheeler filed a petition for a domestic violence protective order on February 8, 2012. (Exc. 87-95) In his petition for a domestic violence protective order Mr. Wheeler notified the court of the tribal custody order regarding J.W. (Exc. 93) The court granted Mr. Wheeler's petition for a 20-Day Ex Parte Domestic Violence Protective Order on February 9, 2012. (Exc. 96) The court found that it had jurisdiction over the parties and the subject matter. (Exc. 98) Mr. Wheeler's petition for a long-term protective order was assigned to Judge Guidi, the judge presiding over the custody case. (Exc. 97)

In response to Mr. Wheeler's custody complaint Ms. Myre filed a Motion to Compel Return of Child and for Writ of Assistance on February 10, 2012. (Exc. 104-127) In this motion Ms. Myre requested the court order Mr. Wheeler to return J.W. or for the court to issue a Writ of Assistance. It was also indicated in Ms. Myre's motion that she would seek modification of the tribal court's custody order. "From that point, she will likely seek corresponding modification of the tribal court order to reflect the need to limit and supervise Mr. Wheeler's future visitation and contact with Jacob." (Exc. 110)

With her motion to compel Ms. Myre also filed a Motion for Expedited Consideration of her Petition to Register Tribal Court Custody Order. (Exc. 128-135) In Ms. Myre's motion for expedited

consideration she notes that "there is not an existing Alaska statute or court rule on point that specifies the authority and procedure for registering an Alaska tribal court order in Alaska state court." (Exc. 129)

The trial Court denied Ms. Myre's petition to register the tribal court order because "Alaska did not include the definition of tribe or adopt section 104." (Exc. 137) The trial court interpreted this exclusion as limiting enforcement to state court child-custody determinations. (Id.) The trial court did note that Washington did include provisions that related to the enforcement of tribal court custody orders in their adoption of the UCCJEA. (Exc. 138) The court directed Ms. Myre to pursue enforcement in Washington. (Id.) Ms. Myre did not file a motion to reconsider the court's order denying her petition to register the tribal court order, nor was there evidence provided that Ms. Myre sought enforcement of the tribal court's order in Washington.

On February 28, 2012 Ms. Myre's counsel entered into the domestic violence protective order proceedings filed by Mr. Wheeler (3AN-12-433/434 CI) and those filed by Ms. Myre (3AN-12-467/468 CI). (Exc. 140-141) Following a long term domestic violence hearing the court issued Supplemental Findings with the orders regarding the long term domestic violence petitions filed by the parties. (Exc. 142-147) In these supplemental findings the trial court acknowledged the tribal custody order. (Exc. 146) The

minor child was also returned to Ms. Myre's primary custody as set forth in the tribal court order. Ms. Myre did not file a motion to dismiss Mr. Wheeler's complaint for custody nor file any pleadings in the following year objecting to the trial court's jurisdiction in this matter. Ms. Myre also participated in a custody investigation ordered by the court in this matter. Trial regarding custody of J.W. was scheduled for April 5, 2013.

On April 2, 2013, ATC filed its Motion for Expedited Consideration and Motion to Intervene and for Deferral/Dismissal. (Exc. 148-192) In the Affidavit of Samuel J. Fortier, submitted in support of ATC's motion, Mr. Fortier acknowledged that ATC and the state court had concurrent jurisdiction of the subject matter. (Exc. 151) Mr. Fortier also stated the request for deferral was based upon the "imminence of potentially conflicting judgments." (Id.) Mr. Wheeler opposed ATC's motion to intervene and for deferral/ dismissal. (Exc. 193-204)

Mr. Wheeler opposed ATC's motion as it was filed in the eleventh hour before trial. (Exc. 193) Mr. Wheeler also noted that ATC did not intervene prior to an earlier hearing in this matter or prior to the earlier scheduled trial dates of January 10 and 11th, 2013. (Exc. 194-195) Mr. Wheeler posited that ATC only sought to intervene as a result of the factual circumstances that now existed which worked against Ms. Myre retaining custody of J.W. (Exc. 195) Mr. Wheeler opposed ATC's intervention because

their stated interest in this case was protection of their "inherent sovereignty" while the subject matter of the case was the custody arrangement that was in the best interests of the minor child. (Exc. 198) Ms. Myre non-opposed ATC's motion to intervene and for deferral/ dismissal. (Exc. 205-209) Prior to this non-opposition Ms. Myre did not independently seek deferral or dismissal of this matter based upon the tribal court's jurisdiction. Ms. Myre's non-opposition also demonstrated that Ms. Myre's attorney had been in communication with Mr. Reichlin, the same representative Mr. Wheeler contacted ATC through. (Exc. 209) This communication occurred more than a year earlier and a day prior to Ms. Myre's attorney's entries of appearance into the domestic violence proceedings. Despite this knowledge ATC did not seek to intervene or assert their subject matter jurisdiction over this case earlier.

