

2002

In the Matter of the Adoption of Jeremiah Halloway v. Navajo Nation : Brief of Respondent

Utah Supreme Court

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BRIEF

DOCUMENT

IN THE SUPREME COURT OF THE STATE OF UTAH

DOCK

20519

IN THE MATTER OF THE
ADOPTION OF JEREMIAH
HALLOWAY,

A person under eighteen
years of age.

Navajo Nation, Appellant.

No. 20519

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
Fourth Judicial District Court of Utah County
Honorable David Sam

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Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The petitioners filed their Petition for Adoption on May 23, 1980. (R. 2-4). Numerous hearings were held in the matter. On January 28, 1985, the Honorable Judge David Sam entered his decision in the matter granting the Petition for Adoption. (R. 575-584). The final Decree of Adoption was signed and entered by Judge David Sam on February 4, 1985. (R. 585-586). It is from the decision and entry of the Decree of Adoption that the appellant appeals.

STATEMENT OF FACTS

Reference is made throughout this brief to the transcript of the consent of the natural mother taken on May 30, 1980, (hereinafter "Tr. I"), the transcript of the hearing of April 7, 1983, (hereinafter "Tr. II"), and the transcript of the hearing of October 22 and 23, 1984, (hereinafter "Tr. III").

1. Michael Carter (his Indian name was Jeremiah Halloway) was born on May 14, 1977, to Cecelia Saunders. (Tr. II, p. 18).

The child was born out of wedlock. The natural mother testified that the father of Michael Carter was Ernest Yazzie, Jr. (Tr. II, p. 18, lines. 7-9).

2. The natural mother testified that the initial care of the child was given by her mother, Bessie Begay, (Tr. II, p. 19, lines 4-8). The natural mother did testify that she had access to the child up to the time he was six months of age. (Tr. II, p. 19, lines 11-14). Cecelia Saunders testified that during the initial six months, she lived with her mother, Bessie Begay and her step-father, Jack Begay. (Tr. II, p. 19, lines 15 to p. 20, line 5). After the six month period, Cecelia started seeing Arthur Saunders and did not live with her mother and stayed either at Arthur's house or at her house. (Tr. I, p. 20, lines 2-14).

3. Cecelia Saunders testified that she married Arthur Saunders in July of 1978, but could not remember the date. (Tr. II, p. 20, lines 18-19). Cecelia testified that the primary care of Michael Carter, after the initial six month period, was given by her mother, Bessie Begay. (Tr. II, p. 20, lines 20-23). Additionally, Cecelia testified that Bessie Begay and Jack Begay had a serious drinking problem. (Tr. II, p. 20, line 24 through p. 21, line 2).

4. Cecelia told a Navajo social worker in a home visit on July 23, 1982, that she gave her son, Michael Carter, to her mother to be cared for in order to save her marriage with Arthur Saunders. In that same visit, Cecelia also stated that she did not provide any monetary or other type of support to Jeremiah and that her husband, Arthur Saunders, the step-father, disliked Jeremiah very much. Cecelia testified at trial that Arthur did not like the child because he was not his son. Cecelia further testified that the step-father stated that he was not going to bother with the child and would not care for or support Michael Carter and would not give the child the normal love that a father would give a child. (Tr. II, p. 20, lines 3-20; p. 22, line 23 through p. 23, line 9).

Cecelia testified that there were times when the social workers found the child left unattended because Bessie Begay was drunk. (Tr. II, p. 23, lines 21-25). Cecelia testified that when Bessie would drink she would go on an alcoholic binge for a week. (Tr. II, p. 23, lines 7-9). The natural mother testified that Jack Begay, her step-father, had the same drinking problem and accordingly never assumed any care of the child. (Tr. II, p. 24, lines 10-15).

5. The only contact the natural mother had with Michael Carter from the time Michael was six months of age is when the

child would be brought over for approximately two to three days at Arthur's house every two to three weeks. (Tr. II, p. 25, lines 4-8; p. 26, lines 22-25). In fact, two of Cecelia's six sisters, Rosita and Polly complained of the care that Jeremiah was receiving. (Tr. II, p. 28, lines 2-6; p. 20, lines 14-19).

6. Polly Ann Dick, the natural mother's sister, reported to Cecelia that she had found the child with Jack Begay who was drunk and that Jeremiah had not eaten. Polly was unsure of the number of days that Jeremiah had been without food. (Tr. II, p. 30, lines 13-14). Polly did testify that Michael Carter had been passed to different people since the time he had been born. (Tr. II, p. 57, lines 19-20). Polly further testified that when she picked Michael up, the child was only wearing a T-shirt and underwear. (Tr. II, p. 59, lines 8-17).

7. Cecelia, the natural mother, testified that she did not object to the child being taken to Utah (Tr. II, p. 31, lines 19-20) and further that she had talked with Polly about giving the child up for adoption and did not object to it. (Tr. II, p. 32, lines 13-16).

Cecelia Saunders came to Utah on May 30, 1980, and appeared before the Honorable Judge David Sam. During those proceedings wherein her consent to adoption was taken, she was interrogated by Mr. Maxfield. In the course of that examination, she was

asked whether or not it was her desire to have the child adopted by the petitioners, Dan and Pat Carter, and she indicated that it was. (Tr. I, p. 3, lines 14-16). Cecelia further testified that she understood that she could not change her mind and did not have any intention of changing her mind with regard to approving of the adoption. (Tr. I, p. 3, lines, 17-23). Cecelia indicated that she had not been paid any money except that necessary to travel to Utah and that she did not expect to receive any money after the proceeding was over. Cecelia finally testified that there had not been any other promises or inducements for her consent to the adoption. (Tr. I, p. 3, line 24 through p. 4, line 18).

8. Cecelia Saunders testified that two years after the child was taken to Utah for adoption, she was contacted by representatives of the Tribe who indicated to her that Jeremiah could not be adopted out of the State. (Tr. II, p. 35, lines 3-4). Cecelia was asked by the Tribal members if she really wanted to give Jeremiah up for adoption and she answered that question by saying "yes." (Tr. II, p. 35, lines 6-11). In that regard, Cecelia Saunders was asked if there were any of her family members who could adopt the child and she indicated that there was only one sister who would take the child and that was Mini, and she had

been determined by the Tribe, itself, not to be fit. (Tr. II, p. 45, line 20 through p. 46, line 2).

9. Michael Carter has been in the home of the petitioners, Dan and Pat Carter, since March 23, 1980. (Tr. II, p. 78).

SUMMARY OF TRIBAL RECORDS

After Michael Carter was born, social agencies within the Navajo nation became involved in monitoring the care that Michael Carter was receiving. Some of the Tribal records were marked as an Exhibit at the time of trial and the information provided therein is enlightening and helpful in the resolution of the legal issues raised by the appellants. (R. 120-191).

1. In a home visit on January 23, 1982, Cecelia Saunders, the natural mother of Jeremiah, admitted that she gave her son away to Bessie Begay in order to save her marriage with Arthur Saunders.

2. In a report of January 23, 1980, a referral was made to the Tribe social agencies indicating that Jeremiah was being neglected by his mother, Cecelia Saunders. The child was reported to be constantly on the go with both grandparents on their sheep herding job, that Bessie had a drinking problem and there were fifteen members living in the same household.

3. In a home visit in March 19, 1980, Bessie Begay, the mother of Cecelia Saunders, indicated that Jeremiah (Michael

Carter) had been with them since birth, contrary to the natural mother's testimony at trial that the care of the minor child had been given to the grandmother at six months.

4. On April 30, 1980, the social worker was informed that Jeremiah (Michael Carter) was taken from Bessie's home by Polly Dick. During that visit, Cecelia, the natural mother, stated that she had given her consent to Polly, her sister, to go ahead and place Jeremiah (Michael) in a foster home in Utah. Her reason for making this decision was due to Bessie Begay's drinking problem. Another fact warranting Cecelia's decision was that Cecelia herself, could not keep Jeremiah (Michael) in her custody because the child was neglected and abused by her husband, Arthur Saunders.

5. The case worker's note for May 2, 1980, indicates that the grandmother, Bessie Begay, continued to abuse alcohol. Shortly thereafter, a case worker indicated that all of the family relatives of Jeremiah were unstable except for the Tolths. The social worker's report of December 8, 1980, indicates that Jeremiah was residing with Dan and Pat Carter in Spanish Fork, Utah, and that Cecelia Saunders had put him up for adoption. In the assessment portion of that note, it is indicated that Cecelia still wanted to continue with giving up the child in order to save her marriage with Mr. Saunders.

6. On December 1, 1980, a home visit was made to Cecelia's sister, Kathy Bilgarito. In that home visit, it was learned that Kathy had done the same thing Cecelia is doing. Kathy had given up three of her children to save her marriage with Ralph.

In the ICWA (Indian Child Welfare Act) case update report, dated January 20, 1980, it was indicated that Cecelia and her family were residing with her mother-in-law. The note indicated that Arthur Saunders, the step-father, could not accept Jeremiah as his step-child. The report indicates that Cecelia gave consent to place the child in Utah for several reasons. The first reason was that Bessie Begay unable to take care of the child because of the heavy abuse of alcohol. The second reason was that giving up the child was necessary to maintain her marriage with Arthur Saunders. The note explicitly states that Cecelia reported that Arthur disliked the child very much, that he often abused and neglected the child, and that Cecelia could not tolerate seeing her child hurt. The report concludes that Cecelia Saunders was from a big family, that she had several sisters but all were unstable and did not have a house of their own. In fact, the report noted that the sisters had done the same thing in giving up their children to save their marriages.

7. The ICWA narrative, March 23, 1981, indicates that

Cecelia still had her mind set on letting the Carters adopt Jeremiah.

STATEMENT OF PROCEDURAL FACTS

1. The Petition for Adoption was filed on behalf of the Carters on May 29, 1980. (R. 2-4).

2. The consent of the natural mother was signed in open court on May 30, 1980. (Tr. I, pp. 1-5; R. 6, 7).

3. On May 11, 1982, the Navajo Nation filed a Motion to Dismiss and Transfer Jurisdiction and at the same time, filed an Affidavit and Revocation of Consent to Adoption signed by the mother, Cecelia Ann Dick. (R. 12-15). After the briefs were filed, the court heard oral arguments and rendered its ruling on July 14, 1982. The Ruling is set out in the Appendix as Exhibit "A." The court found the domicile of the minor child to be with that of the petitioners, the Carters. The court made that finding based upon the fact that the child's residence appeared to be voluntarily and purposefully removed from the natural mother, grandmother, and reservation to the petitioners. The court found that in light of the long period of time the child had been with the petitioners that there was "good cause" for the District Court to take jurisdiction to hear the matter and further found that the requirements of the ICWA had, to that stage, been satisfied. In its ruling of July 14, 1982, the

court explicitly allowed both parties to put on evidence as it related to the issue of domicile which hearing would be set upon the application of either party.

