No. _____

In The Supreme Court of the United States

S.S. and S.S.,

Petitioners,

v.

THE COLORADO RIVER INDIAN TRIBES, STEPHANIE H., and GARRETT S.,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 *et seq.*, was enacted to address the problem of unjustified removal of Indian children from their parents by "nontribal public and private agencies" and their placement in "non-Indian foster and adoptive homes and institutions." *Id.* § 1901(4). That concern is absent in a private action for termination of parental rights, which is a private dispute between birth parents, involving no government entity. Nevertheless, the court below—in conflict with other state courts of last resort, and this Court's precedent—held that ICWA Sections 1912(d) (the active-efforts provision) and 1912(f) (the termination-burden provision) apply to such private disputes.

ICWA's more onerous set of evidentiary and procedural standards, including the "active efforts" and beyond-a-reasonable-doubt requirements at issue here, apply only to cases involving "Indian child[ren]," *id.* § 1903(4)—not to cases involving children who are white, black, Hispanic, Asian, or of any other ethnic or national origin.

The questions presented are:

1) Do ICWA Sections 1912(d) and 1912(f) apply in a private severance action initiated by one birth parent against the other birth parent of an Indian child?

2) If so, does this *de jure* discrimination and separate-and-substandard treatment of Indian children violate the Due Process and Equal Protection guarantees of the Fifth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, S.S. and S.S., are minors. Respondent Stephanie H. is the birth mother of Petitioners. Respondent Garrett S. is the birth father of Petitioners. Respondent Colorado River Indian Tribes is a federally-recognized Indian tribe that intervened in the trial court pursuant to 25 U.S.C. § 1911(c).

None of the parties are corporations.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

S.S. (born in 2000) and S.S. (born in 2002), respectfully request this Court to grant their petition for a writ of certiorari to the Arizona Court of Appeals, Division One.

OPINIONS BELOW

The Arizona Supreme Court's order denying discretionary review is reproduced at App. 49a–50a. The decision of the Arizona Court of Appeals, Division I, *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. App. 2017), is reproduced at App. 1a–16a. The decision of the Arizona Superior Court in and for the County of La Paz is reproduced at App. 17a–27a.

JURISDICTION

The Arizona Supreme Court filed its order denying review on April 19, 2017. App. 49a–50a. This Court has jurisdiction under 28 U.S.C. § 1257(a). This petition is timely filed.

RULE 29.4(b) STATEMENT

The decision below calls into question the validity of 25 U.S.C. §§ 1903(1)(ii), 1912(d), 1912(f). The United

States was not a party in the state-court proceedings. Thus, 28 U.S.C. § 2403(a) may now apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and statutory provisions, namely, U.S. CONST. amends. V, XIV § 1; 25 U.S.C. §§ 1901–1903, 1912, Ariz. Rev. Stat. ("A.R.S.") §§ 8-533, 8-537, are reproduced in relevant part at App. 51a–62a.

INTRODUCTION AND STATEMENT OF THE CASE

The facts and procedural history of this case are summarized in the Court of Appeals' opinion at ¶¶ 2–8. App. 2a–5a. As relevant here, Garrett S. and Stephanie H. had two children, S.S. and S.S., petitioners here. They are "Indian child[ren]" under ICWA. 25 U.S.C. § 1903(4).[1]

Garrett S. and Stephanie H. divorced in 2005. Op. ¶ 2. App. 2a. Garrett S. filed a petition for termination of parental rights ("TPR") against Stephanie H. in December 2012, alleging abandonment and neglect. Op. ¶ 5. App. 3a. The children, Garrett, and Garrett's wife Laynee S., all want Laynee to formally adopt S.S. and

[1] No party to this case is now or ever was domiciled on a reservation.

S.S. Laynee has been every bit their mother, and in ways that Stephanie never was.

Between early- to mid-2009 and January 2016, parties engaged in protracted active efforts even though the court had awarded "continued *sole legal and physical custody*" to Garrett S. in 2009. Op. ¶¶ 4–5. App. 3a–4a (emphasis added). By the time of the trial in January 2016, Stephanie H. "had not seen the children since May 2009." Op. ¶ 5. App. 4a.

Private TPR actions are private disputes between ex-couples. While the child protective services ("CPS") agency of a state also may initiate termination-of-parental-rights actions to protect children from abuse, abandonment, or neglect, no such state-initiated action is at issue here. In other words, this case involves the quintessential private family dispute—*not* a dispute in which any state agency is involved.

Ordinarily, a private TPR action is resolved by reference to state law that sets forth grounds therefor and the evidentiary standard by which those grounds are proven. In Arizona, A.R.S. §§ 8-533 and 8-537 specify grounds for TPR—such as neglect, abandonment, drug abuse, etc. These must be proven by clear and convincing evidence. A.R.S. § 8-537; *Kent K. v. Bobby M.*, 110 P.3d 1013, 1018 ¶ 22 (Ariz. 2005). And it must also be proven, by preponderance of the evidence, that TPR is in the child's best interests. *Id*. That is the baseline standard that applies to *all* Arizona-resident children—Indian, as well as non-Indian.

But because S.S. and S.S. are "Indian children" as defined in ICWA, the court below held that *additional* procedural and substantive rules apply to this private TPR action.

Congress enacted ICWA to address the problem of unwarranted removal of Indian children "by nontribal public and private agencies" and their placement in non-Indian foster and adoptive homes or institutions, 25 U.S.C. § 1901(4)—a concern that is *entirely absent* in a privately-initiated TPR proceeding, which is an ex-couple's private quarrel.

The court below applied ICWA to such a private quarrel. The children ask this Court whether and to what extent ICWA Sections 1912(d) and (f) apply in a privately-initiated TPR proceeding—and if so, whether the *de jure* discrimination established by applying separate and less-protective rules to this case based on the race, color, or national origin of the children violates the Constitution.

State courts are divided, creating a patchwork of non-uniform federal law. Given the lack of factual disputes here, this case is an ideal vehicle to resolve these exceptionally important questions.

PROCEDURAL HISTORY

Garrett S. filed the TPR petition in December, 2012. Op. ¶ 5. App. 3a. In January, 2016, the case came to trial. The Colorado River Indian Tribes ("CRIT")

intervened and fully participated at trial. Op. ¶ 6. App. 4a. Over the course of two days, S.S., S.S., and Garrett S. presented approximately 160 exhibits. App. 74a–85a. Stephanie H. then moved to dismiss on the grounds that ICWA's statutory grounds for TPR had not been met. Op. ¶ 7. App. 4a–5a.

The trial court granted the motion to dismiss, noting that Garrett S. *had* offered "sufficient evidence to go forward on abandonment" under state law, and *had* offered "sufficient evidence to show [TPR] would be in the best interests of the children" under *Kent K.*, *supra*, and had also offered " 'at least some' evidence that continued custody by Mother was likely to result in serious emotional or physical damage to the children" under 25 U.S.C. § 1912(f), but "had not offered sufficient evidence to prove unsuccessful 'active efforts' to prevent the breakup of the family" under 25 U.S.C. § 1912(d). *Id.*

In other words, the motion to dismiss was granted solely as a consequence of ICWA. If S.S. and S.S. were not "Indian children," a different result would have followed.

The children appealed, arguing that ICWA Sections 1912(d) and (f) do not apply to private TPR actions, and if they do, they are unconstitutional. Op. ¶ 8. App. 5a. But the Arizona Court of Appeals affirmed, holding, *first*, that ICWA did apply—meaning that parties needed to engage in "informal private initiatives aimed at promoting contact by a parent with the child and encouraging that parent to embrace his or her

responsibility to support and supervise the child," and *prove* by clear and convincing evidence that such efforts were unsuccessful. Op. ¶ 22. App. 12a–13a. *Second*, the court ruled that "the additional requirements ICWA imposes" on TPR cases involving Indian children "are rationally related to the federal government's desire to protect the integrity of Indian families and tribes" and therefore do not violate the Constitution's Equal Protection guaranty. Op. ¶ 27. App. 16a. The children petitioned the Arizona Supreme Court, but it denied review. App. 49a–50a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. ICWA imposes different substantive and procedural rules on cases involving Indian children than children of other races.

The simplest way to understand what is at stake here is by imagining two boxes.

In the *first* box is an Arizona-resident American-citizen child who is white, black, Hispanic, Asian, Serbian, or Hindu. Arizona law provides that in a case involving such a child, when a parent or other private party petitions for the termination of the parent–child relationship, the petitioner must (a) establish one of the statutory grounds for TPR set forth in A.R.S. § 8-533, (b) do so by clear and convincing evidence, A.R.S. § 8-537(B), and (c) establish by a preponderance of the evidence that TPR is in the child's best interests. *Kent K. v. Bobby M.*, 110 P.3d 1013, 1018 ¶ 22 (Ariz. 2005).

In the *second* box is an Arizona-resident "Indian child" as defined in ICWA. "Indian child" means a child who is either a tribal member or who is *eligible* for tribal membership and has a parent who is a member. 25 U.S.C. § 1903(4). Eligibility is virtually always determined exclusively by biology: for example, CRIT—the tribe involved here—requires a person to have 25 percent "Indian" blood (of *any* tribe), and to be a direct descendant of a signer of the 1937–39 Colorado River Agency Census Rolls. CRIT CONST. art. II, § 1(a).[2] Political, cultural, or religious affiliation are not a factor. Nor is ICWA geographically limited. Any child anywhere who has the requisite DNA in his or her veins, is placed in this second box, and is subject to ICWA. For such a child, the party petitioning must establish the following, "*in addition* to state law requirements" from the first box, *Valerie M. v. Arizona Dep't of Econ. Sec.*, 198 P.3d 1203, 1207 ¶ 16 (Ariz. 2009) (emphasis added):

- by "clear and convincing evidence," *Yvonne L. v. Arizona Dep't of Econ. Sec.*, 258 P.3d 233, 242 ¶ 39 (Ariz. App. 2011), that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful," 25 U.S.C. § 1912(d); and
- "by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent or Indian custodian is likely to result

[2] http://www.crit-nsn.gov/crit_contents/ordinances/constitution.pdf.

> in serious emotional or physical damage to the child." *Id.* § 1912(f).

In this case, the court below, as a matter of first impression, held that Sections 1912(d) and (f) of ICWA apply in a private TPR action. That means that S.S. and S.S., in this private dispute, are subjected to a separate-and-substandard treatment: it is harder for their birth father to take action to protect their interests than it would be, if they were of a different ethnic or national origin. That *de jure* distinction between private TPRs of Indian children and those involving all other children harms these Indian children in a manner that "raise[s] equal protection concerns." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

ICWA was designed to prevent and remedy harms caused by aggressive "*nontribal public and private agencies*." 25 U.S.C. § 1901(4). It was not designed to apply to a private family dispute in which an Indian parent seeks to protect the best interests of his child by severing the rights of an unfit birth parent. In *Adoptive Couple*, 133 S. Ct. at 2562–64, this Court concluded that it makes no sense to apply ICWA Sections 1912(d), (f), and 1915(a), to a case in which no Indian family was faced with "breakup." Here, too, no Indian family is faced with breakup by the action of any state entity.

There is no risk here of the sorts of abuses ICWA was meant to prevent and remediate. No Indian family is threatened with breakup; on the contrary, Garrett S. is the Indian parent, seeking the best interests of his son and daughter, and the trial court has already found

sufficient evidence to justify TPR on grounds of abandonment and that such TPR would be in the best interests of the children. Op. ¶ 7. App. 4a.

But if the parties here are placed in the ICWA penalty box, the rules are entirely different. Different burdens of proof apply, and different—and *additional*—substantive requirements must be satisfied. All to prevent an injury that is not threatened here. The only consequences of applying ICWA here are to delay proceedings, increase the burdens and costs on the parties while they comply with the nebulous, undefined duty of "active efforts," subject the parties to more onerous legal standards, and "put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 133 S. Ct. at 2565.

To make clearer how ICWA results in a set of different laws being applied to children on the basis of an "immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), consider the following: Table 1 summarizes the difference in how Indian children are treated in Arizona as compared to how Indian children are treated in other states. Table 2 summarizes the difference in how Indian children are treated in Arizona compared to all other Arizona-resident children.