The trial court granted permissive intervention to ATC for the limited purpose of defending its jurisdiction and ordered trial to proceed as scheduled. (Exc. 210-211) The trial court ruled that ATC was not granted intervention as a right. (Exc. 210) The trial court also stated that the current custody proceeding was not a derogation of the tribal court's order or ATC's jurisdiction. (Id.) The trial court went on to state that these proceedings were not designed to set aside or invalidate ATC's prior order. (Exc. 211) The trial court reasoned that Mr.

Wheeler was seeking to modify the prior tribal court order. (Id.) The trial court further stated that no reason had been shown why it was an inappropriate forum for the modification of ATC's prior order. (Id.)

The trial court also heard from ATC's attorney prior to commencing trial in this matter. The trial court noted the only stated interest of ATC in this case was the court referring the matter to ATC. (Tr. Page 7, Line 9-19) The trial court, noting the timing of ATC's request, travel of witnesses to appear, and two trial days being scheduled, ruled it would proceed with trial while taking the oral motion for reconsideration under advisement. (Tr. Page 7, Line 16-23) In response to a question from the trial court ATC stated that it did not intend to participate in the proceedings, "Our intent was to enter a limited appearance." (Tr. Page 8, Line 3-4, 6-7)

Following a two day trial, hearing evidence from multiple witnesses and experts, the trial court awarded primary physical custody and sole legal custody to Mr. Wheeler with visitation to Ms. Myre so long as she maintained her sobriety. (Exc. 212-227) The trial court stated in its findings that the minor child had resided in the Third Judicial District for at least six months prior to the filing of the custody action. (Exc. 215) Then the trial court went into a detailed analysis and review of the parties' history and best interest factors under AS 25.24.150.

(Exc. 214-227) The trial court considered significant issues of substance abuse and domestic violence that were not included in the tribal court's findings in the 2008 order. The trial court also considered the change in circumstances since the custody action was initially filed by reviewing Ms. Myre's struggle with sobriety from December 2011 - April 2013.

After receiving the Findings of Fact and Conclusions of Law ATC filed a request for opportunity to be heard and motion for stay, (Exc. 228-235) despite not being present for or participating in the presentation of evidence. The trial court granted ATC's request for an opportunity to be heard and denied their motion for stay. (Exc. 236)

STANDARD OF REVIEW

The Supreme Court evaluates de novo the scope of tribal court jurisdiction and the meaning of federal statutes.¹ Under de novo review the Supreme Court applies "the rule of law that is most persuasive in light of precedent, reason and policy."² This is the same standard applied to questions of statutory interpretation.³

When reviewing a superior court's comity determination the Supreme Court applies its independent judgment, similar to that used when reviewing jurisdiction or a due process determination.⁴

Whether a court can exercise jurisdiction under the UCCJEA is a question of law, which the Supreme Court reviews de novo.⁵

¹ State v. Native Village of Tanana, 249 P.3d 734, 738 (Alaska 2011) citing John v. Baker, 982 P.2d 738, 744 (Alaska 1999)

² State v. Native Village of Tanana, 249 P.3d 734, 738 (Alaska 2011) (citing Glaman v. Kirk, 29 P.3d 255, 259 (Alaska 2001) quoting Philbin v. Matanuska-Susitna Borough, 991 P.2d 1263, 1266 (Alaska 1999))

³ Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 189 (Alaska 2007) (citing Alaska Gen. Alarm, Inc. v. Grinnell, 1 P.3d 98, 100 (Alaska 2000) (quoting Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

⁴ John v. Baker, 30 P.3d 68, 71 (Alaska 2001).

⁵ Steven D. v. Nicole J., 308 P.3d 875, 879 (Alaska 2013) (citing Atkins v. Vigil, 59 P.3d 255, 256-57 (Alaska 2002))

ARGUMENT

I.