4. The hearing on domicile was held on April 7, 1983. At that time, all parties were present and presented testimony and introduced evidence. After the hearing, an Order was entered which Order was dated October 6, 1983. A copy of that Order is attached in the Appendix as Exhibit "B." In the Order, the court explicitly found that the child had been taken from the reservation by a family member with some of the family's consent and delivered to the petitioners for adoption. The court found that no one in the family protested the placement of the child with the petitioners. The court found that the relocation of the child with the petitioners was done with the intent to transfer to the petitioners full parental rights as it related to the child and with the further intent to abandon all parental rights in the child. (R. 182-184).

5. After extensive discovery and pre-trial memoranda had been filed with the court, the court conducted a hearing on October 22, 1984, relative to whether or not the parental rights of the natural mother should be terminated in the child, Michael Carter. The court rendered its decision in the matter on January

28, 1985. A copy of the decision is attached hereto as Exhibit "C" in the Appendix. (R. 575-584).

6. The Decree of Adoption was signed by Judge Sam on February 4, 1985. In the court's decision, it was noted that testimony had been received from numerous experts, including Paul Steven Buckingham, Dr. Robert Crist, Dr. Samuel Roll, and Dr. Robert J. Howell. Based upon the testimony, the court found beyond a reasonable doubt, that the separation of the petitioners and the young child would result in serious emotional damage to the child. The court, in the same ruling, also found that there was serious questions as to the fitness of any of the natural family members to take the child.

SUMMARY OF ARGUMENT

Judge David Sam properly took jurisdiction of the petition for adoption under the U.S. Constitution and the ICWA. The lower court found all of the pre-requisites required by the ICWA before the parental rights of the natural mother were terminated. The lower court had no obligation to provide the Order of the Navajo Nation with Full Faith and Credit.

ARGUMENT

POINT I

THE DISTRICT COURT HAD JURISDICTION
TO RECEIVE THE CONSENT TO ADOPTION
EXECUTED BY THE NATURAL MOTHER.

The appellants contend in Point I of their brief that Cecelia Saunders, at the time her consent for adoption was executed on May 30, 1980, was not advised as to the content of the ICWA. That assertion is totally inaccurate. The natural mother, Cecelia Saunders, has misrepresented the facts to almost every party concerned in the case. Cecelia Saunders informed the Tribe for a long period of time that the child was only be to placed for foster care and was very disgruntled when the Tribe found out that she had given up the child for adoption. Testimony at trial was contradictory. It was Judge Sam, who after the hearing on April 7, 1983, explicitly found that the natural mother was advised at the time of her consent as to the ICWA. The court found that the natural mother consented to the placement and did abandon the child. (R. 94).

The ICWA explicitly indicates that state courts have jurisdiction over a child custody proceeding or a case in which termination of parental rights is sought. 25 U.S.C. § 1911(b) provides in pertinent part as follows:

In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection of either parent, upon the petition of either parent, or the Indian custodian, or the Indian child's

tribe: provided, that such transfer shall be subject to declination by the tribal court of such tribe.

In the court's ruling of July 14, 1982, the court explicitly found that based upon the voluntary change of residence of the minor child by the natural mother, grandmother, and reservation, the domicile of the minor child was with the petitioners. The court further found in view of that fact and the long period of time the child had been with the petitioners, that there was "good cause" for the court to take jurisdiction of the case.

The argument advanced by the Navajo Tribe is deceptive and has been made throughout the proceedings. 25 U.S.C § 1911 is divided into two subparts, (a) and (b). Subsection (a) states that the Indian tribe has exclusive jurisdiction when the child resides or is domiciled within the reservation. However, subsection (b), clearly provides that when the child is not domiciled or residing within the reservation, that the state court has jurisdiction. Based upon the finding that the child was not domiciled or residing within the reservation, Judge Sam made his finding that the state court had jurisdiction to hear the matter.

A review of the legislative history of the ICWA leads to the clear conclusion that the Act contemplates adjudication of Indian adoptive matters by state courts, and that such court adjudication

comports fully with the purposes of the Act. The house report on H.R. 12533, which became the ICWA of 1978, stressed that the purpose of the bill was to provide "minimal safeguards with respect to state proceedings for Indian child custody," and to "impose certain procedural burdens upon state courts in order to protect the substantive rights of Indian children, Indian parents, and Indian tribes in state court proceedings for child custody." 1978 U.S. Code Congressional and Administrative News, pp. 7540-41 (emphasis added). In response to concerns raised by the Department of Justice that the bill may have impermissibly intruded into areas of traditional state interest, the House reports:

. . . the provisions of the Bill do not oust the state from the exercise of its legitimate police powers in regulating domestic relations. . . .

While the committee does not feel that it is necessary or desireable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum federal standards and procedural safeguards in the State Indian child proceedings. . . . Id.

The report also emphasized the "duty of state courts, otherwise having jurisdiction over the subject matter, to enforce federal substantive rights," Id., at 7541; see also, 7535.

During House debate on the act, Representative Udall, who sponsored the Bill, also indicated that the Act "establishes minimum federal standards and procedural safeguards to protect Indian families when faced with child custody proceedings against them in state agencies or courts." Congressional Record, Vol. 124, part 28, p. 38102. In response to concerns raised by the Justice Department regarding the apparent intrusion into the state's authority to adjudicate domestic matters, Representative Udall continued:

. . . where an Indian child is residing or domiciled off an Indian reservation, the State has full jurisdiction over the child in a custody proceeding, including the power to remove the child from the parents on an emergency basis to protect to the child. Id., at 38107, (emphasis added). See also, 38107; Congressional Record, Vol. 123, part 29 p. 37226 Senate Debated.

POINT II

THE MINOR CHILD, MICHAEL CARTER,
WAS DOMICILED WITH THE PETITIONERS
IN UTAH.

There can be no question that the general rule is that a child born out of wedlock takes the domicile of the mother with whom it lives. Application of Morse, 7 Utah 2d 312, 324 P.2d 773, 775 (1958); Restatement (Second) of Conflict of Laws, § 22, Comment C (1971). In analyzing the issue of domicile, it must be understood that the ICWA does not dictate the definition of

"domicile," but leaves that issue for the state courts to determine based upon the law of the jurisdiction. According to the guidelines published by the Department of the Interior's Bureau of Indian Affairs, many commentators recommend that the Act include a uniform definition of residence and domicile. That recommendation, however, was rejected. The guidelines to the ICWA state as follows:

Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine, in any way, the purposes of the Act. Recommending special definitions for the purposes of this Act alone would simply provide unnecessary complications in the law.

44 Fed. Reg. 67583, 67585 (1979).

The problem with the law cited by the appellant is that the trial court was not dealing with a case in which the domicile of an illegitimate child was to be considered. The trial court was dealing with a case in which the mother in March of 1980, allowed her child to be taken from the reservation and placed with the petitioners for adoption. After relinquishing physical custody of the child in March of 1980, with the intent to deprive herself permanently thereof, she traveled to Utah on May 30, 1980, and gave her written voluntary consent to the adoption. It was not until April 30, 1982, that the natural mother signed an Affidavit and Revocation of the Consent to Adoption. (R. 15). Thus, for a

period exceeding two years, it was the intent of the natural mother to give the young child up for adoption.

When, as in the present case, the child has been abandoned by both parents, the Restatement says that if "no guardian of the child's person is appointed, the child shall acquire the domicile at the home of a grandparent or other person who stands in loco parentis to him and with whom he lives." Restatement (Second) of Conflict of Law, § 22, Comment i (1969) (emphasis added). The Comment continues: "The child should therefore have a domicile at the home of the person who stands in loco parentis to him and with whom he lives even though this person is not a blood relative."

The decisions of this State are in accord. In one such case, the Court held that the appellant, though not a blood relative, appeared to have assumed the status of a person in loco parentis. The case was remanded to the trial court for a hearing to determine whether the appellant was in loco parentis. Gribble v. Gribble, 583 P.2d 64 (Utah 1978). The Court stated:

The term "in loco parentis" means in the place of a parent, and a "person in loco parentis" is one who has assumed the status and obligations of a parent without formal adoption. Whether or not one assumes this status depends on whether that person intends to assume that obligation.

Gribble, 583 P.2d at 66 (emphasis in the original). Although the Carters did not formally adopt Jeremiah from March of 1980 to the time the consent of the natural mother was revoked in April of 1982, there was no question that all of the parties assumed in March of 1980, that the Carters would stand in the position of "loco parentis" to the child. It was for that purpose that the child was transported to Utah. It was the clear understanding of all parties in the case. The trial court granted the Carters temporary custody of the minor child on July 14, 1982. (R. 35).

The Restatement, suggests a second way by which Jeremiah's domicile may have shifted off the reservation. Comment "f" of § 22 states that an "emancipated child may acquire a domicile of choice, irrespective of his parent's domicile." With regard to how a child who has yet to reach his majority becomes emancipated, the Comment states:

[T]he majority [of states] insist upon no more than that the minor, having obtained years of discretion, maintain a separate way of life, either with his parent's consent or because they are dead or have abandoned him.

In Hall v. Anderson, 562 P.2d 1250 (Utah 1977), the Court held that to find abandonment, it is not necessary to show that the parent has affirmatively abandoned, but rather, in most cases it can be better determined from the parents' actions than from the words.

In Wilson v. Peirce, 14 Utah 2d 317, 383 P.2d 925 (1963), the Court held that where parents exhibit an intent to completely and permanently abandon a child, it matters not whether the parent has left the child with others who may be expected to care for the child or whether it is left to mere chance of whatever fate might follow it.

Similarly, in Robertson v. Hutchinson, 560 P.2d 1110 (Utah 1977), the Court found that the natural parent had abandoned the child so as to permit adoption of the child without consent of natural parent where it was shown upon clear and convincing evidence that the natural parent had either expressed an intention, or so conducted himself as to clearly indicate an intention, to relinquish parental control and reject parental responsibilities to the child. Completely in line with the case law applicable to the matter, Judge Sam in his ruling of July 14, 1982, Exhibit "A" hereto, (R. 35), found that the domicile of the minor child was that of the petitioners and based that finding upon the fact that the child's residence was voluntarily and purposefully removed from the mother, grandmother and reservation to the petitioners.