Table 1: Application of ICWA in Arizona compared to its application in other states

	Arizona	**Other States**
Level of proof required to satisfy the active-efforts provision	Clear and convincing evidence (*Yvonne L.*, *supra*)	• Preponderance of the evidence (Alaska, Illinois, Nebraska) • Clear and convincing evidence (North Dakota) • Beyond a reasonable doubt (Utah) • Beyond a reasonable doubt or clear and convincing evidence (split between Colorado intermediate appellate courts)
Do ICWA Sections 1912(d) and (f) apply in private family disputes?	Yes (*S.S. v. Stephanie H.*)	• No (California, Montana, Nebraska, New Mexico, Wisconsin, Wyoming) • Yes (Washington, Alaska, Colorado)

Table 2: *De jure* distinction between privately-initiated severances of Indian children and privately-initiated severances of all other children

	All other children	**Indian children**
Efforts to reunify child with parent	Default rule: reasonable efforts	• Active efforts, greater than reasonable efforts (Oklahoma, Oregon, Utah) • Active efforts, equivalent to reasonable efforts (Colorado) • Active efforts; silent as to whether they are greater than or equivalent to reasonable efforts (Arizona)

	All other children	**Indian children**
Are efforts to reunify excused?	Yes, excused if listed aggravated circumstances are present.	Not excused if listed aggravated circumstances are present.
Abandonment in Arizona	Reasonable efforts are excused if aggravated circumstances such as abandonment are present.	Active efforts are required even in cases of abandonment.
Evidence of abandonment in Arizona	Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment. A.R.S. § 8-531(1).	Show active efforts were unsuccessful even if state law abandonment proved; active efforts were conducted in this case for *seven* years (2009–16).
Differences between state-initiated and privately-initiated severance actions in Arizona?	There are meaningful differences.	There is no meaningful difference between state-initiated and privately-initiated severance actions.
Grounds for TPR in Arizona		
Statutory grounds	Prove statutory grounds by clear and convincing evidence.	
Child's best interests	Prove child's best interests by a preponderance of the evidence.	
Additional grounds for severance	None	Prove active efforts were undertaken and were unsuccessful by clear and convincing evidence.
		Prove continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child by evidence beyond a reasonable doubt.

There is *one* manner in which Indian children are not treated differently than their non-Indian peers in Arizona: in a private TPR action, the petitioner must prove the statutory termination grounds by clear and convincing evidence, and that severance is in the child's best interests[3] by a preponderance of the evidence.[4] But that is where the equal treatment ends. Beyond that, the procedural and substantive rules applied in the private severance action involving an Indian child are vastly different—and *substandard*.

1. Arizona law, like the laws in most states, and like the federal Adoption and Safe Families Act, requires *state child protection officers* to make "reasonable efforts" to "preserve and reunify families" before seeking to terminate parental rights. 42 U.S.C. § 671(a)(15); A.R.S. § 8-522(E)(3). These "reasonable efforts" are *not* required, though, when "aggravated circumstances," including "abandonment" are present. 42 U.S.C. § 671(a)(15)(D).

But ICWA requires "*active* efforts" rather than "reasonable efforts." This is not mere semantics. This

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[3] At least one state court has held that "ICWA provides more limited recognition of the child's best interests." *In re N.B.*, 199 P.3d 16, 24 (Colo. App. 2007).

[4] All 50 states and the District of Columbia require statutory grounds be proven by clear and convincing evidence because of this Court's holding in *Santosky v. Kramer*, 455 U.S. 745 (1982), that due process demands something more than the mere preponderance standard. The *Santosky* Court acknowledged, however, that the beyond-a-reasonable-doubt standard that ICWA imposes can "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption." *Id.* at 769.

difference moves the child custody proceeding of a Native American child in a completely different direction than that of a non-Indian child. While ICWA does not define "active efforts," most courts have held that it means something *more* than reasonable efforts. *See, e.g.*, *In re J.S.*, 177 P.3d 590, 593 ¶ 14 (Okla. App. 2008); *In re K.L.D.*, 207 P.3d 423, 425 (Or. App. 2009); *In re C.D.*, 200 P.3d 194, 205 ¶ 29 (Utah App. 2008).[5]

Furthermore, ICWA's "active efforts" requirement is *not* excused—as "reasonable efforts" is—in cases of aggravated circumstances such as abandonment. *See In re J.S.B., Jr.*, 691 N.W.2d 611, 618 ¶ 20 (S.D. 2005) ("[W]hile the presence of 'aggravated circumstances' may eliminate the need to provide 'reasonable efforts' under [state law], it does not remove [the CPS department's] requirement to provide 'active efforts' for reunification under ICWA.").

2. In Arizona, efforts to reunify a parent with a child before seeking severance of the parent's rights on the statutory ground of abandonment is *not* required "in the absence of an existing parent–child relationship." *Toni W. v. Arizona Dep't of Econ. Sec.*, 993 P.2d 462, 467 ¶ 15 (Ariz. App. 1999). The absence of an existing parent–child relationship is *the definition* of

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[5] Other courts have held that active efforts are "equivalent to reasonable efforts." *In re K.D.*, 155 P.3d 634, 637 (Colo. App. 2007). Arizona courts have not yet decided this question. *See, e.g.*, *Iona T. v. Arizona Dep't of Econ. Sec.*, No. 2 CA-JV 2009-0025, 2009 WL 3051509, at *3 ¶ 11 (Ariz. App. 2009). This lack of uniformity only highlights the need for this Court's guidance on these matters.

abandonment. *See* A.R.S. § 8-531(1) (defining "abandonment"). This Court has said that such lesser protection of a parent's rights is justified because "the mere existence of a biological link" merely gives the parent "an opportunity . . . to develop a relationship with [the] offspring"; if the parent fails to "come forward to participate in the rearing of h[er] child"—like Stephanie H. here—then the parent's constitutional rights are not violated by failing to take efforts to reunify her with the children. *Lehr v. Robertson*, 463 U.S. 248, 261, 262, 267 (1983). That is because "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Caban v. Mohammed*, 441 U.S. 380, 397 (1979).

3. There are notable differences in state-initiated and privately-initiated TPR actions—differences designed to protect the constitutional rights of parents and children. For example, it would be absurd to have state-initiated divorce proceedings; divorce actions are necessarily initiated by private parties.

But when a government agency interferes in the family relationship, greater protections are warranted. That is why, when the state intervenes to protect a child from abuse or neglect, it is considered proper for the government to undertake some efforts at reunification. But those efforts must be limited, because imposing such forcible conciliation in private TPR actions could threaten associational freedoms of the individuals involved—of the child, of the birth parents, of the stepparent. Private TPR actions are highly sensitive

family affairs—a "momentous act[] of self-definition" by the family which the government must take care to respect rather than override. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (citation omitted).

In short, applying ICWA to *private* TPR cases accomplishes no legitimate government purpose and causes extraordinary harm. It would mean that even *Indian parents* seeking termination in the best interests of *their own children* would be forced to make active efforts to reunify their children with the parent they consider unfit—a self-contradiction that would essentially force a parent to take steps she considers unsafe for her child. That simply does not secure the interests of the children or Indian tribes.

4. The Court below held that Garrett S. was required to prove *beyond a reasonable doubt, on the testimony of expert witnesses*, "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," 25 U.S.C. § 1912(f), even though Stephanie H. lost legal and physical custody of S.S. and S.S. in 2009 pursuant to a court order that is not in dispute here. Obviously, the difference between burdens is significant. In *Santosky*, this Court refused to impose a "beyond a reasonable doubt" standard on TPR cases in light of the need to balance the rights of children with those of parents. Too high a burden of proof endangers children, especially because proof of "emotional . . . damage," 25 U.S.C. § 1912(f), is "*rarely* susceptible to proof beyond a reasonable doubt." *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (emphasis added); *Addington*

v. Texas, 441 U.S. 418, 432 (1979) (beyond-reasonable-doubt standard is "inappropriate . . . because, given the uncertainties of psychiatric diagnosis, it may impose a burden the [party] cannot meet and thereby erect an unreasonable barrier to [relief]").

II. There is an irreconcilable and acknowledged split between the courts of Arizona and those of other states regarding the application of ICWA in private TPR cases.

State courts are divided[6] on whether and to what extent ICWA applies to private severance cases.

A. State courts are in disarray regarding whether ICWA applies to private family disputes.

This Court and some state courts have held that ICWA Sections 1912(d) and (f) do not apply in certain situations. *Adoptive Couple*, *supra*, held that Sections 1912(d) and (f) do not apply where the parent of an Indian child abandoned the child so that there is no threat of the breakup of an Indian family. 133 S. Ct. at 2557. That case called Section 1912(d) "a sensible requirement when applied to *state social workers* who

[6] ICWA is virtually always applied in state, rather than federal, courts, given that it overrides state family law on matters over which federal district courts virtually never have jurisdiction. Nor does ICWA apply in tribal courts. Therefore, in this context, a split of authority between state courts creates the same fractured, non-uniform application of federal law that a circuit split ordinarily does.

might otherwise be too quick to remove Indian children from their Indian families," but held that "[c]onsistent with the statutory text," ICWA "applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights." 133 S. Ct. at 2562–63 (emphasis added).

In *In re Bertelson*, 617 P.2d 121, 125 (Mont. 1980), the Montana Supreme Court held succinctly that ICWA was "not directed at disputes between Indian families regarding custody of Indian children." That case involved a dispute between grandparents and a mother over custody of a child; all parties were tribal members. *Id.* The court found that ICWA did not apply, because ICWA was written "to preserve Indian culture [*sic*] values under circumstances in which an Indian child is placed in a foster home or other protective institution," which was not the circumstance presented. *Id.* Instead, the case was an "internal family dispute," which "does not fall within the ambit of the Indian Child Welfare Act." *Id.* at 125–26.

The Texas Court of Appeals likewise found in *Comanche Nation v. Fox*, 128 S.W.3d 745 (Tex. App. 2004), that ICWA did not apply to the modification of a conservatorship agreement in a case involving no government agency. It explained that "the Act's congressional findings reveal the intent that it apply only to situations involving the attempts of public and private agencies to remove children from their Indian families, not to inter-family disputes." *Id.* at 753.

In *In re J.B.*, 100 Cal. Rptr. 3d 679 (Cal. App. 2009), the California Court of Appeal held that "ICWA does not apply to a proceeding to place an Indian child with a *parent*." *Id.* at 683. Section 1912(f) of ICWA, it held, did not apply in a dispute between two birth parents. In so holding, the court noted that such a reading "comports with the remainder of the ICWA statutory scheme and the express purpose of ICWA." *Id.*

Similarly, in *In re M.R.*, 212 Cal. Rptr. 3d 807 (Cal. App. 2017), the California Court of Appeal found that ICWA did not apply to a case in which CPS workers removed children and placed them with their grandmother, and then later placed them with their birth father. The court found that ICWA was intended to remediate "the removal of Indian children from their families and the placement of such children in foster or adoptive homes," and therefore did not apply to the case at hand because "[p]lacing a child with a parent—even a previously non-custodial parent—does not equate with removal of the child from its family, and placement in a foster or adoptive home." *Id.* at 822.

Other state courts have held the same. In *In re Micah H.*, 887 N.W.2d 859 (Neb. 2016), the Nebraska Supreme Court held that ICWA Sections 1912(d) and (f) did not apply to a private severance petition filed by maternal grandparents against the birth father, because no "breakup" of an Indian family would result. In *Cherino v. Cherino*, 176 P.3d 1184, 1186 (N.M. App. 2007), the New Mexico Court of Appeals, relying on the text of ICWA and the guidelines from the Bureau of Indian Affairs, held that ICWA "does not apply" to

"[c]hild custody disputes arising in the context of divorce or separation proceedings . . . so long as custody is awarded to one of the parents." And in *In re Sengstock*, 477 N.W.2d 310, 313 (Wis. App. 1991), the Wisconsin Court of Appeals held that because "ICWA concerns cases where custody of a Native American child is to be given to someone other than either one of the parents," it "does not apply" to "an intrafamily dispute." *See also In re ARW*, 343 P.3d 407, 410–12 (Wyo. 2015) (ICWA Sections 1912(d) and (f) do not apply to a petition to terminate a birth father's parental rights because no "breakup" would be precipitated thereby).

To the contrary, however, courts in Washington, Alaska, and Colorado, have—like the court below—rejected the distinction between severance actions initiated by state officials, and those initiated by private parties. Thus, in *In re T.A.W.*, 383 P.3d 492, 503 ¶ 50 (Wash. 2016), the Washington Supreme Court held that "ICWA offers no exceptions for privately initiated actions." In that case, an Indian mother initiated a severance action against a non-Indian birth father with a long criminal history, including physical abuse. *Id.* at 494–96. She sought termination so that her husband could adopt her child. Nevertheless, the court held that ICWA applied and that the Indian mother was required to undertake "active efforts" to reunite her child with the non-Indian birth father. *Id.*

The Supreme Courts of Alaska and Colorado have likewise held that ICWA applies to privately-initiated severance actions. *Bruce L. v. W.E.*, 247 P.3d 966, 974 (Alaska 2011); *In re N.B.*, 199 P.3d 16, 24 (Colo. App.

2007) (same). The result in these cases is that even when Indian parents go to court to advance the best interests of their Indian children, and to build new families, ICWA stands in the way—a result that does not "serve the legislative dual purposes of protecting tribal relations and the best interests of the Indian child." *T.A.W.*, 383 P.3d at 510 ¶ 79 (Madsen, C.J., dissenting). *See also* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 47 (2017) ("To allow a non-Indian to bar that adoption under a statute intended to prevent the breakup of Indian families is nonsensical.").