ASA' CARSARMIUT DOES NOT HAVE STANDING TO APPEAL THE TRIAL COURT'S CHILD CUSTODY ORDER IN THIS MATTER

In order to have standing a person must demonstrate an injury-in-fact.⁶ The need of injury does not need to be great but "it is necessary to assure the adversity which is fundamental to judicial proceedings."⁷ This is referred to as the "interest-injury" test.⁸ "Standing questions are limited to whether the litigant is a 'proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.'"⁹

ATC has failed to demonstrate an injury in fact in their brief. ATC has not demonstrated how the trial court's rulings in this matter will affect their ability to self-govern internal domestic disputes between members, to exercise jurisdiction in ICWA defined child custody proceedings, or to obtain full faith and credit for their orders issued within ICWA defined child custody proceedings. The specific facts of this case support the

⁶ Wagstaff v. Superior Court, Family Division, 535 P.2d 1220, 1225 (Alaska 1975) (citing United States v. SCRAP, 412 U.S. 669, 689 n. 14 (1973)).

⁷ Id.

⁸ Gilbert M. v State, 139 P.3d 581, 587 (Alaska 2006) (citing Trustees of Alaska v. State, 736 P.2d 324, 327 (Alaska 1987)).

⁹ Moore v. State, 553 P.2d 8, 23-24 n. 25 (Alaska 1976) (quoting Flast v. Cohen, 392 U.S. 83, 100-01 (1968)).

trial court's rulings regarding jurisdiction, intervention, registration of tribal court orders and its ultimate custody determination.

ARGUMENT

II.

The Asa'carsarmiut Tribal Court Issued the Initial Determination

A. Asa'carsarmiut's Tribal Court Proceedings 2007-2008

The parties submitted their initial custody proceedings to ATC in 2007. Ms. Myre is an enrolled member of the Tribe, and therefore, the parties minor child, J.W., is a member of the Tribe. (Exc. 71)

A custody hearing was held on December 19 2007, and as a result, on February 8, 2008, ATC issued a custody order through application of their codified child custody factors. (Exc. 72-75) The custody order awarded physical and legal custody to Ms. Myre, with visitation rights to Mr Wheeler. (Id.)

B. Asa'carsarmiut Tribal Court Exercised Continuing Jurisdiction When Mr. Wheeler Petitioned ATC For Increased Visitation.

Mr. Wheeler petitioned the Tribal court to increase his visitation in 2008 and 2009.

During J.W.'s 2011 Christmas visitation with Mr. Wheeler in Washington it became apparent to Mr. Wheeler that Ms. Myre was on a drinking binge and incapable of caring for Jacob. Ms, Myre also claimed to be in hiding from George Johnson, the father of her other two children, due to domestic violence issues. Mr.

Wheeler contacted counsel for the Tribal Court with his concerns about returning J.W. to Ms. Myre's care in an email dated December 30, 2011, titled Jacob Wheeler's Emergency Custody Situation. (Exc. 76) In the email Mr. Wheeler requested a hearing before ATC seeking full custody of J.W. due to the domestic violence and alcohol abuse in Ms. Myre's home. (Id.) Jerry Reichlin of Fortier & Mikko, counsel for ATC, informed Mr. Wheeler that ATC would not get involved because there was no pending issues before the Tribal Court. (Exc. 79)

In her February 10, 2012 affidavit, Ms. Myre also spoke with the Tribal Court in January in an effort to seek assistance in having J.W. returned to Alaska. (Exc. 117) The Tribal Court representative, Joshua, told her that they could not help her. (Id.)

Ms. Myre and Jacob moved to Anchorage in June 2011. (Exc. 83) In an effort to expedite a change of custody Mr. Wheeler filed a Complaint for Custody in the Anchorage Superior Court on January 11, 2012. (Exc. 81) He then filed a Petition for an Ex Parte Domestic Violence Protective Order, on behalf of himself and Jacob. (Exc. 88-95) In his Ex Parte Motions he admitted that ATC had issued a previous Custody Order. (Exc. 93) His Ex Parte motions were granted on February 9, 2012. (Exc. 96-103)

Ms. Myre filed a two Motions for an Ex Parte Protective Order on February 10, 2012, one for her, and one on behalf of

J.W. (Exc. 141) Both motions were denied and long-term hearings were scheduled in the Superior Court custody matter. She also filed her opposition to Mr. Wheeler's Complaint for Custody, thru her attorney appointed by the Alaska Native Justice Center. (Exc. 104-127) She did not move to have the matter dismissed.