One of the key cases discussing the issue In the Matter of Dureya, 115 Arizona 86, 563 P.2d 885 (1977). In that case, three petitions for termination of the parent-child relationship

were filed and concerned three American Indian children who were enrolled with the White Mountain Apache Tribe. The natural parents of the children were White Mountain Apaches and they moved to dismiss the petition on the basis that the State Juvenile Court had no subject matter jurisdiction. The juvenile court did dismiss the petitions and entered an order which found that the Tribe had at least concurrent if not sole jurisdiction. The petitioners appealed.

The Supreme Court, on appeal, found that one of the Indian children was placed by his unwed mother with the petitioners when he was six weeks old. The Court found that his mother who wished to return to school, brought him off the reservation to Lakeside, Arizona, where petitioners lived. At the time of the hearing the child was four and a half years old and had lived continuously with the petitioners since May of 1972, and had seen his natural mother only once during that time.

Another one of the children was placed with the petitioners in September of 1969, by an elderly missionary woman.

The third child was placed with petitioners by a worker from a social agency in Arizona where both of her parents were jailed there. A few months after the natural parents were released, they visited the child in Lakeside and at one time, took the child back with them for a short while, but returned the child to

petitioners in January of 1981. That child had resided with the petitioners for approximately six years.

All three children had subsequently moved with the petitioners to Tucson, Arizona. The court on appeal stated explicitly that the State of Arizona had a very substantial interest in all of the children and found that the juvenile court erred in failing to take jurisdiction in the proceeding. Matter of Dureya, supra., at 887.

Another important case on the issue is that of In Re Cantrell, 159 Mont. 66, 495 P.2d 179 (1972). In that case, the order of the district court in awarding the custody and care of a child on the basis of abandonment was affirmed by the supreme court. The court found that the natural father at the time the order was made was charged in justice court for willful neglect and that the child was abandoned and helpless in Valley County, not on the Indian reservation. The court found the father had been abusive, and that the mother had the child taken from her by order of the Tribal Court for parental neglect. The court concluded that the child had been abandoned. The court explicitly stated:

However, the "fact" of neglect, that of abandonment of a helpless infant, occurred off the reservation and continued for over a year off the reservation. The mother's only effort, to all practical purposes, was to remain in the sanctuary of the reservation

oblivious to the needs of her child. This fact alone removes the case from the heretofore cited Indian jurisdiction case.

In Re Cantrell, at 182.

Many cases, while acknowledging a minor has the same domicile as the parent with whom the child lives, have stated that the domicile of the child who is the ward of the court is domiciled at the location of the court. Betts v. Betts, 3 Wash. App. 53, 58, 473 P.2d 403 (1970). Accord, Restatement (Second) of Conflict of Law, § 22 (1971).

Another similar case is In the Adoption of John Doe, 89 New Mexico 606, 555 P.2d 906 (1976). In that case, the mother of a child, Navajo, placed the child voluntarily with the adoption agency. The petitioners were non-Indians and were challenged by the child's father, grandfather, and as amicus curiae, the association on American Indian Affairs, Inc. That Association challenged the jurisdiction of the New Mexico Court. The Court replied:

The Association claims that the Navajo Nation has exclusive jurisdiction to determine the permanent custody of its minor members. Decisions concerning such a jurisdictional claim are based on cases where the child was a resident of or domiciled on an Indian reservation. Fisher v. District Court, 424 U.S. 382, 96 Sup. Ct. 943; Wisconsin Potowatomies, etc. v. Houston, 393 F.Supp. 719 (BC Mich. 1973); Wakefield v. Littlewhite, 276 Maryland 333, 347 A.2d 228 (1975). The record does not show that a child either

resided or was domiciled on the Navajo reservation . . . whatever concurrent jurisdiction the courts of the Navajo Nation might have, New Mexico has an interest in the welfare of a child who was in New Mexico and not within the boundary of the reservation. [citations omitted].

Adoption of Doe, at 916-917. See also, DeCoteau v. District County Court for the Tenth Judicial District, 420 U.S. 425, 95 Sup. Ct. 1082 (1975), reh. denied, 421 U.S. 939 (1975); Application In the Matter of Montoya, 85 N.M 356, 512 P.2d 384, (1973); Uppen v. Superior Court, 116 Ariz. 81 567, P.2d 12 (1977).

Although the cases cited above were decided before the passage of ICWA, all that were decided on the basis of whether or not the Indian children were domiciled on the reservation. The state court's determination of domicile would be the same whether or not the ICWA had been enacted.

One final matter should be noted. Utah Code Ann. § 78-3-48 (1975 as amended) states in pertinent part as follows:

The court may decree an involuntary termination of all parental rights with respect to one or both parents if the Court finds either (a), (b), or (c) as follows . . .

(b) that the parent or parents have abandoned the child. It shall be prima facie evidence of abandonment that the parent or parents, although having legal custody of the child, have surrendered physical custody of the child and for a period of six months following such surrender, have not manifested to the child or the person having the physical custody of the child, the firm intention to

resume physical custody or to make arrangements for the care of the child; . . .

In this case, the court explicitly found that the natural mother and family had abandoned the child as stated in paragraph 4 of the court's ruling of October 6, 1983, as attached in the Appendix as Exhibit "B." Having made that determination, the sections of the Restatement are applicable in allowing the finding that the petitioners stand in loco parentis to the child which finding was made by the trial court in its ruling awarding temporary custody of the minor child with the petitioners on July 14, 1982.

The leading definition of abandonment for purposes of termination of parental rights is the following from Summers Children v. Welffenstein, 560 P.2d 331, 334 (Utah 1977):

Whether or not there has been abandonment within the meaning of the statute is to be determined objectively taken into account not only the verbal expressions of the natural parents but their conduct as parents as well
. . . .

Abandonment consists of conduct on the part of a parent which implies a conscious disregard of the obligations owed by a parent to the child leading to the destruction of the parent-child relationship.

Abandonment may also be proved in a subjective term, as where, the "parent has either expressed and intentioned, or so conducted himself as to clearly indicate an intention to relinquish parental rights and reject parental responsibilities to his child.

McKinstry v. McKinstry, 629 P.2d 1286, 1288
(1981) (quoting Robertson v. Hutchinson, 560
P.2d 1110, 1112 (Utah 1977)).

The law in Utah clearly gives the trial court jurisdiction to find the natural parent give up parental rights to the child in March of 1980, intending that the child was to be adopted. Coupled with the applicable case law in the State of Utah, the court found that the domicile of the minor child changed to that of petitioners and accordingly, found it had jurisdiction to decide the adoption matter.

POINT III

THE DISTRICT COURT DID NOT ERR WHEN
IT FOUND THAT REMEDIAL AND REHABILI-
TATIVE SERVICES HAD BEEN PROVIDED
TO THE MOTHER AND PROVED
UNSUCCESSFUL.

25 U.S.C § 1912, sets out the requirements that must be established before a child within the jurisdiction of the ICWA may be placed for foster care or for adoption. Subsection (b) of that section provides as follows:

Any party seeking to effect the 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 break-up of the Indian family and that those efforts have proved unsuccessful.

In the court's decision dated January 28, 1985, the court spent considerable time dealing with the issue of rehabilitative

services. (R. 581-583, Exhibit "C" in the Appendix). In the court's ruling, the relevant facts are recited. The court noted that the natural mother had transferred the care of the child to the child's Indian grandmother after the initial six month period. The court found that the transfer was made because the step-father was apparently abusing Jeremiah and did not like the child because it was not his natural son. The court noted that the step-father was not going to bother with the child and would not care for or support Jeremiah and would not give the child the normal love that a father would give a child.

Of the large family that Cecelia Saunders had, the court noted that there was only one sister who would take the child and she was determined not to be fit. As noted by the court, the important testimony concerning the frustrated rehabilitation in the case came from Miss Ella Shirley, a social worker on the reservation. Although the extended Indian family was discussed the record clearly indicated the unsuitability of all the extended family. The social worker testified the child would simply be placed for adoption with another Navajo family. The social worker admitted, based upon those facts, that rehabilitation with the natural family would have been discontinued and the child placed with another Navajo family. The social worker agreed from the notes of the case worker that the natural mother had

vacillated continually between wanting the child back and not wanting the child.

Another social worker testified that the referral to the social agencies was because Jeremiah was neglected. The social worker stated that they were interested in taking the child, but after doing a thorough investigation of the sisters, they decided that placement with those relatives would not work. (Tr. II, p. 120, Exhibit "C" in the Appendix).

The most important illustration of the failure of any type of rehabilitation of the natural mother and her family comes from the notes of the social agencies working with the family. Attached to this Brief as Exhibit "B" are two pages of a social worker's notes introduced as an Exhibit at trial. Particular attention is drawn to the note of June 7, 1983. At that time, both parties were looking for experts to testify in the case. The notes for June 7, 1983, reveals the following with regard to the willingness of experts retained by the Navajo Nation to testify as to the stability of the Saunder's home:

Worker met with Dr. Thomas and Dr. Mellor on possibilities of providing evaluation of the family (Saunders). Both Dr's. were reluctant to testify in court of the stability of the Saunders family. They felt that it would be unfair on behalf of the family and not be able to express what may developed later, as a result of Cecelia's family history. Both Dr's. do not want to testify in court, they feel that this type of situation is not good

for their profession. I asked for names of other possible contacts. The worker will look into these contacts. (Emphasis added).

(R. 122-123).

Attached in the Brief as Exhibit "F" is a summary of the Tribal Records which were prepared from the social worker's notes themselves. The summary clearly indicates that Cecelia had been deceptive with the social agencies, that the family had a large amount of problems in dealing with their off-spring and certainly that the trial court's finding that rehabilitation efforts with Cecelia had been unsuccessful was justified. (R. 120-148, R. 494-505).

POINT IV

THE DISTRICT COURT DID NOT ERR BY
DENYING FULL FAITH AND CREDIT TO
THE ORDER OF THE NAVAJO TRIBAL
COURT.

It is important to understand the chronology of the case as it relates to this particular point. As indicated in the Statement of Facts, the Petition for Adoption was filed on May 29, 1980. (R. 2-4). The Navajo Nation's Motion to Dismiss and Transfer Jurisdiction was filed on May 11, 1982. (R. 12-15). The trial court's first decision in the case came on July 14, 1982, after extensive briefing and argument by counsel for the respective sides. (R. 35). The court took evidence on the domicile issue which was reserved in the court's ruling, on April

7, 1983, (R. 92-94), and rendered its decision and order on October 6, 1983. (R. 181-184). The court expressly reserved in the order dated October 6, 1983, the issue of whether or not there was sufficient basis to terminate the parental rights of the natural mother. After the entry of that order, both sides prepared for trial on the termination issue. It is at that juncture that the Navajo Nation apparently filed in the District Court of the Navajo Nation in Windowrock District, Windowrock, Arizona, a motion to invalidate the State action and for permanent custody. The motion is dated August 11, 1984, but was not filed with the District Court of Utah until September 7, 1985. (R. 198-374).