This division between the lower courts makes review by this Court imperative.

B. Lower courts also disagree about the degree of proof necessary under ICWA's "active efforts" provision.

Assuming Section 1912(d) applies, there is also a recognized split in authority about the appropriate level of proof required to satisfy the active-efforts provision.

Alaska, Illinois, and Nebraska state courts have held that the petitioner in a TPR case must prove by a *preponderance of the evidence* that active efforts were made to provide the non-moving parent with remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those efforts were unsuccessful. *A.A. v. Department of Family*

& Youth Servs., 982 P.2d 256, 260–61 (Alaska 1999); *In re Cari B.*, 763 N.E.2d 917, 923 (Ill. App. 2002); *In re Nery V.*, 864 N.W.2d 728, 738 (Neb. App. 2015).

In Utah, by contrast, the active-efforts provision must be proven by proof *beyond a reasonable doubt*, the opposite end of the evidentiary spectrum. *In re D.A.C.*, 933 P.2d 993, 1001–02 (Utah App. 1997).

Arizona and at least one other state apply the *clear and convincing* standard here. *Yvonne L.*, 258 P.3d at 242 ¶ 39; *In re C.D.*, 751 N.W.2d 236, 239 ¶ 7 (N.D. 2008).

Remarkably, in Colorado, two divisions of the appellate court are split on whether the standard is *beyond a reasonable doubt* or *clear and convincing*. *See In re A.R.*, 310 P.3d 1007, 1013 ¶ 21 (Colo. App. 2012) (noting, but not resolving, this split).

State courts are, therefore, intractably divided on whether and how ICWA Sections 1912(d) and (f) apply in privately-initiated severance actions.

III. Lower courts need guidance regarding the constitutional problems that arise if ICWA Sections 1912(d) and (f) do apply to private TPR actions.

A. ICWA establishes separate procedural and substantive rules for children who qualify—solely on a genetic basis—as Indian children.

Since its enactment in 1978, this Court has only resolved two cases involving ICWA, *Adoptive Couple*, *supra*, and *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), both of which involved critical constitutional questions, and both of which left many others unresolved. Indeed, in *Adoptive Couple*, Justice Thomas emphasized the "significant constitutional problems" that remain in this area. 133 S. Ct. at 2565 (Thomas, J., concurring). Primary among these is the fact that ICWA imposes different—and less protective—rules to cases involving children of one racial category, and establishes literal racial segregation.

If ICWA applies here, it does so solely because S.S. and S.S. are "Indian child[ren]" as defined in Section 1903(4) of ICWA. That section defines "Indian child" as a child who is either a tribal member or *eligible* for membership in a tribe and who has a tribal member parent. Eligibility is defined by tribal law, and virtually all tribes, including CRIT, define membership by genetic origin. Political, cultural, social, or religious affiliation play no role in the definition of "Indian child." Nor does residency or domicile on a reservation. *DNA*

is all that matters. No degree of political or cultural affiliation will make a child eligible for membership if he lacks the required genes, and a child who has the requisite genes is not made *ineligible* due to lack of political or cultural affiliation. Not even legal adoption can qualify a child as "Indian" under ICWA, if the child lacks the proper DNA, because ICWA requires that the child be the *biological* child of a tribal member.

Thus, the application of Sections 1912(d) and (f) to this case would constitute a race-based classification. As used in ICWA, "Indian child" is a genetic or racial categorization subject to strict scrutiny (or, at a minimum, it is a national-origin classification, which is also subject to strict scrutiny).

Solely as a result of the DNA in their blood, S.S. and S.S.—who are, after all, citizens of the United States, entitled to "the protection of equal laws," *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)—are subjected to a separate set of rules, both procedural and substantive—rules that put them at a disadvantage relative to their white, black, Hispanic, or Asian peers. If separate is "inherently unequal," *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954), that separate treatment cannot be tolerated.

B. Lower courts need guidance regarding the racial/political character of ICWA's classification scheme.

As outlined above, the divergence between state courts means that ICWA is being applied differently

in different states—and even differently within different appellate districts within the same state. This Court alone can provide the guidance state courts need.

The court below, without discussion or analysis, ruled that ICWA's separate set of rules are triggered not by race or national origin, but by "Indians' political status and tribal sovereignty," *S.S. v. Stephanie H.*, ¶ 27. App. 16a (despite the fact that such governmental interests are neither implicated nor affected in a private severance case). On that premise, the court applied the rational basis test of *Morton v. Mancari*, 417 U.S. 535 (1974), and found ICWA "rationally related to the federal government's desire to protect the integrity of Indian families and tribes." *Id*.

Some other courts have done the same. In *In re A.B.*, 663 N.W.2d 625, 636 ¶ 36 (N.D. 2003), the North Dakota Supreme Court ruled that under *Mancari*, ICWA's differential treatment of Indian children qualified as a political classification and satisfied rational basis scrutiny. The Oregon Court of Appeals did likewise in *In re Angus*, 655 P.2d 208, 213 (Or. App. 1982), as did the Oklahoma Court of Civil Appeals, *In re M.K.*, 964 P.2d 241, 244 ¶ 7 (Okla. App. 1998), and the Illinois Court of Appeals, *In re Armell*, 550 N.E.2d 1060, 1067–68 (Ill. App. 1990).

This Court, however, has recognized that it "would raise equal protection concerns" for a state court to interpret ICWA in a way that "put[s] certain vulnerable

children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 133 S. Ct. at 2565. And some state courts have likewise found that ICWA is unconstitutional when applied to children whose sole connection to an Indian tribe is biological. In *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 41 Cal. App. 4th 1483, 1509 (1996), the California Court of Appeal held that "any application of [ICWA] that is triggered by an Indian child's genetic heritage, without substantial social, cultural, or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause"—a point it reiterated in *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 92 Cal. App. 4th 1274 (2001).

These courts have rejected reliance on *Mancari*—which, after all, does not automatically shield from judicial scrutiny all laws that treat Native Americans differently than others, *see Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("We reject the notion that distinctions based on Indian or tribal status can never be racial classifications subject to strict scrutiny."). They have observed, as this Court did in *Rice v. Cayetano*, 528 U.S. 495 (2000), that a law that "use[s] ancestry as a racial definition and for a racial purpose," and that "singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics,'" establishes a racial category subject to strict scrutiny. *Id.* at 515 (citation omitted).

Indeed the *Mancari* Court emphasized that it was *not* dealing with a law that was "directed towards a 'racial' group consisting of 'Indians,' " which ICWA is, 417 U.S. at 553 n.24. And *Rice* noted that the sort of "[a]ncestral tracing" involved in a case like this one "achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." 528 U.S. at 517.

The California Court of Appeal rejected reliance on *Mancari* in an ICWA case when it noted that *Mancari* applies only where a classification involves "uniquely Native American concerns," but "child custody or dependency proceedings [do not] involve uniquely Native American concerns." *Santos Y.*, 92 Cal. App. 4th at 1320–21. It held that applying ICWA to a child whose sole relationship to a tribe is genetic would be a racial classification squarely within the ambit of *Rice*, rather than a political classification.

CONCLUSION

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

For the two children involved here, that is more than a statement of abstract principle. S.S. and S.S.'s father, Garrett, tried as a responsible parent to take the legal steps necessary to protect the best interests of his children—and if these children were of any other race, the case would have been a routine proceeding, with one clear outcome. But solely because of their ancestry, their case was decided under the different rules imposed by ICWA—and as a consequence, Garrett and his children were essentially penalized for the fact that he tried to protect them. That irrationality demonstrates the deleterious consequences flowing from the application of ICWA to private severance proceedings—for which it was not intended or designed—and from the *de jure* race-based or national-origin-based distinctions ICWA imposes. Lower courts are in disarray as to whether and how ICWA applies to cases such as this. They need this Court's guidance as much as S.S. and S.S. need this Court's protection.

The children's petition should be *granted*.

July 17, 2017

Respectfully submitted,

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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

S.S., S.S., *Appellants*,

v.

STEPHANIE H., GARRETT S.,
COLORADO RIVER INDIAN TRIBES, *Appellees*.

No. 1 CA-JV 16-0163
FILED 1-12-2017

Appeal from the Superior Court in La Paz County
No. S1500SV201200004
The Honorable Douglas Camacho, Judge *Pro Tempore*

AFFIRMED

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OPINION

Presiding Judge Diane M. Johnsen delivered the opinion of the Court, in which Judge Jon W. Thompson and Judge John C. Gemmill joined.[1]

JOHNSEN, Judge:

¶1 This appeal requires us to consider application of the Indian Child Welfare Act of 1978 ("ICWA") to a private severance proceeding brought by an Indian parent against a non-Indian parent on grounds of abandonment. For the reasons that follow, we affirm the superior court's denial of the requested severance.

FACTS AND PROCEDURAL HISTORY

¶2 Stephanie H. ("Mother") and Garrett S. ("Father") have two children, born in 2000 and 2002, respectively. Upon Mother and Father's divorce in 2005, the court awarded Mother "sole primary care, custody, and control" of the children and granted Father visitation.

¶3 In February 2009, Mother and the children abruptly moved from Northern Arizona to a town south

[1] The Honorable John C. Gemmill, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

of Phoenix without the court's permission and without notice to Father. On Father's *ex parte* petition for relief, the court found the children were at risk of harm and awarded Father "temporary sole legal and physical custody." At the return hearing, Mother lied about the children's whereabouts. After the children were returned to Father a few days later, the court found Mother guilty of perjury and imposed a term of probation that required her to submit to drug testing and substance-abuse counseling.

¶4 A few months later, the court awarded Father "continued sole legal and physical custody" of the children, contingent upon his submission to hair follicle drug testing. The court granted Mother supervised visitation, also contingent upon hair follicle drug testing. Father complied with the drug test requirement within a few weeks, but Mother did not. At a review hearing in August 2009, the court reaffirmed that Mother could have "no visitation and no contact by any means (phone, texting, and visiting schools) with the children until the drug testing [was] completed." After that order, Mother took and passed three hair follicle drug tests, one in 2010 and two in 2014. Between June 2011 and October 2013, as a requirement of her probation, Mother submitted to 72 random urinalyses, 69 of which were negative. In August 2011, she successfully completed a 12-step drug and alcohol recovery program.

¶5 Father filed a petition to sever Mother's parental rights in December 2012, alleging abandonment and neglect pursuant to Arizona Revised Statutes ("A.R.S.")

section 8-533(B)(1), (2) (2017).[2] Various pretrial proceedings and several reassignments of judicial officers caused trial to be delayed until January 2016. In the meantime, Mother made multiple child-support payments between August 2012 and March 2014 and completed a parenting class. Mother also filed for visitation in 2013 and 2014. Father opposed Mother's petitions for visitation, which the court denied. By the time of trial, Mother had not seen the children since May 2009.

¶6 The Colorado River Indian Tribes intervened in the severance case and fully participated at trial. All parties acknowledged that the two children were Indian children under ICWA, 25 U.S.C. § 1903(4) (2012). Accordingly, before the court could sever Mother's parental rights, Father would need to prove that (1) active efforts were made to prevent the breakup of the Indian family, (2) those efforts were unsuccessful and (3) continued custody by Mother was likely to result in serious emotional or physical damage to the children. *See* 25 U.S.C. § 1912(d), (f) (2012).

¶7 At the close of Father's case, Mother moved to dismiss pursuant to Arizona Rule of Procedure for the Juvenile Court 66(F)(3). The court ruled Father had offered sufficient evidence to go forward on abandonment but not neglect. The court found sufficient evidence to show severance would be in the best interests of the children, *see* A.R.S. § 8-533(B), and, addressing

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[2] Absent material revision after the relevant date, we cite a statute's current version.

one of the required ICWA elements, "at least some" evidence that continued custody by Mother was likely to result in serious emotional or physical damage to the children, *see* 25 U.S.C. § 1912(f). The court, however, granted Mother's motion to dismiss because it found Father had not offered sufficient evidence to prove unsuccessful "active efforts" to prevent breakup of the family. *See* 25 U.S.C. § 1912(d).

¶8 The children timely appealed the dismissal of the petition for severance.[3] We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and pursuant to A.R.S. §§ 8-235(A) (2017), 12-1201(A)(1) (2017) and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

A. Application of ICWA to a Private Severance of a Non-Indian's Parental Rights.

¶9 The children first argue ICWA does not apply to a private petition to sever and, in particular, does not apply to an Indian parent's petition to sever the parental rights of a non-Indian parent. They contend ICWA is aimed at abusive child-welfare practices carried out by nontribal public and private agencies, *see Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013), and

[3] Father has not appeared in this appeal.

argue the severance petition at issue here presents no such concern.[4]

¶10 Congress adopted ICWA, 25 U.S.C. §§ 1901-1963, after finding that "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." *See* 25 U.S.C. § 1901(4) (2012); H.R. Rep. No. 95-1386, at 9 (1978) ("Surveys . . . indicate that approximately 25-35 percent of all Indian children are separated from their families."). Accordingly, ICWA provides "minimum Federal standards for the removal of Indian children from their families." 25 U.S.C. § 1902 (2012).