Both parties attempted to utilize ATC to address the concerns for J.W.'s well being prior to Mr. Wheeler filing a Complaint for Custody in the Superior Court, and prior to both parties filing Petitions for Ex Parte Protective Orders in the Anchorage District Court.

Neither party sought further assistance from the ATC with regard to custody of J.W.

While ATC may have concurrent jurisdiction over a custody matter, there jurisdiction only arises when a party files a competing motion in the Tribal Court. In this matter, both parties chose to litigate there issues in the Anchorage Superior Court, a choice both parties clearly made due to the absence of any competing motions being filed in the Tribal Court. Therefore ATC's jurisdiction to decide the custody issues was not triggered.

ARGUMENT

III.

UNDER THE FACTS OF THIS CASE IT IS CLEAR THAT THE SUPERIOR COURT ENGAGED IN A COMITY ANALYSIS REGARDING THE TRIBAL COURT'S CUSTODY ORDER.

The Superior Court did conduct a comity "analysis". The court received a copy of the Tribal Court's 2008 Custody Order and held that it was rendered thru application of the same factors used by the Superior Court in custody matters. (Exc. 136) The Anchorage Superior Court then enforced the Tribal Court Order upon issuing the order requiring Mr. Wheeler to return JW to the custody of Ms. Myre. (Exc. 142-147) The Tribal Custody Order remained in place until the Anchorage Superior Court modified the order thru issuance of the Final Custody Decree dated May 2, 2013. (Exc. 212)

Further proof of the Superior Court's grant of comity to the Tribe's Custody Order is set forth in Court's order dated April 5, 2013, in which the Superior Court states that Mr. Wheeler "is seeking to modify the earlier custody decision in light of the substantial circumstances of the parties that have occurred over the years since the Council's order was issued." (Exc. 211) As stated in the Court's April 5, 2013 order, the custody orders of every court in this state are subject to modification.

ATC would have the Supreme Court find that a modification of a previous order, that does not mirror the modified order, has failed to grant the previous issuing court order comity. When a

substantial change of circumstances occurs the Superior Court completes an analysis to determine if modification of the previous custody order is in the best interest of the minor child. The court is not required to weigh one parents' heritage over the other parents.

The Superior Court provided Ms. Myre with a visitation schedule which allowed her to enjoy time with J.W. and travel to her native village if she chose to do so. (Exc. 225-227)

ATC claims that the Superior Court should have abstained from hearing the parties custody matter, but fails to discuss the fact that neither party filed a competing custody action in Tribal Court. ATC cites National Farmers Union Insurance Co. v. Crow Tribe of Indian¹⁰ and Iowa Mut. Ins. Co. v LaPlante¹¹, two cases involving civil actions arising out of vehicle accidents within an Indian Reservation.

In Iowa Mut. Ins. Co., the party ATC refers to as a non-Native defendant, was required to exhaust all remedies in Tribal Court prior to seeking relief in Federal Court.¹² In contrast, this case does not involve any action by either party within Indian Territory, or a matter where a party filed an action in Tribal Court. This is a custody matter where neither parent

¹⁰ 471 U.S. 845 (1985).

¹¹ 480 U.S. 9 (1987).

¹² Id. at 19.

pursued motion practice with the Tribe, in a State where the Superior Court has concurrent jurisdiction over custody matters, at a minimum.

ATC believes the Superior Court should have abstained upon Ms. Myre's presentation of the Tribal Court order, although she presented the order merely for the purpose of registration. (Exc. 134-135) Application of that reasoning would then require the Alaska Superior Court to abstain from a matter upon presentation of a custody order from Kentucky, an order which would be recognized under the UCCJEA.

Comity is mutual respect for an order¹³, it does not grant any court inherent sovereignty over a custody matter in perpetuity, and surely does not allow ATC to force parties to return to their court when both have filed and submitted themselves and their custody matter to the Supreme Court.

ARGUMENT

IV.

The UCCJEA DOES NOT COMPEL THE CONCLUSION THAT THE TRIBAL COURT HAD EXCLUSIVE JURISDICTION.