The Navajo Nation obtained an order from the District Court of the Navajo Nation in Windowrock, Arizona, based upon their motion on September 7, 1985. (R. 375-376). The return filed in the case indicates that the Carters were served with the order and motion on the 17th of August, 1984. (R. 377). The trial on the final elements of the case conducted on October 22 and 23, 1984.

The argument of the appellants that after litigating in the Utah Courts from 1980 to 1984, the District Court in Utah should simply dismiss the case and allow the Navajo Nation to go forward in the tribal court when the first filings made in tribal court

occurred over three years into the litigation conducted in the State of Utah. Needless to say, the contention of the Navajo Nation that the District Court was required by the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution of the Navajo order the full faith and credit is incredible.

Article IV, Section 1 of the United States Constitution provides that "Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." In light of the fact that the issues of jurisdiction and domicile were properly decided by the lower court some eighteen months prior to the filing of the motion with the Navajo court, the Utah court's ruling on the basis of untimeliness was wholly proper. Furthermore, regardless of the timing of the motion, an examination of the language and legislative history of the ICWA indicates that no violation of the Act occurred. 25 U.S.C 1911 (d), of the ICWA states:

The United States [and] every state . . . shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

The clear import of this language is that states are required to give the same full faith and credit to Indian tribal court

orders and custody matters that they would to court orders of a sister state. This, apparently, was in response to conflicting state court rulings as to whether Indian laws and judicial orders were entitled to full faith and credit (e.g., compared Jim v. CIT Financial Services Corporation, 86 N.M. 784, 527 P.2d 1222 (1974) and In Re Adoption of Beuhl, 87 Wash. 2d 647, 555 P.2d 1334 (1976), with Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 571 P.2d 689 (Ariz. App., 1977) and Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950), or were only entitled to the same deference of decisions of foreign nations, as a matter of comity. Matter of Marriage of Fox, 23 Ore. App. 393, 542 P.2d 918 (1975).

The language contained in 25 U.S.C. 1911 (d) was proposed in H.R. 12533, the Bill which became the ICWA. H.R. 12533 was a rewriting of an earlier senate Bill, S.1214. 1978 U.S. Code Congressional Administrative News, pp. 7530, 7564. The version of this section contained in S.1214 (section 105), stated:

In any child placement proceeding within the scope of this Act . . . every state . . . shall give full faith and credit to the laws of any Indian tribe applicable to a proceeding under the Act and to any tribal court orders relating to the custody of a child who is the subject of such a proceeding.

Congressional Record, Vol. 123, part 29, p. 37225. Thus, the earlier language which would have required each state to give full faith and credit, apparently across the board, to any tribal

court orders regarding Indian child custody, was changed to indicate that tribal court orders are entitled to the same full faith and credit as orders from other states' courts, but not obtain a higher status so as to enable them to override the judgments and orders of state courts. See also, Note, The Indian Child Welfare Act of 1978: Provisions and Policy," 25 S.D. Law Review 98, 104, n. 49 (1980).

The pertinent question thus becomes to what degree a state court before which the issue of personal jurisdiction has been fully litigated, and the ruling entered thereon, must then give full faith and credit to a long-subsequent ruling of another state in effect reversing the first state's ruling and denying jurisdiction to that state. Clearly, the full faith and credit clause would not require the court of the first state to defer to a contrary ruling of another state's court, and such a scenario, as well as the Navajo Nations' reading of the ICWA in this regard, would violate the general rule, that where a question of jurisdiction has been fully litigated in the first court, the issue may not be relitigated by collateral attack in state or federal courts in another state, e.g. Fidelity Standard Life Insurance Co. v. First National Bank & Trust Co. of Vadalia, 382 F. Supp. 956 (D.C. Georgia, 1974), aff'd., 510 F.2d 272 (5th Cir., 1975), cert. den. 423 U.S. 864, 96 Sup. Ct. 125 (1975), Johnson v.

McDole, 394 F. Supp. 1197 (D.C. La. 1975), app. dism., 526 F.2d 710 (5th Cir. 1976).

As to the power of a state to exercise jurisdiction to determine custody of a child present in the state:

A state has power to exercise judicial jurisdiction to determine the custody, or to appoint a guardian, of a person of a child or adult.

- a) who is domiciled in the state, or
- b) who is present in the state or,
- c) who is neither domiciled nor present in the state, if the controversy is between two or more persons who are personally subject to the jurisdiction of the state.

Restatement (Second) Conflict of Laws, § 79. In this matter, the State District Court of Utah properly exercised its jurisdiction over a minor whom it determined to be a resident and domiciled within the state. It is respectfully submitted that the holding of the trial court was not at variance with 25 U.S.C. 1911 (a), which pertains to tribal court jurisdiction over Indian children residing or domiciled within reservations. The Utah court clearly would not have been required to relinquish jurisdiction based upon the court order of a sister state entered after the jurisdictional issue had already been litigated, and under the terms of 25 U.S.C. 1911 (d), was not required to do so in light of the tribal court order. If the State court found that the tribal

court's jurisdiction over the matter was not exclusive, it had no obligation to give full faith and credit to any ruling to the contrary. State v. Baldwin, 305 A.2d 555 (Me. 1973). The mere fact that the tribal court declared itself to have exclusive jurisdiction (especially subsequent to the state court's ruling) does not require the state court to follow such a declaration.

Full Faith and Credit Clause of the United States Constitution does not prohibit a state from exercising jurisdiction in a transitory cause of action even though a sister state has provided that action and the particular claim shall not be brought outside its territory.

Cain v. Cain, 646 P.2d 505, 506 (Mont. 1982).

POINT V

THE DECISION OF THE DISTRICT COURT
TERMINATING THE PARENTAL RIGHTS OF
CECELIA SAUNDERS WAS PROPER.

In evaluating whether or not the trial court properly terminated the parental rights of the natural mother, reference must be made to the ICWA itself. 25 U.S.C § 1912 deals with the burdens that must be met by petitioners in an involuntary proceeding before the parental rights of a natural parent may be terminated. Subsection (c) requires that all reports or other documents filed with the court are to be available to each party to a foster care placement or termination of parental rights proceeding. Section (d) of § 1912 requires a party seeking to

affect the termination of parental rights to satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and further prove that those efforts have been unsuccessful. That point has been addressed above. Additionally, Section (f) of § 1912 provides as follows:

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.

25 U.S.C. § 1912(f). In Point VI of the appellant's Brief, the argument is made that before the parental rights of Cecelia Saunders could be terminated, there must be a finding by the trial court that she was unfit. However, the ICWA in the Section set out above, do not require a finding of unfitness. The appropriate sections clearly require there be proof in the proceedings supported by evidence beyond a reasonable doubt, including testimony of a qualified 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. After that test has been met, it is the burden of the petitioners to meet the tests applicable within the State of Utah.

The argument of the Navajo Tribe is totally inapplicable to the facts of this case because parental unfitness, besides not being required by the ICWA, is not required in Utah before a court can terminate the rights of a natural parent. Utah Code Ann. § 78-38-48 states in pertinent part as follows:

The court may decree an involuntary termination of all parental rights with respect to one or both parents if the court finds either (a), (b), (c) or (d) as follows: . . .

(b) that the parent or parents have abandoned the child. It is prima facie evidence of abandonment that the parent or parents, although having legal custody of the child, have surrendered physical custody of the child, and for a period of six months following the surrender have not manifested to the child or to the person having physical custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child. . . .

It is also interesting to note that the Utah Legislature has amended Utah Code Ann. § 78-38-48(a). Prior to its amendment in 1985, the Code Section listed a number of different conditions under which the court could consider the child's best interest. Subsection (a) now provides:

That the parent or parents are unfit or incompetent by reason of conduct or condition which is seriously detrimental to the child.

. . . .

In this particular case, the court found the requisites of both Subsections (a) and (b). The trial court explicitly found that the natural mother, Cecelia Saunders, abandoned the child. Having made that determination, the court was then free to examine whether or not there was evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the child.

The records of the social records of the Navajo Tribe, attached in the Appendix as Exhibit "E", clearly establish that Cecelia Saunders tried for a number of months to hide the fact that the child had been given for adoption by stating that the child was only on temporary placement. There is no question that the child was abandoned for a period far in excess of six months and further the evidence is uncontroverted that for a period of six months after the child was given to the Carters, there was not attempt or expression of intention on behalf of the natural mother to resume custody and control of the minor child. Thus, inasmuch as abandonment, on an individual basis under the termination statute, has been proven to the trial court, there was absolutely no need to establish a separate basis of "unfitness" of the natural mother.

This Court has ruled on the particular question of whether or not anything but abandonment must be shown in order to terminate parental rights. In a recent decision In Re J.P., 648 P.2d 1364 (Utah 1982), the Court was faced with a similar question. In that case, the facts are as follows. On May 20, 1980, the Division of Family Services filed a petition with the juvenile court asking that the parental rights of the natural mother of J.P. be terminated. The mother filed a motion to dismiss the petition stating that the statute was unconstitutional. The lower court granted the mother's motion to dismiss on the constitutional issues and the DFS appeal.

In analyzing whether or not the statute was unconstitutional, the Court started with an analysis of the law prior to the legislative change. The Court noted that the first statutory law after statehood allowed a mother and father to prevent the adoption of their child unless the parent was adjudged guilty of desertion. In Re J.P., supra., at 1366, see also, R.F. Utah, 1898 § 4.

The Supreme Court then noted that the current Adoption Statutes, Utah Code Ann. § 78-30-4, § 78-30-5 (1953 as amended), permit the adoption without a natural parent's consent if the parent "has been judicially deprived of the custody of the child

on account of cruelty, neglect, or desertion, or has abandoned the child." See In Re. J.P., at 1367.

The Court then noted that the Juvenile Court Act of 1965 empowered the juvenile court to terminate the rights of a natural parent who was either unfit or incompetent, or had abandoned the child. See Utah Code Ann. § 78-38-48 (1953) Chapter 40, 1980 Utah Laws. As summarized by Justice Oaks in the decision in In Re J.P.:

As in the Adoption Statute, the rights of parents were respected [referring to prior laws in Utah]: No parent could be deprived of his or her parental rights without a prior showing of unfitness, abandonment, or a substantial neglect. So long as a parent's conduct remains within those broad bounds, the court was not empowered to terminate the parent-child relationship. (Emphasis added.)