¶11 The federal act applies to a "child custody proceeding," including a "termination of parental rights," involving an "Indian child." *See* 25 U.S.C. § 1903(1)(ii); *Maricopa County Juv. Action No. A-25525*, 136 Ariz.

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[4] "This court reviews *de novo* the interpretation and application of a statute." *Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 156, ¶ 7 (App. 2000). "In interpreting a statute, we first look to the language of the statute itself." *Cross v. Elected Officials Ret. Plan*, 234 Ariz. 595, 603, ¶ 26 (App. 2014). "If the language is clear, the court must 'apply it without resorting to other methods of statutory interpretation.' " *Bilke v. State*, 206 Ariz. 462, 464, ¶ 11 (2003) (quoting *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268 (1994)). "If the language is not clear, we consider other factors such as 'the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose.' " *Cross*, 234 Ariz. at 603, ¶ 26 (quoting *In re Estate of Jung*, 210 Ariz. 202, 204, ¶ 12 (App. 2005)). Unless otherwise stated, we assume the legislature "accords words their natural and obvious meaning," which often may be discerned from a dictionary definition. *State v. Jones*, 188 Ariz. 388, 392 (1997).

528, 531 (App. 1983). An "Indian child" under ICWA is "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).

¶12 As Mother and the Tribes argue, ICWA's plain language does not limit its scope to proceedings brought by state-licensed or public agencies. By its own terms, ICWA applies to *any* petition to terminate a parent's rights. 25 U.S.C. § 1903(1)(ii) (" 'termination of parental rights' . . . shall mean any action resulting in the termination of the parent-child relationship"). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' " *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). It follows that Congress did not intend that ICWA would apply only to termination proceedings commenced by state-licensed or public agencies. *See D.J. v. P.C.*, 36 P.3d 663, 673 (Alaska 2001) ("ICWA applies to termination proceedings when a party other than the state seeks the termination."); *In re N.B.*, 199 P.3d 16, 19 (Colo. App. 2007) ("ICWA's plain language is not limited to action by a social services department."); *In re D.A.C.*, 933 P.2d 993, 1000-01 (Utah App. 1997) (ICWA applies to any proceeding in juvenile court with permanent consequences to the parent-child relationship).

¶13 Further, Congress explicitly excluded dissolution and delinquency proceedings from its definition of

"child custody proceeding." 25 U.S.C. § 1903(1). Had it also intended to exclude private termination proceedings, we presume it would have done so expressly. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) ("[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980))). Accordingly, and in the absence of any authority to the contrary, we conclude that ICWA applies to a private termination proceeding just as it applies to a proceeding commenced by a state-licensed private agency or public agency.

¶14 The children also argue, however, that ICWA does not apply because termination of Mother's rights would not result in the breakup of an Indian family, given that they would remain in the custody of their Indian parent, Father.

¶15 Although Congress might have crafted ICWA to exclude petitions to sever the rights of non-Indian parents, no such exclusion appears in the statute, which, as we have said, expressly applies to "any action resulting in the termination of the parent-child relationship." 25 U.S.C. §§ 1903(1)(ii); *see* 25 U.S.C. § 1912(d), (f). Moreover, under the statute, "parent" means "any biological parent . . . of an Indian child." 25 U.S.C. § 1903(9). Given this and ICWA's definition of "termination of parental rights," *id.* § 1903(1)(ii), the plain language of the act reveals its focus is not on custody proceedings that affect Indian *parents*, but instead is

on custody proceedings that affect Indian *children*. *See id.* § 1903(1)(ii). This conclusion is further supported by ICWA's stated purpose. *See id.* § 1902 ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of the Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families."); *see In re Adoption of T.A.W.*, 383 P.3d 492, 500 (Wash. 2016) (application of ICWA depends on the status of the child).[5]

¶16 Accordingly, the superior court did not err by applying the requirements of ICWA to Father's petition to terminate Mother's parental rights.

B. "Active Efforts" When Severance Is Based on Abandonment.

¶17 ICWA imposes certain procedural and substantive requirements in cases involving the termination of parental rights involving Indian children, but otherwise contemplates that termination proceedings in state courts will proceed according to state law. *Valerie*

[5] Rules recently issued by the Bureau of Indian Affairs ("BIA") addressing "requirements for State courts in ensuring implementation of ICWA in Indian child-welfare proceedings" are informative. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778-01, 38778 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23). Under these rules, which took effect December 12, 2016, "Indian family," in the context of 25 U.S.C. 1912(d), "means the Indian child's family." *Id.* at 38798; *see also In re T.A.W.*, 383 P.3d at 500. Here, in addition to Father, this includes Mother, even though she is not a member of a tribe. *See Adoptive Couple*, 133 S. Ct. at 2562.

M. v. Ariz. Dep't of Econ. Sec., 219 Ariz. 331, 334-35, ¶¶ 14, 16 (2009) ("[Congress] recognized that federal requirements would be in addition to state law requirements, which will themselves prevail over federal law if they are more protective of parental rights."); *see also* 25 U.S.C. § 1921 (2012).

¶18 Among the additional federal protections ICWA imposes is that:

> [a]ny party seeking to effect . . . termination of parental rights to[ ] an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d); *see also In re T.A.W.*, 383 P.3d at 503 ("active efforts" requirement applies to private severance proceeding). The same requirement is imposed by Arizona Rule of Procedure for the Juvenile Court 66(C):

> [I]f the child is an Indian child, . . . [t]he moving party . . . must also satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.

Ariz. R.P. Juv. Ct. 66(C); *see also Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 415, 421, ¶26 (App. 2011) ("[T]he necessary ICWA 'active efforts' finding must

. . . be made under the clear and convincing evidence standard.").

¶19 Although the superior court in this case found Father offered sufficient evidence to go forward on his petition for severance based on abandonment, *see* A.R.S. § 8-533(B)(1), it dismissed the petition because it found he had offered insufficient evidence of unsuccessful "active efforts" to prevent the breakup of the family under 25 U.S.C. § 1912(d).

¶20 On appeal, the children argue the court erred by requiring Father to prove "active efforts" had been made to prevent abandonment. They offer no authority, however, for their contention that the "active efforts" mandate does not apply to a termination proceeding brought on the ground of abandonment. To the contrary, the statute allows no exception to the required proof of unsuccessful "active efforts" whenever "[a]ny party seek[s] . . . termination of parental rights to an Indian child under state law." 25 U.S.C. § 1912(d).

¶21 ICWA does not define "active efforts . . . to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." Nor does it specify who must make the required "active efforts." Rather, the statute only requires proof that active efforts have been made to preserve the parent-child relationship and those efforts have proved unsuccessful. *See In re Pima County Juv. Action No. S-903*, 130 Ariz. 202, 208 (App. 1981); *In re Crystal K.*, 276 Cal. Rptr. 619, 626 (Cal. App. 1990) ("[R]emedial efforts

must be directed at remedying the basis for the parental termination proceeding."); Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146-02, 10156 (Feb. 25, 2015). What constitutes "active efforts" will vary, depending on the circumstances, the asserted grounds for severance and available resources. 25 U.S.C. § 1912(d); *see In re Baby Boy Doe*, 902 P.2d 477, 484 (Idaho 1995); *In re C.A.V.*, 787 N.W.2d 96, 103-04 (Iowa App. 2010) ("The 'active efforts' requirement must be construed in the context of the existing circumstances.").[6]

¶22 The children argue there are no services that can prevent a parent from abandoning a child. *Cf.* A.R.S. § 8-533(B)(8) (petition to sever parental rights based on out-of-home placement requires proof "that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services"). But "active efforts," particularly in the context of abandonment, will not always implicate formal public services. Under Arizona law, a parent

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[6] In its new rules, the BIA "recognizes that what constitutes sufficient 'active efforts' will vary from case-to-case, and the definition . . . retains State court discretion to consider the facts and circumstances of the particular case before it." Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38791. The financial and practical resources available to a party seeking termination are among the circumstances that bear on what "active efforts" might be required under ICWA. *See In re C.A.V.*, 787 N.W.2d at 103; *In re T.A.W.*, 383 P.3d at 509 (Madsen, C.J., dissenting in part) ("[M]other did all that she could do to facilitate the father's relationship with the Indian child; those efforts did not include the provision of agency or institutional resources and services that she did not have access to or which were otherwise unavailable.").

abandons a child by failing "to provide reasonable support and to maintain regular contact with the child, including providing normal supervision." A.R.S. § 8-531(1). Construing ICWA broadly to promote its stated purpose, we interpret the "active efforts" requirement of § 1912(d) in an abandonment proceeding to include informal private initiatives aimed at promoting contact by a parent with the child and encouraging that parent to embrace his or her responsibility to support and supervise the child. *See In re C.A.V.*, 787 N.W.2d at 103 (mother met "active efforts" requirement by "facilitating visits before [father's] incarceration and by inviting continued contact during his prison stay").

¶23 In the abstract, "active efforts" to prevent a parent from abandoning a child might include, *inter alia*, informing the parent about the child's educational progress and interests; sending the parent photographs of the child; keeping the parent informed of irregular but significant expenses, such as medical expenses, to which the parent would be expected to contribute; and, where appropriate, inviting the parent to school and extracurricular events and allowing the child to accept communications from the parent. *See, e.g.*, *In re N.B.*, 199 P.3d at 25 ("[D]espite its finding of abandonment, the trial court also found that stepmother could have engaged in active efforts to provide remedial services and rehabilitative programs by informing the child of the identity of his biological mother and seeking to preserve the relationship between them by showing the child pictures of her.").

¶24 While arguing Mother abandoned the children by failing to contact, support and supervise them, Father offered no evidence at trial that anyone shared any information about the children with Mother or invited or encouraged her to contact, support or supervise the children. To the contrary, from 2009 on, Father obtained a series of protective orders that forbade her from any contact with the children; he testified he objected to all of Mother's efforts to regain visitation rights out of concern for her drug history and because he did not want to give her another chance to abscond with the children. *Cf. Calvin B. v. Brittany B.*, 232 Ariz. 292, 297, ¶ 21 (App. 2013) ("A parent may not restrict the other parent from interacting with their child and then petition to terminate the latter's rights for abandonment.").

¶25 At trial, Father's evidence of "active efforts" focused instead on the 2009 order in the dissolution proceeding that required Mother to undergo hair follicle drug testing before she could enjoy visitation with the children. Father argued Mother effectively abandoned the children by failing to comply with the drug test requirement. On appeal, the children contend that "active efforts" did not require Father to shoulder the burden or expense of ensuring Mother complied with the drug testing order so as to be able to visit the children.

¶26 We need not decide whether the "active efforts" requirement of ICWA, 25 U.S.C. § 1912(d), required Father to try to ensure that Mother complied with the court's order to drug test because the record undercuts

the premise of Father's contention at trial and the children's argument on appeal. The evidence showed that although Mother at first put off obtaining a hair follicle test, she underwent one such test in 2010 and two others in 2014. In addition, as part of her probation requirements, she submitted to 72 random drug tests between June 2011 and October 2013 and successfully completed a 12-step drug and alcohol recovery program. The superior court dismissed Father's petition before hearing Mother put on evidence why she was unable to regain visitation rights, notwithstanding her eventual compliance with the drug testing ordered in the dissolution. Nevertheless, on this record, the evidence was sufficient to support the superior court's finding that any "active efforts" to encourage Mother to address her drug issues had been successful, not unsuccessful, as ICWA requires.[7]

[7] Father testified he attempted to pay for a hair follicle test for Mother, but the court held that this alone, if true, was not an "active effort" in the absence of evidence that he let Mother know she would not have to pay for the test. Given the record shows that Mother eventually completed a successful drug-testing regime, we need not decide whether ICWA requires proof in a private severance proceeding of failed active efforts by the *petitioner* aimed at preventing severance. *See* 25 U.S.C. § 1912(d) (petitioner "shall satisfy the court that active efforts have been made . . . to prevent the breakup of the Indian family and that these efforts have proved unsuccessful").

C. Equal Protection Challenge.

¶27 Without citation to authority, the children finally argue that application of ICWA to Father's petition violates their constitutional rights to equal protection, based on their "race and tribal affiliation." We join the several other courts that have concluded that the additional requirements ICWA imposes on severance of a parent's rights to an Indian child are based not on race, but on Indians' political status and tribal sovereignty, and that those requirements are rationally related to the federal government's desire to protect the integrity of Indian families and tribes. *See, e.g.*, *In re N.B.*, 199 P.3d at 22-23 (citing cases).