- A. **The Trial Court Did Not Err In Interpreting Alaska's UCCJEA, AS 25.30.300, et. seq., As Excluding Tribal Courts Within The Meaning Of "Court" In AS 25.30.909(6) And Did Not Err In Declining To Register The Asa'carsarmiut Tribal Court Custody Order In Light Of The Court's Prior Precedents, Particularly State V. Native Village of Tanana, 249 P.3d 734 (Alaska 2011)**

¹³ John v. Baker, 982 P.2d 738, 762 (Alaska 1999).

This court construes a statute in light of its purpose.¹⁴ When this court is trying to determine legislative intent it considers the statements by a bill's sponsor relevant evidence.¹⁵ In contrast, if the court statutes meaning is plain and unambiguous the party asserting a different meaning bears a heavy burden of demonstrating a contrary legislative intent.¹⁶

"However, we may not read into a statute that which is not there, even in the interest of avoiding a finding of unconstitutionality, because 'the extent to which the express language of the provision can be altered and departed from and extent to which the infirmities can be rectified by the use of implied terms is limited by the constitutionally decreed separation of powers which prohibits this court from enacting legislation or redrafting defective statutes.'"¹⁷

There is a canon of statutory construction, *expressio unius est exclusio alterius*, that establishes where certain things are designated within a statute all omissions should be understood as

¹⁴ Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 192 (Alaska 2007) citing Beck v. Dep't of Transp. & Pub. Facilities, 837 P.2d 105, 117 (Alaska 1992).

¹⁵ Id.

¹⁶ Id. citing State v. Alaska State Employees Ass'n/ AFSCME Local 52, 923 P.2d 18, 23 (Alaska 1996).

¹⁷ Id. (quoting State v. Campbell, 536 P.2d 105, 111 (Alaska 1975), overruled on other grounds by Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978)).

exclusions.¹⁸

The court in John v. Baker stated,

"in the absence of proof that the Alaska legislature specifically intended the UCCJA to include Indian tribes, we follow the principle of statutory interpretation instructing that all omissions be treated as exclusions. We therefore conclude that the UCCJA does not apply to tribal judgments."¹⁹

As with the adoption of the UCCJA there is no evidence that the Alaska legislature specifically intended the UCCJEA to include Indian tribes. In fact, the issue of tribal court orders was never mentioned.²⁰ ATC is requesting this court to read something into the legislative intent that is not there and effectively redraft the legislation to include Alaska Native Tribes.

Case law is clear in regards to an omission in a statute.

The court in State v. Native Village of Tanana concluded that the specific facts of the case precluded the court from

¹⁸ L. Street Investments v. Municipality of Anchorage, 307 P.3d 965, 970 (Alaska 2013) (citing Puller v. Municipality of Anchorage, 574 P.2d 1285, 1287 (Alaska 1978) quoting 2A C. SANDS, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §47.23, AT 123 (4TH ed. 1973))

¹⁹ 982 P.2d 738, 762 (Alaska 1999).

²⁰ see 20th Alaska Legislature Committee, House Journal, January 20, 1998; 20th Alaska Legislature Committee Minutes House Health Education & Social Services; 20th Alaska Legislature Committee Minutes House Judiciary Committee; 20th Alaska Legislature Committee Minutes Senate Health Education & Social Services; 20th Alaska Legislature Committee Minutes Senate Judiciary.

defining the standards for determining which judgments would be entitled to full faith and credit by the state.²¹ The court held that ICWA defined proceedings may be entitled to full faith credit by the State under ICWA.²² As clearly set forth above, this is not an ICWA matter

B. The Trial Court Did Not Err In Concluding That It Had "At Least Concurrent Jurisdiction Over The Issue of Jacob's Custody."

The court in John v. Baker held that Alaska's state courts retain concurrent jurisdiction over child custody disputes.²³ The court reasoned that all disputes arising within the state fall within the state's general jurisdiction, tribal or not.²⁴ The court states both the tribe and state courts can adjudicate custody disputes.²⁵ "A tribe's inherent jurisdiction does not give tribal courts priority, or presumptive authority, in disputes involving tribal members."²⁶ The court went on to address concerns raised in the dissenting opinion that state court's would be closed to tribal members.

²¹ 249 P.3d 734, 736 (Alaska 2011)

²² Id.

²³ 982 P.2d 738, 759 (Alaska 1999).

²⁴ Id.

²⁵ Id.

²⁶ Id.