In Re J.P., at 1367. In that regard, the Court noted that it had always been willing to uphold the termination of parental rights upon a proper showing of abandonment or failure to support. See Adoption of McKinstry v. McKinstry, 628 P.2d 1286 (Utah 1981); In Re J.P., at supra., at 1367; State In Re Orgill v. Thompson, 636 P.2d 1075 (Utah 1981). In all of those cases, the Supreme Court upheld an adoption where the father had not provided support or contacted the child for a period of time and also in the case in which a mother who had not contacted the children was deemed to have abandoned them.

In conclusion, Justice Oaks stated in the J.P. decision as follows:

We do not suggest that the Constitution relegates a child to the status of a mere chattel, to be treated or mistreated by his or her parents according to their pleasure. Consistent with all the principles discussed above, a parent shown by clear and convincing evidence to be unfit, abandoning, or substantially neglectful, can be permanently deprived of all parental rights. [citing cases].

In Re J.P., supra, at 1377.

So that there is no question as to what constitutes abandonment, reference must be made to Sommers Children v. Welffenstein, 560 P.2d 331, 334 (Utah 1977):

Whether or not there has been abandonment within the meaning of the Statute is to be determined objectively, taking into account not only the verbal expressions of the natural parents, but their conduct as parents as well . . . abandonment consists of conduct on the part of the parent which implies a conscious disregard of the obligations owed by a parent to the child, leading the destruction of the parent-child relationship.

Id. at 1159. Justice Oaks writing that decision, then stated:

Abandonment may also be proved in subjective terms as where "the parent has either expressed an intention or so conducted himself as to clearly indicate an intention to relinquish rights and reject parental responsibilities to the child. [citing cases]."

Id., at 1159.

As it relates to the evidence actually introduced at trial, the petitioners called numerous witnesses. Linda Coray, Lynn F. Coray, Virginia Lewis, and Kathleen A. Orton all testified relative to the relationship between Michael Carter and his parents, Dan and Pat Carter. The evidence of the strong relationship between Michael Carter and his parents was uncontroverted. All of the witnesses testified as to the devastating effects by the change of the child's custody to some individual located on the Reservation would cause. Also for the petitioners was allowed to proffer the evidence of the petitioners Mr. Dan Carter and Mrs. Patricia Carter. Also, the testimony of Chad Carter and Mr. A. G. Hawkins was proffered to the court in the proffer, was accepted by court and counsel.

As it related to the expert testimony, the petitioners presented almost all of the expert testimony that the Court heard. The first expert called was Paul Stephen Buckingham who received his Bachelors in Science and Psychology from Brigham Young University in 1972, and received a Masters of Social Work from the University of Utah in 1974. The Masters Degree he obtained was in social work. Mr. Buckingham was employed by the LDS Social Services in the capacity of a clinical worker.

Mr. Buckingham's experience included employment between 1974 and 1976 as a bilingual psychiatric social worker for the Spanish

speaking population in Weber County and also was the director of programs for Weber County Mental Health in the Spanish speaking unit. Mr. Buckingham related to the court how he was employed by the LDS Social Services as a case worker in the Indian Placement Program in which Navajo children were placed for the scholastics school year on a voluntary basis. Mr. Buckingham was directly involved with the placement of Navajo children for two years and during that time would meet on a monthly basis with children to assess their progress in school and their adjustments and feelings about the home that they were in. (Tr. III 59-61).

Mr. Buckingham interviewed the petitioners and Michael Carter. He found no signs of depression or identity crisis. (Tr. III, p. 65). He found the family (Dan, Pat and Michael) close and to be extremely bonded. (Tr. III, p. 68). Mr. Buckingham found that to return the child to the Reservation would cause, at worse, "tremendous psychological damage, emotional damage, from the fact that he had been taken from the home that he loved and bonded to and put in a home where there was a very lost [sic] potential at the very least for neglect and at the very most a physical abuse" (Tr. III, at 77). In light of Mr. Buckingham experience and training, he certainly was a competent expert witness to testify on the issues raised by the ICWA. In the

Matter of K.A.B.E and K. B. E., 325 N.W. 2d 840 (S.D. 1982); In Re The Welfare of Fisher, 643 P.2d 887 (Wash. App. 1982).

The next expert who testified was Dr. Robert M. Crist. Dr. Robert M. Crist attended the University of Utah Medical School in 1962. He completed a rotating internship at the Holy Cross Hospital from July 1, 1962 to June 30, 1963. Dr. Crist completed a psychiatric residency at the University of California at Los Angeles from July 1, 1963 to June 30, 1966. Dr. Crist has been involved in the private practice of psychiatry from July 1, 1966 to the present. Dr. Crist testified at trial relative to his qualifications. (Tr. III, pp. 126-128). Dr. Crist talked with Dan and Pat Carter and also the minor child and also performed an evaluation that was necessary to render a psychiatric opinion in the case. (Tr. III, p. 129). For stating the opinion rendered by Dr. Crist, it is important to note that Dr. Crist experience included several post concerned with the issue of integration into the anglo-American culture by minority groups. (Tr. III, pp. 129-120).

Dr. Crist testified that the Carters were a stable couple and that they were eager to provide a home for the child, and that the nurture and stimulation provided by them was more than most couple were capable of. (Tr. III, pp. 131-132). In addressing the question of what impact the taking of the child

from the Carter home back to the Reservation would cause, Dr. Crist stated as follows:

I think the likelihood of that [serious emotional damage] is very great that you would be rupturing the child-parent bond which is one of the primary necessary developments in young people and children. He would be placing him in a new strange environment for him. . . .

(Tr. III, p. 135). Dr. Crist testified that the damage would be irreparable. (Tr. III, pp. 135-136).

Dr. Robert J. Howell then testified for the petitioners. A copy of Dr. Howell's report is marked as Exhibit 2 to the trial. Without restating all that is contained in the Exhibit, Dr. Howell has received his Ph.D and is a diplomat in clinical psychology, clinical hypnosis, and forensic psychology. His professional experience includes that of a Full Professor of Psychology, Senior Psychologist at the Utah State Hospital, Consultant Senior Psychologist and Supervisor of Diagnostic Training at the Utah State Hospital; Research Specialist, Center for Training in Community Psychologist, Los Angeles, and many other professional appointments. Additionally, Dr. Howell has published a extensively as is outlined in Exhibit 2 to the trial.

Dr. Howell, after hours of work and after interviewing the Carters, the child, and also the natural mother rendered a fourteen page report to the court which is attached in the

Appendix as Exhibit "F." After the workup that he performed, Dr. Howell performed a professional opinion as the effects removing the child from his present circumstances:

It is my opinion that the probability of the emotional damage taken place which would result from removing Michael from the Carter home, for out weighs the potential conflict as to Michael's not having a clear identity of himself as an Indian, and yet, also knowing he is not a caucasian. It is my belief that the probability of emotional damage is at a very high level certainty -- beyond a reasonable doubt.

Specifically, Dr. Howell's findings were as follows:

1. Michael is a bright youngster who has no memory of his life; for two years and ten months on the reservation.

2. Michael is well adjusted in the home that he is now in and sees Mr. and Mrs. Carter as his parents. In my opinion, the Carters are his psychological parents.

3. It is my opinion that Michael will be emotionally damaged by taking him out of the home. The nearly five years that he has spent with the Carters, especially when considering the early age that he came with them, clearly speaks to be important to his continuing to live with them.

4. I agree with Dr. Roll that efforts should be made to inculcate in Michael in appreciation for his heritage and I see no reason why contact could not be effected between Cecelia Saunders and Michael.

5. I could not find any evidence that Michael was depressed, if he was depressed when Dr. Rolls saw him, it is likely that this is reaction to his fears that he would

be taken away from the Carters. He told his school teacher, Paula Fair, that he was going to see a man to determine if he could keep living with the Carters.

(Exhibit 3 to trial, Exhibit "F" in the Appendix).

In addition to the testimony of the experts regarding the effect of removing the child from petitioners' home, there is extensive testimony relative to the fitness of the Indian custodian which has been set out in this Brief and is particularly identified in the Summary of the Tribal Records, Exhibit "E" in the Appendix.

In the Matter of J.H.L & P.L.L.H., 360 N.W. 2d 350 (S.D. 1982), the court found that evidence of conduct of not only the natural parents but also "other persons in and about the residence: may support a trial court's finding that severe emotional or physical damage would be likely if the child were returned to the natural parents. Id., at 651. In the present case, the record indicates that the child's grandmother and other members of the extended family are alcoholics (Tr. II, pp. 23-25, 30); the natural mother's husband did not like the child nor did he want them in the marital relationship (Tr. II, pp. 21-23); the natural mother willing gave up the child for adoption (Tr. II, p. 31) and only revoked her consent to adoption after the Navajo Tribe indicated its disapproval of the adoption. There is also testimony, although not uncontroverted, that the mother revoked

her consent only after being subject to duress by the Navajo Nation. (Tr. II, pp. 60-62).

An Arizona court has held that an Indian mother who revokes or relinquishes her parental rights is entitled to a return of the child in the absence of evidence of her fitness of a parent or any attempt to preserve the parent-child relationship. In the Matter of Appeal in Pima County, 635 P.2d 187 (Ariz. App. 1981). In that case, the court almost seemed to belittle the adoptive parents' argument that the return of the child would be emotionally traumatic:

Any potential emotional trauma to the child if the contemplated adoption is aborted was ingenerated by the conduct of the adoptive parents not adhering to the mandates of the Act.

Id., at 193.

The relevant facts in the present case are quite different and distinguishable from the case cited above. In that case, the adoptive parents had custody of the child for only about four months before the natural mother revoked her relinquishment. At the case at bar, the petitioners had custody of the child for a full two years before there was indication that the natural mother would revoke her consent to adoption. At that time the child has already developed emotional and psychological bonds with the petitioners and it would be unfair to punish the child

because the adoptive parents did not send him off to the reservation immediately upon hearing that the biological mother had changed her mind.

It is respectfully submitted that the trial court acted proper in all respects in terminating the parental rights of the natural mother.