CONCLUSION

¶28 For the reasons set forth above, we affirm the superior court's dismissal of Father's petition for failure to comply with the requirement in 25 U.S.C. § 1912(d) to show proof of unsuccessful "active efforts" to prevent the breakup of the family.

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF LA PAZ

In re the Matter of: S[.] S[.], dob [2000] and S[.] S[.], dob [2002]. ——————————— GARRETT [] S[.], Petitioner, and STEPHANIE [] H[.], Respondent.	Case No. S1500SV201200004 **ORDER** **(Hon. Doug Camacho)**

This matter came before this Court for a trial on the Petition to Terminate/Sever Respondent's Parental Rights on January 12, 2016, beginning at 8:30 a.m.,

and continuing to January 13, 2016, at 9:00 a.m. Present in the courtroom were: Petitioner, Garrett S[.], represented by Phillip G. Krueger; Respondent, Stephanie H[.], represented by Jessica L. Quickle; the Minor Children, S[.] S[.] and S[.] S[.], represented by their Guardian ad Litem, Brad Rideout; and counsel for the Colorado River Indian Tribes, Elizabeth Lorina-Mills.

On the second day of trial, beginning at approximately 9:00 a.m., Petitioner rested. At that time, Respondent's counsel moved to dismiss the petition on the basis that Petitioner had failed to meet his burden of proof, and counsel for the Colorado River Indian Tribes joined in the motion to dismiss. Following oral arguments by all counsel, this Court took a recess to review the evidence and testimony presented, as well as the applicable law. The Court reconvened at approximately 10:06 a.m. and delivered its decision to the parties as set forth below.

DISCUSSION

Pursuant to recent decisions, including *Roberto F. v. Arizona Department of Economic Security*, 232 Ariz. 45, 55-56, ¶¶ 43-50, 301 P.3d 211, 221-222 (App. 2013), the Court considered the allegations in the petition to determine if Petitioner met his burden to go forward in this case. The petition alleged that the mother abandoned the children pursuant to A.R.S. § 8-533(A)(1). Pursuant to A.R.S. § 8-533(B)(1), the Court considered the best interests of the children and whether there

was sufficient evidence presented to conclude that abandonment had taken place. A.R.S. § 8-201(1) defines abandonment as "failure of the parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision." The Court found there was sufficient evidence to show that the mother had not provided reasonable support for the children. Additionally, the Court found that, although there was a dispute of fact about the reason why, there was sufficient evidence to show that the mother had failed to maintain regular contact with the children. Further, pursuant to A.R.S. § 8-201, abandonment exists if there is evidence of it for a period of at least six (6) months, and therefore, the Court concluded that there was sufficient evidence to go forward on this allegation.

The petition also alleged, pursuant to A.R.S. 8-531(11), that the mother neglected or willfully abused the children, and that this abuse included serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting the children. Upon reviewing the petition, the Court found that it mainly alleged neglect. Pursuant to A.R.S. § 8-201(24)(a), neglect is defined as the "inability or unwillingness of a parent or guardian to provide the child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare, except if the inability of a parent, guardian, or custodian to provide services to meet the needs of a child with a disability or

chronic illness is solely the result of the unavailability of reasonable services." The only issue before the Court at this time was whether Petitioner had presented a prima facie case to go forward. The Court found that an argument could be made that because the mother failed to pay for child support and did not provide food, clothing, shelter or medical care for the children, and because she was not there on behalf of the children through possible abandonment, she failed to provide supervision. However, the Court heard no evidence that this inability or unwillingness of the mother to provide these things caused an unreasonable risk of harm to the children's health or welfare, because the evidence showed that the father was able to provide for the needs of the children. The Court was provided with no evidence that since the time that the children were returned from the mother to the father following the incident that took place in 2009, that the children were ever actually in any unreasonable risk of harm because of the mother's failure to provide.

The next allegation was found in the Petitioner's Pretrial Statement. Pursuant to A.R.S. § 8-533(B)(3), petitioner alleged that the mother was unable to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of drugs, controlled substances or alcohol and there were reasonable grounds to believe the condition would persist for a prolonged indeterminate period. The Court found that this allegation was not sufficiently raised in the petition. Although the petition discussed drug use, the Court did not see that it alleged that this was a

reason for the termination of parental rights in this case. Once again, under *Roberto F.*, 232 Ariz. at 55-56, ¶¶ 43-50, 301 P.3d at 221-222, the Court was concerned about amendments to the petition on the eve of trial in order to allow the petitioner to add to the allegations. Regardless, the Court considered this allegation and discussed it for the record.

It was unclear to the Court why the mother and father were required to submit to drug testing in this case as the Court could find nothing in the record to explain this. What was clear from the record and the evidence in this case is that there have been negative hair follicle drug tests by the mother in 2010 and 2014. It was clear that the mother had a few positive TASC drug tests for amphetamine in June of 2011 and June of 2012, and that there were a few diluted tests in July of 2012 and August of 2012 that could show that the mother was trying to hide the use of drugs. But the Court also found that the tests were about one year apart and so, while the tests showed some abuse, the Court did not find a history of chronic drug abuse. The Court heard no testimony of drug abuse during the parties' marriage or in between the parties' divorce proceedings and the time that the petition was filed other than the TASC testing, and so the Court did not find that there is a history of chronic drug abuse by the mother. Additionally, the Court found no evidence that there were any reasonable grounds to believe that this abuse would continue for a prolonged period of time because since 2012 it did not appear that there was any evidence of drug abuse by the mother, and she was

taking TASC tests until October of 2013. Also, there were two hair follicle tests for the mother from 2014 that were negative, and, based on the experience of the Court, these tests would show drug abuse for a longer period of at least three months. Therefore, the Court found that, even though this was not actually properly alleged in the petition, the petitioner failed to show that the mother is unable to discharge parental responsibilities due to chronic abuse of dangerous drugs.

As far as the best interests of the children with respect to the severance of the mother's parental rights, the Court heard evidence that the stepmother wants to adopt the children and that the children are uninterested in having a relationship with the mother, as well as that a continued relationship with the mother may have a detrimental effect on the children. Without evaluating the weight of this evidence, the Court found that there was a prima facie case that it would be in the best interest of the children for the termination to take place.

Pursuant to Rule 66(C) of the Arizona Rules of Procedure for the Juvenile Court, the moving party or petitioner has the burden of proving the grounds for the termination alleged, pursuant to the standards set forth therein. Rule 66(C) further states that "if the child is an Indian child, the moving party or petitioner must prove beyond a reasonable doubt, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The Court found that there is no

question that the children involved here are Indian children, and there was evidence of this presented by petitioner and it was alleged in his petition. The petitioner's qualified expert witness was Phil Powers, and he presented some evidence of serious emotional or physical damage to the children. When the Court asked him a few questions, he first stated that there was a "good chance" of emotional damage. He then stated he was "confident" that a continued relationship with the mother would result in serious emotional damage to the children. For purposes of deciding whether to move forward on the petition before it, the Court found that there was at least some evidence that continued custody by the mother was likely to result in serious emotional or physical damage to the children.

The last issue for the Court to decide, and the issue that seemed to be contended the most by the mother and the Colorado River Indian Tribes, was whether the petitioner had satisfied the Court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those efforts have proven unsuccessful. The children made the argument that because the father is the parent who is the member of the Colorado River Indian Tribes, and the mother is non-Indian, termination of the mother's rights would not result in the breakup of the Indian family in this case. The Court could not find any case law to support the children's argument, and it appeared clear to all parties and the Court that the Indian Child Welfare Act ("ICWA") applies in this case.

As stated previously, there is no question in this case that the children are Indian children because they are enrolled members of the Colorado River Indian Tribes, and therefore, the Court found that ICWA applies.

Pursuant to 25 U.S.C. § 1912(d), "any party seeking to effect a foster care placement of, or termination of parental rights to an Indian child under State law shall satisfy the Court that active efforts have been made to provide remedial services, and/or rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful." The Court finds that the term "any party" means that in a private severance that active efforts are required. The next question for the Court was who has to provide the active efforts. The Tribes and the mother argued that Petitioner had to provide the active efforts, but the Court could not find any Arizona case law on this point, although the Tribes presented a Colorado case that supports this argument. Further, the Court attempted to determine what active efforts could be provided when the allegation is, as in this case, abandonment. In this case, there appears to be some evidence that, if the mother had taken the hair follicle tests within a certain time frame she may have been able to be around the children. The father testified that he paid for a hair follicle test for the mother by leaving a check at the TASC office in Lake Havasu City and he maintained that this constituted an active effort on his part. But there was no evidence before the court to indicate that the father contacted the mother to tell her that he did so. Further, the Court did not

find that leaving a check to pay for a hair follicle test would be an active effort.

As far as the TASC drug testing, as noted previously, there were some positive tests, and some missed tests that may have been during a period when the mother was in custody on a petition to revoke her probation. However, it appears that from February of 2013 to October of 2013, mother's TASC tests were clean and there were clean hair follicle tests that showed that the mother was clean as late as April of 2014. Additionally, the Court had evidence that showed that the mother successfully completed drug counseling programs. Even if the Court considered the TASC testing to be an active effort, the other portion that the Court must find is that the active efforts have proven unsuccessful. There was no evidence before the Court to indicate that the mother is not successfully off of drugs now.

Finally, the Court agreed with the arguments of the mother and the Tribes that this case is not about custody, but only about the termination of the mother's parental rights. Based on all of the evidence, testimony and applicable law as set forth above,

THE COURT FINDS THAT:

1. Jurisdiction in this Court is appropriate because Petitioner, Respondent, and the Minor Children all reside in in [sic] Parker, Arizona, in La Paz County.

2. The Minor Children are enrolled members of the Colorado River Indian Tribes, and therefore, the Indian Child Welfare Act ("ICWA") applies in this case.

3. The Petitioner failed to meet his burden pursuant to ICWA and Rule 66(C) of the Arizona Rules of Procedure of the Juvenile Court of proving that, whatever active efforts may have been made in this case, whether by Petitioner or someone else, those active efforts have proven unsuccessful.

THEREFORE, IT IS ORDERED:

1. GRANTING Respondent's motion to dismiss in which the Tribes joined and dismissing the petition to terminate Respondent's parental rights.

This is a final appealable order pursuant to Rule 104(A) of the Arizona Rules of Procedure for the Juvenile Court.

DATED this 1st day of MARCH, 2016.

/s/ [Illegible]
HON. DOUG CAMACHO,
Visiting Judge La Paz
County Superior Court

COPIES of the foregoing emailed/mailed this
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By AG

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF LA PAZ

IN THE MATTER OF: S[.] S[.], D.O.B. [2000] S[.] S[.], D.O.B. [2002] MINORS, GARRETT [] S[.], PETITIONER, vs. STEPHANIE [] H[.], RESPONDENT.	Case No. SV-2012-00004 SEVERENCE TRIAL DAY 1

Before the Honorable Doug Camacho, Judge

Tuesday, January 12, 2016

8:49 a.m.

Parker, Arizona

Reporter's Transcript of Proceedings

Reported by: Sharon E. Bradley | Registered Merit Reporter | Certified Realtime Reporter | Arizona Certified Reporter No. 50040 | California CSR No. 4003 | Nevada CR No. 101 | Utah CCR No. 8015306431

CERTIFICATE OF REPORTER

I, Sharon E. Bradley, Official Reporter in the Superior Court of the State of Arizona, in and for the County of La Paz, do hereby certify that I made a shorthand record of the proceedings had at the foregoing entitled cause at the time and place hereinbefore stated;

That said record is full, true, and accurate;

That the same was thereafter transcribed under my direction; and

That the foregoing two hundred seventy-seven (277) typewritten pages constitute a full, true, and accurate transcript of said record, all to the best of my knowledge and ability.

Dated at Lake Havasu City, Arizona, this 16th day of June, 2016.

/s/ Sharon E. Bradley [SEAL]
Sharon E. Bradley | Registered Merit Reporter | Certified Realtime Reporter | Arizona Certified Reporter No. 50040 | California CSR No. 4003 | Nevada CR No. 101 | Utah CCR No. 8015306431

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF LA PAZ

In re the matter of: S[.] S[.] AND S[.] S[.] Persons under the Age of 18 Years.	
GARRETT [] S[.], Petitioner, vs. STEPHANIE [] H[.], Respondent.	Cause No. S1500SV201200004

Before the Honorable Doug Camacho, Judge

Wednesday, January 13, 2016

9:05 a.m.

Parker, Arizona

Reporter's Transcript of Proceedings

Reported by: Juliette L. Vidaurri, CCR, RPR
AZ CR #50359/CA CSR #11081/
NV CCR #748

* * *

[26] THE COURT: If you have a copy, that would be fine.