"Native parents who live in Anchorage and do not wish to avail themselves of a distant tribal forum will still be able to resolve their custody disputes in Anchorage Superior Court. Indeed, Alaska Natives who for any reason do not wish to have their disputes adjudicated in a tribal court will retain complete and total access to the state judicial system. Because state courts retain concurrent jurisdiction, there is no 'mandatory tribal court jurisdiction.'"²⁷

In this matter, neither party filed a competing motion to modify custody in the tribal court. Ms. Myre failed to file the tribal custody order in Washington despite being instructed to do so by the Anchorage Superior Court. (Exc. 138) Instead, both parties filed competing Petitions for Protective Orders in the Anchorage Court, and litigated Mr. Wheelers' Complaint for Custody in the Anchorage Superior Court for a year before ATC filed a motion to intervene in an effort to protect the integrity of its previous custody order.

Clearly, the Anchorage Superior Court had at least concurrent jurisdiction over the issues of deciding custody of the minor child. The child was a resident of the State of Alaska, as was Ms. Myre, and both parties not only submitted to the Anchorage Superior Courts' jurisdiction, but actively chose to file motions in the Anchorage venue.

²⁷ Id. (quoting Oklahoma Tax Commission v. Chicksaw Nation, 420 U.S. 425, 427-428 (1975)).

C. The Trial Court Properly Had Jurisdiction Over The Custody Issues And The Alaska Native Child In This Matter In Accordance With The Requirements of Alaska's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), AS 25.30.300, et seq., And In Light of Prior Precedents Including State v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011)

This court in State v. Native Village of Tanana concluded that the specific facts of the case precluded the court from "defining the extent of any individual Alaska Native Tribe's inherent sovereign jurisdiction to initiate 'child custody proceedings.'"²⁸ The court did conclude the Alaska Native Tribes were not necessarily precluded from exercising their inherent sovereignty to initiate "child custody proceedings" as defined by ICWA.²⁹ The Native Village of Tanana specifically noted to the court that "this case does not present the issues the State raises concerning tribal jurisdiction over non-members."³⁰

In its decision the court in State v. Native Village of Tanana reviewed precedent regarding ICWA and Alaska Native Tribal Sovereignty from 1986 in Native Village of Nenana³¹ v. State, DHSS through John v. Baker I.³² The court held,

²⁸ 249 P.3d 734, 736 (Alaska 2011).

²⁹ Id.

³⁰ Id. at 751.

³¹ 722 P.2d 219 (Alaska 1986).

³² 249 P.3d at 739-744.

"that federally recognized Alaska Native Tribes that have not reassumed exclusive jurisdiction under §1918(a) still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country. Necessarily, federally recognized Alaska Native Tribes are entitled to all of the rights and privileges of Indian tribes under ICWA, including procedural safeguards imposed on states and §1911(d) full and faith and credit with respect to ICWA-defined child custody orders to the same extent as other states' and foreign orders."³³

The court specifically did not address the extent of tribal jurisdiction over non-member parents of Indian Children and "extent of jurisdiction over Indian children or member parents who have limited or no contact with the tribe."³⁴ The goal of State v. Native Village of Tanana's decision was to clarify jurisdiction that may be held by federally recognized Alaska Native tribes to initiate ICWA-defined child custody proceedings.³⁵

ICWA defines a "child custody proceeding" to include foster placement, termination of parental rights, preadoptive placement, and adoptive placement.³⁶ ICWA excludes from its definition of "child custody proceeding" an award of custody to one of the

³³ Id. at 751.

³⁴ Id. at 752.

³⁵ Id.

³⁶ 25 U.S.C. §1903(1)(i)-(iv).

parents.³⁷ In John v. Baker, the court considered this exception to ICWA defined child custody proceedings.³⁸ The court reasoned that in a custody dispute between two parents neither of the concerns ICWA addresses were raised, because the minor children would spend time in both parents homes and their respective villages.³⁹

The court in Healy Lake Village, d/b/a Mendas Cha-ag v. Mt. McKinley Band and Healy Lake Traditional Counsel, was tasked with determining if state court jurisdiction was appropriate in a tribal election and membership dispute.⁴⁰ The court compared the question before it to the question of jurisdiction in child custody cases. The court reasoned that state court jurisdiction is appropriate in child custody disputes, such as John v. Baker, because the jurisdiction "furthers the state and federal laws designed to protect Alaska Native children without interfering with tribal self-governance."⁴¹ In contrast the state has no interest in determining the outcome of the tribal election and

³⁷ Id. See also 249 P.3d at 752 n. 19.