CONCLUSION

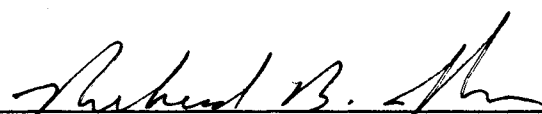
It is respectfully submitted that the litigation which has embroiled this young child should be brought to an end. There is simply no justification after hearing the testimony relative to the bonding of the child with his adoptive parents to continue this matter any further. The testimony at trial was uncontroverted that the child does not have any memory whatsoever of his life on the reservation; could not even recognize his Indian mother and had no desire for anything but to know that he was secure in his home with the Carters. The litigation relative to this child started in 1980, was escalated by the filing of motions in 1982, and finally came to some conclusion that result in the granting of the petition of adoption on February 4, 1985. The child has been sealed, ecclesiastically, to the Carters in the LDS Church. After that significant event occurred in their lives, the Navajo Nation filed suit against Judge David Sam, the Fourth District Court, and the Carters not only seeking to invalidate the

State Court proceeding, but seeking damages against the Carters. In essence, it was not sufficient for the Navajo Nation to continue to invade the child's security in addition to the thousands of dollars that the Carters have spent in defending their right to maintain a relationship with the child, the Navajo Nation wanted the Court to impose damages against them. A copy of Judge J. Thomas Greens' decision in Federal Court dismissing the lawsuit is attached in the Appendix as Exhibit "G."

When all is said and done, the Court has before it the future of a young boy who is totally innocent to the circumstances around him. One would think that a child whose character and personality is so dear to his parents and those persons who have known him should have the right to a few years of pleasant adolescence in which he is secure in his home and in his parents.

It is respectfully submitted that the trial court acted properly, that the petition for adoption was properly granted, and that the appeal of the Navajo Nation should be dismissed and the trial court affirmed.

DATED this 24 day of October, 1985.

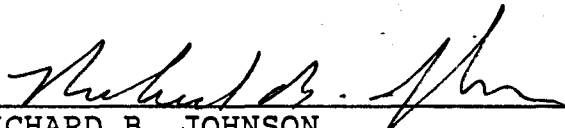


RICHARD B. JOHNSON, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served four true and correct copies of the foregoing Brief of Respondent upon the following, by mailing the same, on the 24 day of October, 1985:

Mary Ellen Sloan
9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111
Attorney for Appellant



RICHARD B. JOHNSON

A D D E N D U M

EXHIBIT "A"

IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF UTAH
IN AND FOR UTAH COUNTY

FILED
JUL 15 1982
CLERK OF DISTRICT COURT
JUL 15 1982

IN THE MATTER OF THE
ADOPTION OF JEREMIAH
HALLOWAY

R U L I N G
19,981

Having now considered the arguments of counsel and the memorandum of law on file herein together with the applicable provisions of the Indian Child Welfare Act, the court now holds, rules, and finds as follows:

R U L I N G

Under the facts and circumstances of this case as have now been presented to the court and considering the applicable law as it relates thereto, the court finds the domicile of the minor child to be that of the petitioners. This finding is based upon the fact that the child's residence appears to have been voluntarily and purposely removed from the natural mother, grandmother, and reservation to the petitioners. In view of that fact and the long period of time that the child has been with the petitioners, this court finds that apparent "good cause" exists for this court to take jurisdiction and that the requirements of the Indian Child Welfare Act have at this stage of the proceedings been satisfied in order to do so.

Accordingly, this court will proceed to now take evidence on the issue of domicile if any further evidence need be presented as to that issue and also on the issue of abandonment by the natural mother. Evidentiary hearing on those issues will be set upon application of either party which application should also indicate the length of time estimated for said hearing. Temporary custody of the minor child to remain with the petitioners until further order of the court.

Dated this 14th day of July, 1982.

Howard W. Hunter

EXHIBIT "B"

1 RICHARD B. JOHNSON, FOR:
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5 P. O. Box 778
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7 TELEPHONE: 373-6345

FILED
CLERK OF DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1983 OCT -6 PM 4:46

WILLIAM F. HUNSH, CLERK
DEPUTY

Attorneys for PETITIONERS

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

IN THE MATTER OF THE ADOPTION :
OF JEREMIAH HALLOWAY, :

O R D E R

A person under eighteen years :
of age, :

Probate No. 19,981

This matter came on before the Court for hearing on the 7th of April, 1983 and the 16th day of September, 1983. The petitioners, Dan Carter and Pat Carter were present at the April 7th hearing and represented by their attorney, Richard B. Johnson. The Navajo Nation was present and represented by its attorneys, Craig Jay Dorsay and Larry Kee Yazzie. The Court, on the basis of testimony, evidence and the argument of counsel, now makes and enters the following Order:

1. In the Court's prior ruling of July 14, 1982, the Court gave both sides the opportunity to request an evidentiary hearing on the issue of jurisdiction. The Court, after considering the evidence, finds that this Court has jurisdiction to hear this matter as an adverse proceeding for termination of parental rights and adoption of an Indian child not domiciled or residing within the reservation of the Indian child's tribe.

2. The Court specifically finds that the child was taken from

1 the reservation by a family member, with some of the family's con-
2 sent and delivered to the petitioners, for adoption. The Court
3 finds that the transfer of the child to the petitioners by the
4 biological family of the child was done in what some members of the
5 family felt was the child's best interests. The Court finds that
6 no one in the family of the child protested placement of the child
7 with the petitioners.

8 3. The Court finds that the relocation of the child with the
9 petitioners was done with the intent to transfer to the Carters
10 full parental rights as it relates to the child and with the further
11 intent to abandon all parental rights in the child.

12 4. The Court finds further that the natural mother and the
13 family have abandoned the child and that prior to the Court's
14 awarding of temporary custody of the minor child to the petitioners
15 on July 14, 1982, the petitioners stood in the position of loco
16 parentis to Jeremiah Halloway.

17 5. The Court finds further that on the basis of the Court's
18 determination of domicile and the Court's finding that the child
19 had a residence with the petitioners in Utah County, State of Utah,
20 the Court finds further that there is good cause pursuant to
21 25 U.S.C.S. §1911(b) for this Court to retain jurisdiction based
22 upon the findings of the Court that there has been a long period of
23 time that the child has been with the petitioners; the fact that no
24 Indian custodian has been appointed and that the custody and
25

1 parental rights to the child had been voluntarily relinquished by
2 the parents and family; that the child has had little contact with
3 the tribe for a significant period of time; that the child has not
4 resided on the reservation for a significant period of time and
5 that the child has significant contact with this district; and, that
6 the convenience and assessability of witnesses best able to deter-
7 mine the status, condition and health of the child are located in
8 this district.

9 6. The Court makes no ruling with respect to termination of
10 parental rights as it relates to Jeremiah Halloway, the Court
11 determining that the petitioners must meet the burden of 25 U.S.C.S.,
12 §1912(f) by proving beyond a reasonable doubt from the evidence,
13 including testimony of qualified expert witnesses, that the
14 continued custody of the child by the parent or Indian custody is
15 likely to result in serious emotional or physical damage to the
16 child. The Court will be guided by the Indian Child Welfare Act
17 25 U.S.C.S. §1901 et seq. and those matters contemplated by said
18 Act.

19 7. The Court finds that the natural mother has withdrawn her
20 consent prior to the entry of a Decree of Adoption.

21 8. Accordingly, the Court orders that the matter be set for
22 hearing at a time convenient for counsel to determine whether or
23 not parental rights should be terminated.

24 9. The Court notes the stipulation of the parties recognizing
25
26

1 the rights of the Court to enter Findings of Fact, Conclusions of
2 Law and Decree in this matter after a hearing of all of the evidence.

3 10. The Court orders that the records previously ordered to
4 become part of the record on April 7, 1983 hearing be made part of
5 this record.

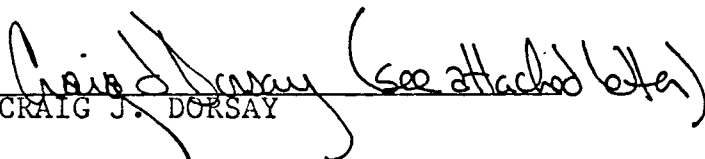
6 11. All motions for sanctions are, as of the present time,
7 denied.


8 DATED this 6th day of ^{Oct 11.} ~~September~~, 1983.

9 BY THE COURT:

10
11 APPROVED AS TO FORM:


12 JUDGE DAVID SAM

13 
14 CRAIG J. DORSAY (see attached letter).

15 
16 LARRY KEE TAZZIE
17 Attorneys for Navajo Nation

ATTORNEYS AND COUNSELORS AT LAW
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P. O. Box 778
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EXHIBIT "C"

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH

STATE OF UTAH

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH

COUNTY OF COCONINO
APR 28 PM 4:21

WILLIAM F. HUNTER, CLERK

IN THE MATTER OF THE
ADOPTION OF JEREMIAH
HALLOWAY, A PERSON
UNDER EIGHTEEN YEARS OF
AGE

D E C I S I O N

19,981

FEDERAL LAW

This case is before the Court on petitioner's Motion to Terminate the Parental Rights of the Natural Mother of Jeremiah Halloway, a Navajo Indian Child. The controlling law in this case is the Indian Child Welfare Act. The portions of that act we are specifically concerned with are the following:

25 U.S.C. Sec. 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 rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. Sec. 1912(f)

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.

The child was placed with the petitioners on March 23, 1980; the biological mother consented to the adoption of the child on May 30, 1980. The petitioners notified the Navajo Nation of their intent to adopt the

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child and on April 30, 1982 the mother revoked her consent to the adoption. Testimony was taken on these matters on April 7, 1983 and trial was held on October 22, 1984.

Testimony of experts concerning the effect of taking the child from the petitioner's home and replacing him in the reservation is summarized here.

Damage to the Child

Paul Steven Buckingham

Mr. Buckingham interviewed the petitioners and Jeremiah. He found no signs of depression or identity crisis. (October transcript page 65). He found them to be extremely bonded (October transcript page 68). He found that to return the child to the reservation would cause at worst "tremendous physiological damage, emotional damage, from the fact that he has been taken from the home that he felt loved and bonded to and put in a home where there was a very lost [sic] potential at the very least for neglect and at the very most of physical abuse." (October transcript page 77)

The Navajo Nation has challenged the testimony of Mr. Buckingham on the grounds that he did not have sufficient qualifications to testify as an expert under the ICWA. Mr. Buckingham's qualifications were set out as follows: Bachelors Degree in Science and Psychology from BYU in 1972; Masters of Social Work from the University of Utah in 1974;

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Clinical Worker for L.D.S. Social Services for last eight years; case worker in the Indian Placement Program for Navajo children. He has also worked with Navajo children on the reservation. He has had a Navajo youth in his home for the last five years. These are ample qualifications in light of In the Matter of K.A.B.E. and K.B.E., 325 NW2d 840 (S.D. 1982). In that case, the South Dakota Supreme Court found that a person who had worked as a social worker for over four years, had a bachelor of arts degree in social work and had contact with Indians on a regular basis was a qualified expert under the ICWA. See also, In re the Welfare of Fisher, 643 P.2d 887 (Wash. App. 1982).