MR. KRUEGER: Judge?

THE COURT: Yes.

MR. KRUEGER: As you may recall, I had a 9:30 hearing, so this would allow you some time.

THE COURT: All right. What I will do is I will take this under advisement for a few minutes. Let staff know when you are done with your hearing; and if it happens to be after the time that I've read this case and looked at other things, then I'll come out.

We will stand at recess.

(There was a break taken at 9:41 a.m. until 10:06 a.m.)

THE COURT: All right. There has been a motion, and the Court first looks to see what was actually alleged in the petition to determine as far as the allegations are concerned, and the first allegation is under 8 dash 533(A)(1), which alleges basically that the mother abandoned the child.

And for purposes of this motion the Court is only determining whether there's sufficient evidence that the Court could conclude that abandonment took place, and specifically 8-533(B)(1) says, "Court shall consider the best interest of the child" – actually, it says "Evidence [27] sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following

grounds, the Court shall also consider the best interests of the child. (1), that the parent has abandoned the child."

And, again, for purposes of this, the Court's not determining whether clear and convincing evidence has shown that that's the case. The Court's only considering whether there's been sufficient evidence that the Court could conclude whether that abandonment has taken place.

Abandoned is defined in 8 dash 201, subsection (1) which says, "Abandoned means the failure of the parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision."

And based upon the evidence that the Court has been presented, there's sufficient evidence to show that the mother has not provided reasonable support for the child.

The "and" portion of that means that the Court also has to show that the mother has failed to maintain regular contact with the child, and the Court is aware that there is a disputed fact as to whether or not that was because the mother had not taken hair follicle tests as was required by the La Paz County Superior Court or whether or not it was the father that was trying to keep the mother from having contact with the superior – or I mean with the [28] children.

For purposes of deciding the motion that was just made, the Court finds that there's at least enough evidence that the Court could find that the mother by failing to take or submit to the court proof of the hair follicle tests that she failed to maintain regular contact with the children for that reason.

So as far as the abandonment charge or the allegation is concerned, the Court finds that there's at least sufficient evidence for the Court to – to conclude or to go forward on that allegation.

The next one is that the parent has neglected or willfully abused a child. This abuse includes serious physical or emotional injury or situations in which that parent knew or reasonably should have known that a person was abusing or neglecting the child.

And the Court read through the petition, and the petition itself talked mainly about neglect, and it said – it gave the place where neglect is defined, which is 531, subsection (11). It didn't actually discuss – well, it didn't actually discuss their – the allegation of abuse that may have taken place. And because of recent rulings, for example, the Roberto F – and I don't have the citation – the Court believes that it must rely on the petition that was filed in determining that.

[29] And, by the way, 8 dash 532, subsection (1) also discusses abandonment, um, and discusses the six-month period.

But getting to neglect, neglect is also defined in 8 dash 201, and it discussions [sic] several instances

where neglect could potentially be found. The first of which is 24(a). "The inability or unwillingness of a parent or guardian to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare, except if the inability of a parent, guardian, or custodian provides services to meet the needs of a child with a disability or chronic illness is solely the result of the unavailability of reasonable services."

And going through neglect – and, again, the only issue is whether or not the petitioner has presented prima facie case to go forward, not whether or not the Court will decide that there is a – there is clear, convincing evidence of neglect. That would be something that would be determined depending on the Court's ruling after hearing all the evidence.

The inability or unwillingness of a parent to provide a child with supervision, food, clothing, shelter, or medical care. I suppose the argument could be made that [30] by failing to pay for child support, um, that the mother didn't provide food, clothing, or shelter, medical care on behalf of the child or that by not being there with the child through possible abandonment could potentially be failing to provide the child with supervision.

But the part that troubles the Court is that it says if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare. And if it's an allegation that failure to provide those things, um,

was neglect, the Court has seen no evidence that the children in the care of the father caused an unreasonable risk to the child's health or welfare because the father was able to provide for the needs of the children.

The Court actually doesn't see that any time since the children were returned from the mother to the father after the incident that took place in 2009 that the children were ever actually in any unreasonable risk of harm because of failure to provide.

Um, the next few possible, um, ways that it could be are not relevant. They include leaving the child in a structure where they are manufacturing dangerous drugs. There's no indication of that. Or that, um, the child was a newborn exposed prenatally to drug or substance abuse, or things like that, and so there's – those are the allegations that could potentially be neglect.

[31] I know that there was an indication that, um, at least one of the children was suffering from some serious difficulties that had to see a therapist for. It's unclear whether that was neglect or abuse that was the cause of that or what the cause of it was, but it doesn't appear to be the mother being unable or unwilling to provide the child with supervision, food, clothing, shelter, or medical care.

Then the next one that was contained in the statement that father submitted, a pretrial statement, was 8 dash 533(B)(3). And that one is the allegation that, um, that the parent is unable to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of drugs, controlled

substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

The Court saw that one in the pretrial statement. The Court reviewed the petition that was filed in this case carefully, and the Court did not see – there were allegations of drugs, but the Court did not see that that was one of the allegations that was alleged as a reason of termination of parental rights.

And under the Roberto F. opinion, the Court discussed earlier, the Court is concerned about amendments to the petition on the eve of trial in order to allow the [32] petitioner to add allegations.

Having said that, the Court will discuss that one for the record. Basically that the parent is unable to discharge parental responsibilities because of mental illness, mental deficiency, or history of chronic abuse, dangerous drugs, controlled substances, or alcohol, and there are reasonable grounds to believe that the condition will be continued for a prolonged indeterminate period. And perhaps the Court should have fully read Dr. Schiff's report.

As far as the history of chronic dangerous drug, controlled substances, or alcohol, there is an indication – and honestly the Court is unclear as to what the reason why the mother and father were required to take tests in this case.

It is clear that there have been negative hair follicle tests that have been taken in 2014 and also in 2010

by the mother. Also, it's clear that there have been a few positive tests in June of 2011 and also in June of 2012. That seemed to be a time for taking amphetamine for the mother.

There's a few, um, diluted tests that seem to be around the same time. There was one in July of 2012 and also in August of 2012. But while the Court can't find that that was indeed positive, it would be an indicator that the [33] mother may have been trying to hide the use of drugs.

And what's interesting is that in evaluating the TASC tests, there's – basically the positive tests are about a year apart. So it does seem to show that there was at least some abuse.

The Court doesn't find that there was a history of chronic abuse. If it was a use that was a year apart that the parties can prove. I actually didn't hear any testimony about any abuse of drugs that may have occurred during the parties' marriage or in between the parties' divorce proceedings and the time that the parties, um, may have filed this petition other than the TASC testing, and so the Court doesn't find that there was a history of chronic abuse.

There was a history of abuse. Um, there's been really no evidence to show whether or not there is reasonable grounds to believe that there will be – that this abuse will continue for a prolonged indeterminate period.

Since 2012 it appears that there hasn't been any proof that mother has abused drugs, and it looks like she was taking random tests until October 2013. There are two hair follicle tests that were taken in 2014 that appear to have shown negative results, and the hair follicle test would have shown for a longer period of time that there was [34] no abuse.

Typically, in the Court's experience, a hair follicle test would show for at least three months that there was no abuse during that period of time, and so the Court finds that even though it was not actually alleged in the petition, that the mother has failed to show that the parent is unable to discharge parental responsibilities due to chronic abuse of dangerous drugs. And maybe I should ask. As far – what exhibit is Dr. Schiff's reports?

MS. QUICKLE: Your Honor, first of all, um, the Court said "that the mother has failed to show."

THE COURT: I'm sorry. That was a mistake.

MS. QUICKLE: Okay. I just wanted to clarify for the record.

THE COURT: The petitioner failed to show.

MS. QUICKLE: Dr. Schiff's reports are Exhibit 103, and Exhibit 104 is an addendum.

THE COURT: Okay. All right. Well, I'll get back to that in a little bit.

And as far as the best interest of the children if rights are severed, the Court has heard evidence that

the stepmother of the children is willing to adopt the children and that the children basically are uninterested in having a relationship with the mother and that – the Court will get [35] to this a little bit later – that continued relationship with the mother may have a detrimental effect on the children.

And without evaluating the weight of that evidence, for purposes of this motion the Court finds that there's been a prima facie case that it would be in the best interest of the children for the termination to take place. And that, of course, would have to be made – depending on the outcome of this – by a preponderance of the evidence.

The next issue that the Court has to determine - and this would be under Rule 66 – where it says in Rule 66(C), "The moving party or petitioner has the burden of proving the grounds for the termination alleged" and it goes into that standard, and the standard for the child's best interest.

And it says, "In addition, if the child is an Indian child, moving party or petitioner must move beyond a reasonable doubt – or must prove beyond a reasonable doubt, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

And there's been evidence that was presented by Phil Powers, and he is the person that the petitioner presents as a – an expert witness on the tribe. And [36] without getting into his qualifications, at least at this

time, he presented evidence that the children, um, would, um – that it would result in serious emotional or physical damage to the children.

Um, his testimony, as I brought out in the questions that I asked him, um, at first said that there was a good chance of emotional damage. When the Court questioned him later on, he – he said that he was confident that a continued relationship with the mother would result in emotional – serious emotional damage to the children.

For purposes of deciding this motion, the Court finds that there's at least sufficient evidence to go forward on the issue as to whether or not, um, the – the evidence presented could show that continued custody of the children by the parents or the Indian custodian is likely to result in serious emotional or physical damage to the child or children.

And then the last issue, which seems to be the issue that is, um, contended most by mother and by the tribe is whether or not the petitioner, um, has satisfied the Court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.

And the – and one of the arguments that was made [37] by the children, which is very interesting is, um, the fact that what's happening here is that the Indian father is moving to severe [sic] the rights of the non-Indian mother, and that the argument that is made by the children is that it would not actually break up the

Indian family because the Indian family is intact with the father and the children, and really what is happening is that the non-indian [sic] parent is being removed or at least that's what is being requested of the Court.

And, frankly, the Court looked for case law regarding that issue last night was not able to find case law regarding that argument. It appears clear to all parties that ICWA does apply; and though there seems to be irony in that situation, the Court feels that ICWA does apply based on the statutes.

And 25 dash USCA 1912, which is the federal statute that basically requires ICWA, Subsection (d), says – let me back up. There seems to be no question that the children are Indian children. They are enrolled members of a tribe, and so there seems to be no question, and so there's no issue that ICWA does apply, at least in the Court's mind.

(D) says, "Remedial services and rehabilitative program and preventative measures." Says, "Any party seeking to effect a foster care placement of, or termination [38] of parental rights to an Indian child under State law shall satisfy the Court that active efforts have been made to provide remedial services, rehabilitate programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

And without even needing to refer to the Colorado case that, in the Court's mind would be perhaps persuasive, the federal statute says "any party." And since

it says, "any party," it's the Court's interpretation of that that that [sic] means that even in a private severance that active efforts are required.

And so the next question is who has to provide active efforts, and I looked last night for case law to determine who would be required to provide those active efforts.

The argument's been made by the tribe and by mother that – that it has to be the petitioner who would have to provide them. I didn't actually find any case law last night – admittedly, that was only a few hours of searching for case law to determine.

Um, all it says is that the, um, the parties shall satisfy the Court that active efforts have been made, and so – and it says "Made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved [39] unsuccessful."

And then the next question is what active efforts or what efforts have been made by anyone. Well, let's start with, I guess, the petitioner. Um, the effort – let me see here – that the Court sees – Let me back up.

The Court was considering – since the real allegation is abandonment, that's the only allegation that's still outstanding. The Court was – was thinking what would be an active effort that could be done to prevent the abandonment.

And as far as that is concerned, it appears clear that if mother had submitted hair follicle tests in – I

guess in the time frame that the mother was supposed to have, it appears that that would have been something that could have overcome the abandonment by the mother, at least as far as the not being around the children or providing supervision or having contact with the children.

I suppose, um, there were indications that the mother may be without a job. Actually, the Court hasn't heard any evidence that the mother was indeed without a job and unable to support the children, at least not at this trial, um, and so the Court doesn't really know what active efforts could be done to force the mother to pay child support. I suppose going to the Attorney General's Office and having them, um, file a petition to enforce child [40] support would perhaps be an active effort on the father's part to, um, to get mother to pay child support.

Um, as far as abandoning the child, um, by not being around, there's been indications that if she'd taken hair follicle tests, she could have been able to have contact with the children, at least if she had provided the Court with proof that she had done that.

The father testified that when he went to take a hair follicle test, he gave a check to – or money order, some sort of cash, to TASC, and it appears it was in Havasu or something.

There's been no testimony that the father in some way contacted mother to say, hey, look. I paid for the test. Um, go there and you can take the test with my

dime. I didn't hear that testimony. All I heard was the father gave a check.