³⁸ 982 P.2d 738, 747 (Alaska 1999).

³⁹ Id. The court also noted legislative intent supported the divorce exception to apply to any parental custody dispute, referencing statements made by the Department of the Interior to Congress and the conclusions of the Bureau of Indian Affairs.

⁴⁰ Healy Lake Village, d/b/a Mendas Cha-ag v. Mt. McKinley Band and Healy Lake Traditional Counsel, S-14987 (Alaska 2014).

⁴¹ Id.

membership dispute.⁴² The court concluded that the state court did not have subject matter jurisdiction because it lacked an interest, and as result the dispute remained "within 'the tribe's retained inherent sovereign powers.'"⁴³

The facts of this case are distinguishable from the facts in State v. Native Village of Tanana and John v. Baker. Both of the parties before the court in John v. Baker were members of two different Alaska Native Tribes.⁴⁴ Approximately six months after filing a custody action in tribal court Mr. Baker filed a custody complaint in state court.⁴⁵ Subsequently, Ms. John filed a motion to dismiss the state court action citing the tribal court proceedings, this motion was denied and Ms. John appealed.⁴⁶

In this matter Ms. Myre is the only parent that is a tribal member. Another important fact that distinguishes this matter is that Mr. Wheeler did not file in state court within a few months of the tribal courts ruling. The tribal court issued its order on February 7, 2008. (Exc. 75). Mr. Wheeler did not file his complaint for custody in the state trial court until January 11,

⁴² Id.

⁴³ Id. (citing John v. Baker, 982 P.2d 738, 751 (Alaska 1999)).

⁴⁴ 982 P.2d at 743.

⁴⁵ Id.

⁴⁶ Id.

2012, (Exc. 81-82) almost four years later. At the time of filing there weren't any current motion before ATC. (Exc. 79) ATC's brief repeatedly highlights that Mr. Wheeler did not disclose the existence of the tribal court order in his child custody jurisdiction affidavit. ATC fails to acknowledge that Mr. Wheeler did include information regarding the tribal court case in his petition for a domestic violence protective order filed less than a month later. (Exc. 88-95) Mr. Wheeler was not attempting to hide the tribal court ruling from the state trial court. Moreover, the trial court specifically stated that the proceedings filed by Mr. Wheeler were not designed to set aside or invalidate the tribal court's order. (Exc. 211)

Another key distinguishing fact is that unlike Ms. John, Ms. Myre did not file a motion to dismiss citing the tribal court proceedings in response to Mr. Wheeler's custody complaint. Ms. Myre filed a petition to register the tribal court order (Exc. 128-135). Ms. Myre also filed separate two domestic violence protective proceedings in the state trial court. (Exc. 141). Ms. Myre did not file her own motion seeking dismissal of the state court proceeding, nor did she file a competing motion in the tribal court. Both parties submitted to the jurisdiction of the state trial court in this matter.

ARGUMENT

V.

THE SUPERIOR COURT PROPERLY HAD JURISDICTION OVER THE CUSTODY ISSUES IN THIS MATTER AND DID NOT ERR BY ENTERING A FINAL CUSTODY DECREE AND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Superior Court did not abuse its discretion or commit error when issuing the Final Custody Decree which in effect modified the Tribal Court order.

ATC relies on Howlett v. Howlett to demonstrate the Superior Courts' error in this matter. In Howlett, the court failed to set forth in the findings whether a substantial change of circumstances had occurred or provide an analysis of the best interests of the child.⁴⁷

In contrast to Howlett, the Superior Court in this matter issued an order on April 5, 2013 which acknowledged Mr. Wheeler's Complaint for Custody as a motion "seeking to modify the earlier decision in light of substantial changes in the circumstances of the parties that have occurred over the years since the Council's order was issued." (Exc. 211) The court clearly accepted Mr. Wheeler's complaint as a motion to modify the Tribal order. The court also noted that the Council failed to assert exclusive jurisdiction. (Exc. 211)

The court in this matter had clearly determined, and held that a substantial change of circumstances had occurred. All

⁴⁷ 890 P.2d 1125, 1127-1128 (Alaska 1995).

parties were made aware of the finding thru issuance of the April 5, 2013 order. (Exc. 210-211) The fact that the Findings of Fact and Conclusions of Law failed to incorporate the court's determination of the court's earlier finding that a substantial change of circumstances had occurred is merely clerical error, and does not rise to the level of reversible error.