Dr. Robert M. Crist

Dr. Robert M. Crist also testified regarding the effect of returning the child to the reservation. He stated that "the likelihood of that is very great that you would be rupturing the child-parent bond which is one of those primary necessary developments in young people and children. You would be placing him in a new strange environment for him. There would be a questions as to who would be the parent figures in the future." Again, the Navajo Nation challenged Dr. Crist's qualifications to testify as an expert. While the witness's experience had not been with Navajo people per se, his work in psychiatry and minority integration are sufficient to qualify him to testify.

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Dr. Samuel Roll

Dr. Samuel Roll, called on behalf of the Navajo Nation, submitted a report (Exhibit 4) based upon his evaluation of the child and background information supplied by counsel for the tribe. Dr. Roll found that the child is mildly depressed and that he has a negative image of Indians. With regard to the child's attachment to the petitioners, Dr. Roll found that

Jeremiah is very closely and warmly bonded and attached to the Carters. It is clear that he sees them as faithful and powerful sources of stimulation, confidence and security. He also looks to them for positive productive discipline. His love and bonding to them very strongly speaks to the value that the relationship with the Carters has for him. It will be extremely difficult for Jeremiah to make a break with the Carters and will cause considerable pain and a period of painful mourning. It is clear that Jeremiah will not be able to go through this period successfully without close supervision and professional help.

Nevertheless, Dr. Roll's opinion was that the child should be taken from the petitioner's home and replaced with the tribe so that he would not suffer an identify crisis in his adolescent years.

Dr. Robert J. Howell

Testimony and a report (Exhibit 3) prepared by Dr. Robert J. Howell reveal that after his examination of the child, and conversations with the child's teachers and the petitioners, he formed a professional opinion as to the effect of removing the child from his

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present circumstances:

It is my opinion that the probability of emotional damage taking place which would result from removing Michael from the Carter home, far outweighs the potential conflict as to Michael['s] not having a clear identity of himself as an Indian, and yet, also knowing that he is not Caucasian. It is my belief that the probability of emotional damage is at a very high level of certainty--beyond a reasonable doubt.

Specifically, Dr. Howell's findings were as follows:

1. Michael is a bright youngster who has no memory of his life for, two years and ten months on the reservation.
2. Michael is well adjusted in the home that he is now in and sees Mr. and Mrs. Carter as his parents. In my opinion, the Carters are his psychological parents.
3. It is my opinion that Michael will be emotionally damaged by taking him out of the home. The nearly five years that he has spent with the Carters, especially, when considering the early age that he came with them, clearly speaks to the importance of his continuing to live with them.
4. I agree with Dr. Roll that effort should be made to inculcate in Michael an appreciation for his heritage, and I see no reason why contact could not be effected between Cecelia Sanders and Michael.
5. I could not find any evidence that Michael was depressed, if he was depressed when Dr. Roll saw him, it is likely that this was a reaction to his fears that he would be taken away from the Carters. He told his school teacher Paula Farrer that he was going to see a man to determine if he could keep living with the carters.

In addition to the testimony of experts regarding the effect of removing the child from the petitioner's home, there was (in the April hearing) some testimony regarding the fitness of his Indian custodians.

In In the Matter of J.H.L. and P.L.L.H., 316 NW2d 650 (S.D. 1982), the court found that evidence of conduct of not only the natural parents

PAGE SIX

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but also "other persons in and about the residence" may support a trial court's finding that severe emotional or physical damage would be likely if the child were returned to the natural parents. Id. at 651. In the present case, the record indicates that the child's grandmother and other members of the extended family are alcoholic (April transcript pages 23-25,30); the natural mother's husband did not like the child nor did he want him in the marital relationship (April transcript pages 21-23); the natural mother willingly gave the child up for adoption (April transcript page 31) and only revoked her consent to the adoption after the Navajo Nation indicated its disapproval of the adoption. There is also testimony, although not uncontroverted, that the mother revoked her consent only after being subject to duress by the Navajo Nation. (April transcript pages 60-62).

An Arizona court has held that an Indian mother who revokes her relinquishment of parental rights is entitled to the return of the child in the absence of evidence of her fitness as a parent or any attempt to preserve the parent-child relationship. Matter of Appeal in Pima County, 635 P.2d 187 (Ariz. App. 1981). In that case, the court also seemed to belittle the adoptive parent's argument that return of the child would be emotionally traumatic:

Any potential emotional trauma to the child if the contemplated adoption is aborted was engendered by the conduct of the adoptive parents not adhering to the mandates of the Act.

Id. at 193.

PAGE SEVEN

19,981

The relevant facts in the present case are quite different and distinguishable from Matter of Appeal. In that case the adoptive parents had had custody of the child for only about four months before the natural mother revoked her relinquishment. In the case at bar, the petitioners had custody of the child for a full two years before there was any indication that the natural mother would revoke her consent to the adoption. At that time the child had already developed emotional and psychological bonds with the petitioners and it would be unfair to punish the child because the adoptive parents did not send him off to the reservation immediately upon hearing that the biological mother had changed her mind.

Rehabilitative Efforts

In the first hearing conducted on April 7, 1983, the natural mother testified that the primary care of Jeremiah after the initial six month period was with the child's Indian grandmother (Page 20). She testified that at the time physical custody of the child was transferred to the grandmother, the step-father was apparently abusing Jeremiah. He did not like the child because it was not his son (Page 20). In addition, he stated he was not going to bother with the child and would not care for or support Jeremiah and would not give the child the normal love that a father would give a child (Pages 22-23).

The mother testified that there was only one sister who would take the child and she was determined not to be fit (Pages 45-46).

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The most important testimony concerning the frustrated rehabilitation in the case comes from Ms. Ella Shirley. On page 86 of the transcript, she explains the shared care concept. In her testimony, she stated that if the natural parents could not take care of the child, then the extended family would then be charged with the care. Ms. Shirley testified specifically that there was a maternal aunt and sister who could be used. However, the record clearly indicates the unsuitability of all of the extended family. On page 108 of the transcript, the social worker was asked questions as to what decision she would have made as far as rehabilitation of the family unit or placement in 1980. Starting on page 109 she was asked that if the facts revealed that the members of the extended family who wanted the child were not fit custodians, would adoption outside the Tribe be considered. The social worker testified that they would simply place the child with another Navajo family. The social worker admits based upon those facts, rehabilitation with the natural family would have been discontinued and the child would have been placed with another Navajo family. The social worker agreed that from the notes of the case worker it appeared that the natural mother vacillated continually between wanting the child back and not wanting the child (Page 112).

Another social worker testified that the first referral to the social agencies was because Jeremiah was neglected (Page 119). The social worker stated that "they were interested in taking the child, but after doing a thorough investigation of the sisters, we decided

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that placement with those relatives would not work (Page 120).

Accordingly, the court finds that the burden of rehabilitation and working with the family has been met.

STATE LAW

In addition to the provisions of the ICWA, the State of Utah has set forth certain requirements which must be met before the rights of a parent may be terminated. One of the things that satisfy state requirements for termination is abandonment. Utah Code Annotated Sec. 78-3a-48(1) states in relevant part:

The court may decree an involuntary termination of all parental rights with respect to one or both parents if the court finds . . .
(b) That the parent or parents have abandoned the child. It shall be prima facie evidence of abandonment that the parent or parents, although having legal custody of the child have surrendered physical custody of the child, and for a period of six months following such surrender have not manifested to the child or to the person having the physical custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child . . .

Under, the guidelines laid down by the above statute, the natural mother's sustained absence of any showing of interest in the child for a two year period establishes prima facie evidence of abandonment.

In State v. J.T., 578 P.2d 831 (Utah 1978) the State Division of Family Services had placed children of the litigant mother in foster homes after she had released them to the agency. Despite her

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attempts to remain in contact with her children, the state refused to tell her where the two youngest were. Consequently, she had no contact with them for two and one-half years. Eventually, when the mother sought custody of the children, the State sought to terminate her parental rights on the basis of abandonment. The Supreme Court found that there could be no abandonment where everytime the parent sought to see the children she was denied visitation.

In the case before the court, the mother knew that the petitioners had the child and at all times relevant to this action their phone number and address were listed in the telephone directory, nevertheless, she made no attempt to contact the child.

Conclusion

In light of the foregoing, the court finds 1) that the evidence (including expert testimony) established beyond a reasonable doubt that to return Jeremiah to his Indian custodians would result in serious emotional or physical damage to him; 2) that active efforts have been undertaken to attempt the rehabilitation of the Indian family and have failed; and 3) that the biological mother knowingly and voluntarily abandoned the child as defined in Utah Code Annotated Sec. 78-3a-48(1). Accordingly, the amended petition of adoption is granted.

Dated this 28th day of January, 1985.


DISTRICT JUDGE

EXHIBIT "D"

planning on moving next door to the south home, she is giving her present home to Art & Cecelia.

In conversing with Art & Cecelia they still want to try and get Jeremiah back. They feel that they are willing to continue with the present situation in court. In terms of whether they had sought help from there NAC. The family was still planning this. They still would like Mr. Yazzie, myself and Mr. Dorsay to participate in this ritual. They feel that this can better prepare all of us emotional. Cecelia has deep hopes of Jeremiah returning, with their home. Jeremiah and his little brother will be roomed in their own room. The Saunders are now looking for furnitures.

1b

9-83 C. Saunders came into office with family. In our meeting we discussed the importance of getting an evaluation on the family. It was suggested that Cecelia and Arthur have a psychological evaluation completed to determine their capability as parents. The response from the Saunders was positive. They are willing to come into Gallup to met with any psychologist to begin the evaluation. It was also suggested that the psychologist make a homevisit and visit with the family do better determine their ability to be good parents.

The family was also interested in knowing whether contact was made with another psychologist to testify in court. Unfortunately the Psych., Dr. Dorsay had contacted did not want to testify against the LDS Church. He is a strong adovate for placement Indian children in Indian homes, but does not want to testify against the church. (It was learned he is a follower of the Morman belief). Presently Mr. Dorsay is trying to locate another Psych. that may be able to help us. The Saunders want to be informed of any further information that may come up.