And I suppose if mother didn't have the money or didn't think she had the money to do it and didn't know the [sic] that the father had left the money order or the check, then I suppose she would have never known that she could take advantage of that service so to speak. Um, that alone, leaving a check, the Court doesn't find would be an active effort.

Um, as far as receiving drug testing is concerned. Again, it appears from the TASC records that there were a [41] few past tests – three – that were negative. The remainder were either missed. And it looks like, um, from the testimony that the Court received, the September 2012 to perhaps December of 2012 may be consistent with the petition to revoke probation where the mother may have been in custody. It appears that there a [sic] few missed ones in 2013.

There have been – other than the positives and the diluteds, appears that from February of 2013 to October of 2013 they were clean. The hair follicle tests show that the mother was clean as late as April of 2014.

And so assuming that the – that the purpose of the testing was to help the mother to be able to overcome whatever drug addictions that she had, and assuming – let me just – I know I saw it and I don't remember the – the exhibit number, but there was an exhibit that showed that the mother had completed some sort of counseling related to drug testing.

MS. QUICKLE: Your Honor, if I may, um, I believe that's Exhibit 102 as well as, um, Exhibit 116, which were discussed. One was a certificate. The other one was Miss King's letter stating that she had successfully completed counseling.

THE COURT: All right. So referring to Exhibit 102, it appears that she did complete that program in 2011. Though it appears that there were some, um, [42] positive tests that were after that period of time.

But the other half of – even if what TASC did to help with, um, monitoring drug abuse was successful – or I mean, even if that was active efforts, the next part of the question is it said the Court – "Satisfy the Court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful."

And it appeared – I mean, there's nothing to prove that the mother is not successfully off of drugs now. The last indication that there may have been drug abuse was back in 2012, and in the last – and I suppose arguably by missing sample could have been in February of 2013.

But because there's no indication that she is continuing to use drugs, no proof that she is continuing to use drugs, there's been a lack of proof that whatever active efforts may have been made, whether they were by probation or by anybody else, that those have proven to be unsuccessful.

And so the Court finds that there has been a failure by the petitioner to prove that whatever active efforts have been made have proven unsuccessful.

And, frankly, it's been talked a lot and parties have discussed this; that this case the petition for [43] severance is not about the custody of the children. It's not about what's – it does have to do with the best interest of the children if the other factors are met.

But unfortunately with ICWA the Court's convinced that the active efforts and the efforts to prove – or that those efforts have not been successful have not been proven by the petitioner.

And so for that reason, it is ordered granting the motion to dismiss by the petitioner – or not petitioner – by respondent in this matter.

And, Miss Quickle, if you could file or lodge an order consistent with the Court's ruling today.

MS. QUICKLE: Your Honor, may I get a copy of the – Does the court wish to have all of its finding in there as well?

THE COURT: Yes.

MS. QUICKLE: May I have sufficient time to perhaps get a copy of the transcript.

THE COURT: How long do you think you will need?

MS. QUICKLE: Perhaps the court reporter can tell you how long it will take to get a copy of that.

She's stating two weeks, your Honor

THE COURT: So if you could do it within 30 days.

[44] MS. QUICKLE: Absolutely, your Honor.

THE COURT: All right. And is there anything else that the Court needs to address at this time?

MS. QUICKLE: Nothing further, your Honor.

MS. MISS: No, your Honor.

MR. KRUEGER: No, your Honor.

MR. RIDEOUT: No, your Honor.

THE COURT: All right. Then we will stand at recess.

(The proceedings were concluded at 10:46 a.m.)

CERTIFICATE OF REPORTER

I, Juliette L. Vidaurri, Official Reporter in the Superior Court of the State of Arizona, in and for the county of La Paz, do hereby certify that I made a shorthand record of the proceedings had at the foregoing entitled cause at the time and place hereinbefore stated:

That said record is full, true, and accurate; That the same was thereafter transcribed under my direction; and

That the foregoing forty-four (44) typewritten pages constitute a full, true, and accurate transcript of said record, all to the best of my knowledge and ability.

Dated at Lake Havasu City, Arizona, the 17th day of April, 2016.

/s/ Juliette L. Vidaurri [SEAL]
Juliette L. Vidaurri, CCR, RPR
AZ CR #50359/CA CSR #11081/NV
CCR #748

[SEAL]

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court
STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

April 19, 2017

RE: S.S./S.S. v STEPHANIE H. et al
Arizona Supreme Court No. CV-17-0053-PR Court of Appeals, Division One No. 1 CA-JV 16-0163 La Paz County Superior Court No. S1500SV201200004

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 18, 2017, in regard to the above-referenced cause:

ORDERED: Petition for Review of Opinion of Court of Appeals = DENIED.

Justice Brutinel voted to grant review.

Justice Bolick did not participate in the determination of this matter.

Janet Johnson, Clerk

TO:
Wendy Marcus
Jessica L Quickle
Elizabeth Lorina-Mills
LeeAnne Kane
Aditya Dynar
Amy M Wood
adc

ARTICLE V.

No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

ARTICLE XIV.

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

25 U.S.C.A. § 1901

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds –

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are

[1] So in original. Probably should be capitalized.

placed in non-Indian foster and adoptive homes and institutions; and

(5) that 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.

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25 U.S.C.A. § 1902

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

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25 U.S.C.A. § 1903

§ 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 the 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, 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.

* * *

(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;

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25 U.S.C.A. § 1912

§ 1912. Pending court proceedings

* * *

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

* * *

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that

the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

A.R.S. § 8-533

§ 8-533. Petition; who may file; grounds

A. Any person or agency that has a legitimate interest in the welfare of a child, including, but not limited to, a relative, a foster parent, a physician, the department or a private licensed child welfare agency, may file a petition for the termination of the parent-child relationship alleging grounds contained in subsection B of this section.

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court shall also consider the best interests of the child:

1. That the parent has abandoned the child.

2. That the parent has neglected or wilfully abused a child. This abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.

3. That the parent is unable to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

4. That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which that

parent was convicted is of such nature as to prove the unfitness of that parent to have future custody and control of the child, including murder of another child of the parent, manslaughter of another child of the parent or aiding or abetting or attempting, conspiring or soliciting to commit murder or manslaughter of another child of the parent, or if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years.

5. That the potential father failed to file a paternity action within thirty days of completion of service of notice as prescribed in § 8-106, subsection G.

6. That the putative father failed to file a notice of claim of paternity as prescribed in § 8-106.01.

7. That the parents have relinquished their rights to a child to an agency or have consented to the adoption.

8. That the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and that one of the following circumstances exists:

(a) The child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order or voluntary placement pursuant to § 8-806 and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement.

(b) The child who is under three years of age has been in an out-of-home placement for a cumulative total period of six months or longer pursuant to court order and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement, including refusal to participate in reunification services offered by the department.

(c) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to § 8-806, the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

9. That the identity of the parent is unknown and continues to be unknown following three months of diligent efforts to identify and locate the parent.

10. That the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause.

11. That all of the following are true:

(a) The child was cared for in an out-of-home placement pursuant to court order.

(b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.

(c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.

(d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

C. Evidence considered by the court pursuant to subsection B of this section shall include any substantiated allegations of abuse or neglect committed in another jurisdiction.

D. In considering the grounds for termination prescribed in subsection B, paragraph 8 or 11 of this section, the court shall consider the availability of reunification services to the parent and the participation of the parent in these services.

E. In considering the grounds for termination prescribed in subsection B, paragraph 8 of this section, the court shall not consider the first sixty days of the

initial out-of-home placement pursuant to § 8-806 in the cumulative total period.

F. The failure of an alleged parent who is not the child's legal parent to take a test requested by the department or ordered by the court to determine if the person is the child's natural parent is prima facie evidence of abandonment unless good cause is shown by the alleged parent for that failure.

* * *

A.R.S. § 8-537

§ 8-537. Termination adjudication hearing

A. If a petition for terminating the parent-child relationship is contested, the court shall hold a termination adjudication hearing. The general public shall be excluded and only such persons admitted whose presence the judge finds to have a direct interest in the case or the work of the court, provided that such person so admitted shall not disclose any information secured at the hearing. The court may require the presence of any parties and witnesses it deems necessary to the disposition of the petition, except that a parent who has executed a waiver pursuant to § 8-535, or has relinquished the parent's rights to the child shall not be required to appear at the hearing.

B. The court's findings with respect to grounds for termination shall be based upon clear and convincing

evidence under the rules applicable and adhering to the trial of civil causes. The court may consider any and all reports required by this article or ordered by the court pursuant to this article and such reports are admissible in evidence without objection.

C. If a parent does not appear at the pretrial conference, status conference or termination adjudication hearing, the court, after determining that the parent has been instructed as provided in § 8-535, may find that the parent has waived the parent's legal rights and is deemed to have admitted the allegations of the petition by the failure to appear. The court may terminate the parent-child relationship as to a parent who does not appear based on the record and evidence presented as provided in rules prescribed by the supreme court.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF LA PAZ

MEGAN SPIELMAN, CLERK

HON. DOUG CAMACHO BY: Arlene Ruiz, Appeals Clerk

CASE NO.
S1500S201200004 DATE: 4/28/2016

IN THE MATTER OF:	**COUNSEL:**
S[.] S[.] AND S[.] S[.] (Plaintiff/Appellee)	BRAD RIDEOUT (For the Plaintiff)
VS.	
STEPHANIE H[.] (Defendant/Appellant)	JESSICA L. QUICKLE (For Defendant/Appellant)

NOTICE OF ACCEPTANCE OF ELECTRONIC INTERSPERSED INDEX

The Notice of Appeal having been electronically transmitted to the Court of Appeals, Division One on, 4/19/2016, and having been **accepted** by said court on, 4/27/16,

Notice is given of the following:

- The number assigned to this case by the appellate court is **1 CA-JV-16-0163**
- The Interspersed Index was filed and electronically accepted to the appellate court on,

4/27/2016; Enclosed is a copy of the Interspersed index.

cc: [A.R. 4/28/16]

Honorable Doug Camacho
Mohave County Superior Court
2001 College Drive
Lake Havasu City, AZ 86404

Jessica L. Quickle
(Placed Inbox)
Attorney for Defendant

Brad Rideout
2800 Sweetwater Ave Suite A-104
Lake Havasu City, AZ 86406
Attorney for Minor Children

IN THE MATTER OF
S[.] S[.] & S[.] S[.]
S1500SV201200004

[SEAL]

Electronic Index of Record
LAP Case Number
S1500SV201200004

No.	Document Name	Filed Date
1.	**RESTRICTED** PETITION: TO TERMINATE/SEVER/RESPONDENT'S PARENTAL RIGHTS	Dec. 14, 2012
2.	NOTICE: OF INITIAL HEARING ON PETITION FOR TERMINATION OF PARENT-CHILD RELATIONSHIP	Dec. 14, 2012

3.	**RESTRICTED** NOTICE: RE-ASSIGNMENT OF JUDGE	Dec. 21, 2012
4.	**RESTRICTED** NOTICE: RE-ASSIGNMENT OF JUDGE	Dec. 21, 2012
5.	AFFIDAVIT OF SERVICE OF A PRIVATE SERVER	Dec. 21, 2012
6.	****RESTRICTED** MINUTE ENTRY: PETITION TO TERMINATE PARENT CHILD RELATIONSHIP {JANUARY 2, 2013}**	**Jan. 2, 2013**
7.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {FEBRUARY 5, 2013}**	**Feb. 5, 2013**
8.	ORDER APPOINTING COUNSEL	Feb. 7, 2013
9.	**RESTRICTED** CLERK'S CERTIFCATE OF MAILING	Feb. 7, 2013
10.	**RESTRICTED** MOTION: TO CONTINUE	Feb. 28, 2013
11.	ORDER: GRANTING CONTINUANCE	Mar. 1, 2013
12.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {MARCH 11, 2013}**	**Mar. 11, 2013**
13.	CLERK'S CERTIFICATE OF MAILING	Apr. 19, 2013
14.	ORDER: APPOINTING NEW COUNSEL	Apr. 19, 2013

15.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {MAY 13, 2013}**	**May. 13, 2013**
16.	**RESTRICTED* NOTICE: REASSIGNMENT OF JUDGE	May. 15, 2013
17.	CLERK'S CERTIFICATE OF MAILING	May. 15, 2013
18.	**RESTRICTED** COURT ORDER/NOTICE DATED MAY 29, 2013	May. 29, 2013
19.	COURT NOTICE/ORDER/ RULING DATED MAY 29, 2013	May. 30, 2013
20.	RESPONSE TO PETITION TO TERMINATE/SEVER RESPONDENT'S PARENTAL RIGHTS	May. 31, 2013
21.	**RESTRICTED** NOTICE/ COURT ORDER DATED JUNE 12, 2013	Jun. 17, 2013
22.	**RESTRICTED** CLERK'S CERTIFICATE OF MAILING	Jun. 17, 2013
23.	**RESTRICTED** ORDER DATED JUNE 18, 2013	Jun. 18, 2013
24.	**RESTRICTED** CLERK'S CERTIFICATE OF MAILING	Jun. 19, 2013
25.	**RESTRICTED** NOTICE/ COURT ORDER	Jun. 19, 2013
26.	CLERK'S CERTIFICATE OF MAILING	Jun. 19, 2013
27.	NOTICE OF CHANGE OF JUDGE	Jun. 19, 2013