The court did make a best interest analysis regarding J.W. in the findings. (Exc. 214-227) In the Findings of Fact the court held that it did not address every factor on the record because it believed the Custody Investigator did an excellent job addressing the application of the standard factors. (R. 598-615) The court then expressly adopted the Custody Investigator's analysis of the standard factors, as well as the conclusion. (Exc. 224)

ATC states that the court failed to consider that litigation had occurred and was ongoing in Tribal Court. In fact, there was no ongoing litigation in the Tribal Court. Neither party had filed any motions in Tribal Court.

The Superior Court did not commit reversible error by failing to include earlier findings in it's final findings in this matter.

CONCLUSION

This matter evolves from a custody case between two parents. It does not involve the adoption, foster placement, or termination of parent rights. Therefore, ICWA does not apply to these proceedings. ICWA specifically carves out an exception for divorce proceedings or intra-family disputes. One parent is a tribal member and one parent is a non-tribal member. These parties were involved in a tribal court proceeding over six years ago, and almost four years prior to the filing of the superior court custody case.

Furthermore, the minor child had resided in the Third Judicial District for at least six months prior to the filing of the custody action and continued to reside there until trial in this matter. ATC has not demonstrated that the trial court was an inappropriate forum to hear the evidence presented in this case.

Both parties willingly participated in the state trial court proceeding. Neither party filed a motion to dismiss or a competing motion in the tribal court. Both parties availed themselves to the state trial court in domestic violence protective order proceedings, which were consolidated with the Superior Court custody matter. Mr. Wheeler maintains that in the context of these facts ATC does not have standing to bring this appeal. Alaska would not have permitted the State of Kentucky to intervene in a custody proceeding or for Kentucky to file a

motion to defer/ dismiss the case to its jurisdiction if neither party resided in that State and the minor child and the custodial parent were residents of Alaska, and both parties willingly sought out the jurisdiction of the Alaska Superior Court. Kentucky would also not be able to file an appeal for the denial of such motions. It would have been appropriate for one of the parties to raise the objection to the jurisdiction of this court or sought, through their own motion, to defer/ dismiss. It is not appropriate for a tribal court to do so on their own when neither party had previously objected to the trial court's jurisdiction. To permit such an action by a tribal court would effectively close the doors to the state courts for parties in non-ICWA proceedings, because a tribal court could independently object to any custody or divorce proceeding filed in state court.

ATC in the eleventh hour before trial sought to defer/ dismiss the state trial court proceedings. Prior to this motion neither party had sought to end the state trial court's jurisdiction over the matter. ATC claims their inherent sovereignty and the dignity of their orders is being diminished by the trial court's actions in this matter. Mr. Wheeler disagrees.

The trial court considered Ms. Myre's petition to register ATC's order from February 7, 2008. The trial court determined that the definition of tribe and Section 104 of the model act had

not been enacted by the state legislature. Instead of going outside the bounds of the plain language of the statute the trial court correctly denied the petition and directed Ms. Myre to register ATC's order in Washington. Ms. Myre, who was represented by counsel, chose not to do so. The trial court did not err in its interpretation of the statute or precedent. This is not an ICWA proceeding where ICWA specifically provides for full faith and credit of tribal court orders, nor should the trial court have read language into the statute that was previously omitted. Under the separation of powers this is not a power afforded to the judiciary.

ATC also overlooks that the trial court did afford "dignity" to their prior custody order. The trial court specifically stated it was a lawful order and that Mr. Wheeler was seeking to modify based upon a substantial change of circumstances. The prior custody order for ATC was not ignored by the trial court as they argue in their brief. Ms. Myre did not maintain custody as awarded by ATC due to the evidence presented at trial and the best interest factors considered by the court.

The facts of this case are easily distinguishable from the precedent highlighted by ATC. ATC has failed to demonstrate how the state trial court's actions under these particular facts infringe on their future ability to govern domestic relations between the tribal members or have their custody orders granted

full faith and credit under ICWA.

The trial court properly had jurisdiction over the child custody issue in this matter and did not err in its interpretation of precedent or the UCCJEA enacted by the Alaska Legislature. Mr. Wheeler respectfully requests the court affirm the trial court's conclusions of law regarding jurisdiction in this matter.

Dated this 29TH day of April 2014, in Anchorage, Alaska.

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By: 

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