28.	NOTICE/COURT ORDER DATED JUNE 19, 2013	Jun. 20, 2013
29.	MOTION: TO WITHDRAW COUNSEL	Jun. 20, 2013
30.	**RESTRICTED** CLERK'S CERTIFCATE OF MAILING	Jun. 20, 2013
31.	**RESTRICTED** MOTION TO WITHDRAW	Jun. 20, 2013
32.	**RESTRICTED** COURT NOTICE/ORDER/RULING DATED JUNE 20, 2013	Jun. 20, 2013
33.	**RESTRICTED** ORDER/ RULING/NOTICE DATED JULY 1, 2013	Jul. 2, 2013
34.	**RESTRICTED** ORDER/ RULING/NOTICE DATED JULY 17, 2013	Jul. 17, 2013
35.	**RESTRICTED** CLERK'S CERTIFCATE OF MAILING	Jul. 23, 2013
36.	**RESTRICTED** MOTION TO CONTINUE INITIAL APPEARANCE HEARING	Jul. 23, 2013
37.	****RESTRICTED** MINUTE ENTRY: INITIAL APPEARANCE {AUGUST 12, 2013}**	**Aug. 12, 2013**
38.	**RESTRICTED** ORDER CONTINUING INITIAL APPEARANCE HEARING	Aug. 15, 2013
39.	MOTION TO CONTINUE REVIEW HEARING	Sep. 19, 2013

40.	NOTICE TO CHILDREN'S TRIBE, PARENT AND INDIAN CUSTODIAN OF PETITION TO TERMINATE PARENTAL RIGHT OF MOTHER	Sep. 26, 2013
41.	CLERK'S CERTIFICATE OF MAILING	Oct. 4, 2013
42.	ORDER CONTINUING INITIAL APPEARANCE HEARING	Nov. 12, 2013
43.	****RESTRICTED** MINUTE ENTRY: INITIAL APPEARANCE {NOVEMBER 13, 2013}**	**Nov. 13, 2013**
44.	**RESTRICTED** ORDER/ RULING/NOTICE DATED JANUARY 31, 2014	Feb. 3, 2014
45.	MOTION TO CONTINUE REVIEW HEARING	Feb. 6, 2014
46.	ORDER/RULING/NOTICE DATED FEBRUARY 6, 2014	Feb. 7, 2014
47.	**RESTRICTED** ORDER/ RULING/NOTICE DATED JANUARY 31, 2014	Feb. 10, 2014
48.	**RESTRICTED** MOTION FOR ORDER TO RELEASE RESPONDENT'S PROBATION RECORDS	Feb. 10, 2014
49.	**RESTRICTED* ORDER/ RULING/NOTICE DATED FEBRUARY 6, 2014	Feb. 12, 2014

50.	RESPONSE TO RESPONDENT'S MOTION TO RELEASE PROBATION RECORDS	Feb. 14, 2014
51.	**RESTRICTED** MOTION TO DISMISS	Feb. 20, 2014
52.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {FEBRUARY 20, 2014}**	**Feb. 20, 2014**
53.	**RESTRICTED** SEVERANCE INITIAL DISCLOSURE STATEMENT BY PETITIONER	Feb. 24, 2014
54.	**RESTRICTED** COLORADO RIVER INDIAN TRIBES MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS NOTICE OF INTERVENTION	Mar. 19, 2014
55.	**RESTRICTED** COLORADO RIVER INDIAN TRIBES NOTICE OF INTERVENTION	Mar. 19, 2014
56.	**RESTRICTED** AFFIDAVIT OF MAILING AMENDED NOTICE TO CRIT OF PETITION TO TERMINATE PARENTAL RIGHT OF MOTHER	Mar. 20, 2014
57.	**RESTRICTED** NOTICE TO CHILDREN'S TRIBE, PARENT AND INDIAN CUSTODIAN OF PETITION TO TERMINATE PARENTAL RIGHT OF MOTHER (AMENDED WITH TRIAL DATE)	Mar. 20, 2014

58.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {APRIL 1, 2014}**	**Mar. 28, 2014**
59.	****RESTRICTED** MINUTE ENTRY: AMENDED STATUS CONFERENCE {MARCH 28, 2014}**	**Mar. 28, 2014**
60.	****RESTRICTED** MINUTE ENTRY: SECOND AMENDED STATUS CONFERENCE {MARCH 28, 2014}**	**Mar. 28, 2014**
61.	MOTION TO APPEAR TELEPHONICALLY	Apr. 4, 2014
62.	**RESTRICTED** TRIBE'S DISCLOSURE STATEMENT	Jun. 9, 2014
63.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {JUNE 23, 2014}**	**Jun. 23, 2014**
64.	***SEALED*** MOTION FOR WITNESSES TO APPEAR BY TELEPHONE AT TRIAL	Aug. 6, 2014
65.	**RESTRICTED** RESPONDENT'S PRETRIAL STATEMENT	Aug. 12, 2014
66.	RESPONDENT'S EXHIBITS FOR TRIAL BEGINNING AUGUST 20, 2014	Aug. 13, 2014
67.	PETITIONER'S PRE-TRIAL STATEMENT	Aug. 15, 2014
68.	***SEALED*** ORDER ALLOWING TELEPHONIC	Aug. 18, 2014

	TESTIMONY FROM PETITIONER'S WITNESSES	
69.	**RESTRICTED** MOTION TO CONTINUE TRIAL DUE TO EMERGENCY CIRCUMSTANCES	Aug. 18, 2014
70.	**RESTRICTED** NOTICE OF APPEARANCE	Aug. 18, 2014
71.	**RESTRICTED** AFFIDAVIT OF SERVICE – SHERIFF'S RETURN	Aug. 19, 2014
72.	***SEALED*** ORDER/ RULING/NOTICE DATED SEPTEMBER 5, 2014	Sep. 10, 2014
73.	***SEALED*** MOTION TO CONTINUE TRIAL DUE TO UNAVAILABILITY OF WITNESS	Sep. 12, 2014
74.	EX PARTE MOTION TO AUTHORIZE RELEASE OF FUNDS TO PAY EXPERT WITNESS FEES	Sep. 26, 2014
75.	**RESTRICTED** ORDER/ RULING/NOTICE DATED OCTOBER 15, 2014	Oct. 20, 2014
76.	**RESTRICTED** ORDER/ RULING/NOTICE DATED OCTOBER 17, 2014	Oct. 24, 2014
77.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {OCTOBER 27, 2014}**	**Oct. 27, 2014**

78.	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE MOTION TO AUTHORIZE RELEASE OF FUNDS TO PAY EXPERT WITNESS FEES	Dec. 1, 2014
79.	AMENDED EX PARTE ORDER AUTHORIZING RELEASE OF FUNDS TO PAY EXPERT WITNESS FEES	Dec. 8, 2014
80.	**RESTRICTED** AFFIDAVIT OF SERVICE – SHERIFF'S RETURN	Feb. 18, 2015
81.	MOTION TO CONTINUE TRIAL/MOTION TO EXTEND TIME FOR TRIAL (EXPEDITED RULING REQUESTED)	Feb. 23, 2015
82.	ORDER CONTINUING TRIAL/ EXTENDING TIME FOR TRIAL	Mar. 2, 2015
83.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {JUNE 4, 2015}**	**Jun. 4, 2015**
84.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {JUNE 24, 2015}**	**Jun. 24, 2015**
85.	ORDER/RULING/NOTICE DATED JUNE 26, 2015	Jul. 2, 2015
86.	MOTION TO CONTINUE STATUS CONFERENCE	Jul. 20, 2015
87.	COURT NOTICE/ORDER/ RULING DATED JULY 28, 2015	Jul. 28, 2015

88.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {AUGUST 28, 2015}**	**Aug. 28, 2015**
89.	**RESTRICTED** COURT NOTICE/ORDER/RULING DATED DECEMBER 3, 2015	Dec. 3, 2015
90.	**RESTRICTED** COURT NOTICE/ORDER/RULING DATED DECEMBER 10, 2015	Dec. 10, 2015
91.	****RESTRICTED** MINUTE ENTRY: STATUS CONFERENCE {DECEMBER 18, 2015}**	**Dec. 18, 2015**
92.	RESPONDENT'S PRETRIAL STATEMENT (SUPPLEMENTAL)	Dec. 22, 2015
93.	**RESTRICTED** RESPONDENT'S SUPPLEMENTAL EXHIBITS FOR TRIAL BEGINNING JANUARY 12, 2016 AT 8:30 A.M.	Jan. 11, 2016
94.	**RESTRICTED** PETITIONER'S PRE-TRIAL STATEMENT (SUPPLEMENTAL)	Jan. 11, 2016
95.	**RESTRICTED** AFFIDAVIT OF SERVICE – SHERIFF'S RETURN	Jan. 12, 2016
96.	****RESTRICTED** MINUTE ENTRY: SEVERANCE TRIAL {JANUARY 12, 2016}**	**Jan. 12, 2016**

97.	****RESTRICTED** MINUTE ENTRY: (AMENDED) SEVERANCE TRIAL {JANUARY 12, 2016}**	**Jan. 12, 2016**
98.	****RESTRICTED** MINUTE ENTRY: SEVERANCE TRIAL DAY TWO {JANUARY 13, 2016}**	**Jan. 13, 2016**
99.	**RESTRICTED** MISCELLANEOUS: EXHIBIT LIST REPORT	Jan. 13, 2016
100.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 1	Jan. 13, 2016
101.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 2	Jan. 13, 2016
102.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 3	Jan. 13, 2016
103.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 4	Jan. 13, 2016
104.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 5	Jan. 13, 2016
105.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 6	Jan. 13, 2016
106.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 7	Jan. 13, 2016
107.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 8	Jan. 13, 2016
108.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 9	Jan. 13, 2016

109.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 10	Jan. 13, 2016
110.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 11	Jan. 13, 2016
111.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 12	Jan. 13, 2016
112.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 13	Jan. 13, 2016
113.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 14	Jan. 13, 2016
114.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 15	Jan. 13, 2016
115.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 16	Jan. 13, 2016
116.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 17	Jan. 13, 2016
117.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 18	Jan. 13, 2016
118.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 19	Jan. 13, 2016
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260.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 136	Jan. 13, 2016
261.	**RESTRICTED** MISCELLANEOUS: EXHIBIT(S) – 134	Jan. 13, 2016
262.	**RESTRICTED** NOTICE OF FILING PROPOSED FORM OF ORDER	Feb. 10, 2016

263.	**RESTRICTED** ORDER DATED 03/01/2016	Mar. 7, 2016
264.	**RESTRICTED** NOTICE OF APPEAL	Mar. 15, 2016
265.	**RESTRICTED** CLERK'S NOTICE OF FILING OF NOTICE OF APPEAL	Mar. 17, 2016
266.	**RESTRICTED** CLERK'S CERTIFICATE OF MAILING	Mar. 17, 2016
267.	**RESTRICTED** NOTICE OF HEARING TO TRI-STATE REPORTING	Mar. 17, 2016
268.	**RESTRICTED** MISCELLANEOUS EXHIBIT(S) – 49	Mar. 18, 2016
269.	**RESTRICTED** MISCELLANEOUS EXHIBIT(S) – 50	Mar. 18, 2016
270.	**RESTRICTED** MOTION: TO APPOINT APPELLATE COUNSEL	Apr. 1, 2016
271.	**RESTRICTED** ORDER: RE: MOTION TO APPOINT APPELLATE COUNSEL	Apr. 8, 2016

APPEAL COUNT: 1

CAPTION: IN THE MATTER OF S[.] S[.] & S[.] S[.]

RE: CASE: S1500SV201200004

DUE DATE: APRIL 23, 2016

SEALED DOCUMENT: SEE ITEMS: #64, #68, #72, & #73

DEPOSITION(S): NONE

TRANSCRIPTS(S): NONE

COMPILED BY: aruiz on April 19, 2016; [2.4-12334.47] C:\c2c\S1500SV201200004\Group_01

CERTIFICATION: CERTIFICATION: I, Megan Spielman, Clerk of the Superior Court of La Paz County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above entitled action.

The bracketed {date} following the minute entry title is the date of the minute entry.

CONTACT INFO: APPEALS CLERK of the superior court, La Paz County, 1316 Kofa Avenue, Suite 607 Parker, AZ 85344 928-669-6131