1b

-83 The Saunders were in the office today. They were wondering if any court date had been set. I was not familiar with a date. The Saunders were also wanted to know if any arrangements have been made for the Psychological evaluation. Presently they have gotten a new car and are able to make any appointment. I had attempted to contact Dr. Thomas, but learned he was on training in Albuquerque. Worker will contact Dr. Thomas next week to refer evaluation to him. The Saunders are also planning on have a prayer meeting for Jeremiah possible in mid July. Arthur and his mother are planning on traveling in to Texas to pick up some medicine for the up coming meeting. The family will be free anytime after the week of the 18th. Worker will notified the family when arrangements are made.

The Saunders a very difficult time, she made them bring in a list of jobs they had looked into. The family will be recieveing \$136.00 every two (2) weeks. Their initial grant is \$217.00.

And finally, the family would like for Mr Dorday to make a home visit. They want for him to see how they have prepared for Jeremiah's return. Worker will contact Dorsay

1b

-83 Worker met with Dr. Thomas and Dr. Muller on possibilities of providing evaluation of the family (Saunders). Both Dr's. were reluctant to testify in court of the stability of the Saunder family. They felt that it would be unfair to testify on behalf of the family.

what may developed later, as a result of Cecelia's family history. Both Dr's. do not want to testify in court, they feel that this type of situation is not good for their profession. I ask for names of other possible contacts. Worker will look into these contacts.

1b

10-83 Home visit made with Mr. Yazzie. He spoke with Cecelia and briefed her on what to expect from Utah. He also reassured her that she really did not have much to worry about. Mr. Yazzie has strong feelings of getting this case transferred. Cecelia's first choice was that of guardianship she wanted contact with the child. Her second choice was to have him return should they decide not to go with her terms. It was now understood that her case would be contested. Cecelia seem confident with her choic of remain steadfast to getting Jeremiah return.

22-83 Worker made home vist to remind Mrs. Saunders that I will be coming by early Thursday morning, to pick her up. we will be returning Saturday morning. Cecelia still has hope that her child will be returned.

24-83 == Arrived Ms. Saunders home at 8:30 AM begin trip to Provo. Most of our talk covered issues of Cecelia's childhood. Arrive Provo, 6:30 PM. Cecelia had little money, so we spend the night in the same room. No one was contacted at the court house as our arrival.

1b

25-83 Hearing, present at the hearing were the Carters, Jeremiah Halloway, Polly Ann Dick, Larry K Yazzie, Cecelia Saunders and myself. (Prior to our meeting, I contacted the court house and learned the hearing had been moved up to 1:30 PM).

In grief Mr. Johnson, sttorney for the Carters, argued issues involving abandonment and domcile. Mr. Yazzie's response was rather neverously exhabit, he had one real through answer for Mr. Johnson's comments regarding domicle. Both Mr. Yazzie and myself felt that this would become an issue long before appearing in court. Questions regarding how does the Tribe define domocile? Is domocile that of the natural mother? As a result, Johnson left good points to retain jursidiction, especially with the question's regarding where is the domicile of the child. In essence, Mr. Yazzie fail to define the tribes terms of domicile. In close the Honorable Sam gave ten (10) to response to the issues developed from this hearing. At that time he will determine wheather "Good Cause" is evident to retain jursidiction. Upon learning of his decision, we shall either:

1. Make arrangements to return Jeremiah or
2. Request for an Evidenary Hearing to dtermine final status of Jeremiah.

Upon closure, Cecelia was only able to see Jeremiah, she was unable to talk or hold him. From viewing Jeremiah he appears to be in good care. He is tall and chubby, he held fast to his custodian. The family seems to be very close. Cecelia broken down and cried as she watched them from a very short distance. It was evident that Cecelia felt bad of not being able to see or talke with Jeremiah.

Both client and worker left almost immediately after the hearing. We return to Iyanbito at 11:00 PM.

1b

EXHIBIT "E"

1 RICHARD B. JOHNSON, FOR:
2 HOWARD LEWIS & PETERSEN
3 ATTORNEYS AND COUNSELORS AT LAW
4 120 EAST 300 NORTH STREET
5 P. O. BOX 778
6 PROVO, UTAH 84603
7 TELEPHONE 373-6345

8 Attorneys for Petitioners

9 IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
10 STATE OF UTAH

11
12 IN THE MATTER OF THE ADOPTION : SUMMARY OF TRIBAL RECORDS
13 OF JEREMIAH HALLOWAY, DOB: 5/14/77

14 A person under eighteen years :
15 of age. Probate No. 199810

16
17 COME NOW the petitioners Dan and Patricia Carter and submit the
18 following summary of the Social Worker file and exhibits previously
19 submitted to petitioners' counsel in answers to interrogatories.
20 Initially, it should be noted that in making the summary, the peti-
21 tioners continue to object to the tribe's failure to mark and have
22 introduced as exhibits the records as they existed at the time of
23 the court hearing as opposed to submitting typed substitutes which
24 contain many disparities and omissions from that originally submitted
to the Court.

1. Jeremiah Halloway was born on May 14, 1977 and is an
enrolled Navajo child, C#427,273.

2. In a home visit on January 23, 1982, Cecilia Saunders, the
natural mother of Jeremiah, admitted that she gave her son Jeremiah

1 away to her mother Bessie Begay in order to save her marriage with
2 Arthur Saunders. Cecilia also stated that she did not provide any
3 monetary or any other type of support to Jeremiah. Cecilia also
4 stated that Arthur, the step-father, disliked Jeremiah very much.

5 3. In a home visit to Rosita Dick, a sister of Cecilia, on
6 January 23, 1980, Rosita stressed that it wouldn't be a good idea
7 to give custody of Jeremiah to Bessie Begay, her mother, because of
8 her drinking problem. Rosita suggested that there were three
9 sisters who were interested in obtaining legal custody of Jeremiah.
10 However, the social worker indicated that all three seemed to be
11 ineligible due to age or other reason. During that same visit the
12 case worker spoke with Bessie Begay who stated that she had adopted
13 two grandchildren in the past who were children of Minnie Williams.
14 She also stated there were fifteen members in the same household.

15 4. In a report of January 23, 1980, a referral was made to the
16 tribe's social agencies indicating that Jeremiah was being neglected
17 by his mother, Cecilia Saunders. The child was reported to be
18 constantly on the go with both grandparents on their sheep herding
19 job, that Bessie had a drinking problem and that there were fifteen
20 members living in the same household.

21 5. In a home visit on March 19, 1980, Bessie Begay indicated
22 that Jeremiah had been with them since birth, contrary to the
23 natural mother's testimony that the care was given to the grandmother
24 at six months.

1 6. On April 30, 1980, the social worker was informed that
2 Jeremiah was taken from Bessie's home by Polly Dick. During that
3 visit, Cecilia, the natural mother of Jeremiah stated that she had
4 given her consent to Polly, her sister, to go ahead and place
5 Jeremiah in a foster home in Utah. Her reason for making this
6 decision was due to Bessie Begay's drinking problem. Another fact
7 warranting Cecilia's decision was that Cecilia herself could not
8 keep Jeremiah in her custody because the child was neglected and
9 abused by her husband, Arthur Saunders.

10 7. The case worker's note for May 2, 1980 indicates that the
11 grandmother Bessie continues to abuse alcohol. Shortly thereafter
12 a case worker report indicates that all of the family relatives
13 of Jeremiah were unstable except for the Tolths.

14 8. In a Title XX client service plan dated August, 1980, it
15 is reported that Jeremiah's was a child neglect case, that Cecilia
16 and Arthur were not very stable and that Cecilia had signed a consent
17 for placement.

18 9. On October 21, 1980, the home visit report indicates that
19 Cecilia reported that Jeremiah had been placed in an LDS foster
20 home on a year round basis. The worker advised Cecilia to get a
21 copy of his placement verification. It is also reported by the
22 worker that Cecilia almost gave up her son Jeremiah for adoption.
23 The note then says that Cecilia stated that "the Navajo Tribe wouldn't
24 allow her" The note is not completed and the next page does

1 not exist in the record.

2 10. It should be indicated that although not included in the
3 records of the tribe, the child came to Utah on March 23, 1980 and
4 that Cecilia signed the Consent for Adoption in Utah on May 30, 1980

5 11. The social worker's report of December 8, 1980 indicates
6 that Jeremiah is presently residing with Dan and Pat Carter in
7 Spanish Fork and that Cecilia Saunders had put him up for adoption
8 to be adopted by the Carter couple. The note indicates that Cecilia
9 had indicated that the child had been placed in a Mormon foster
10 placement in Provo, Utah on a year round basis but it was learned
11 that she had put the child up for adoption. Since learning about
12 the situation, ICWA has intervened. In the assessment portion of
13 that note it indicates that Cecilia still wants to continue with
14 giving up the child in order to save her marriage with Mr. Saunders.

15 12. On December 1, 1980, a home visit was made to Cecilia's
16 sister, Kathy Dilgarito. In that home visit, it was learned that
17 Kathy had done the same thing Cecilia is doing. Kathy had given up
18 three of her children to save her marriage with Ralph. Kathy's three
19 children were being raised and taken care of by an aunt in Mariano
20 Lake. The note also reports that Cecilia's other sister, Minie
21 Williams, is also staying there shacking up with a guy.

22 13. The note for December 2, 1980, indicates that the worker
23 explained to Cecilia that it was made known to the worker that
24 Cecilia had put Jeremiah up for adoption. Cecilia was very upset

1 to hear about this since she had been telling the worker a different
2 story. The previous story Cecilia had indicated to the worker is
3 that she had placed Jeremiah on an LDS foster placement for school
4 purposes. The note indicates that Cecilia was very unhappy about the
5 worker's intervention into the situation. Cecilia commented that
6 she knew abortion was the best solution when she got pregnant with
7 Jeremiah. Cecilia further indicated that Ernest Yazzie, Jr. of
8 Church Rock was the natural father of Jeremiah and finally that
9 Cecilia does not wish to let her aunt take custody of Jeremiah
10 however she would consider her sister-in-law (Yvonne Tolth) who had
11 been interested in the child for a long time. On December 5, 1980,
12 a home visit was made to Ernest Yazzie, Sr. to make contact with
13 Ernest Yazzie, Jr., the alleged natural father of Jeremiah. The
14 father indicated that his son was working in the mine and was not
15 the father of Jeremiah and that there had been family conflicts on
16 both sides when the child was born.

17 14. The note for February 19, 1981 relates to a home visit
18 with Cecilia Saunders. In that visit, the natural mother indicated
19 that she was not sure about what her plans were for Jeremiah. She
20 wanted to continue to give him up to Mr. and Mrs. Carter. Also,
21 the natural mother changed her mind about giving the child to Mr.
22 and Mrs. Jimmy Tolth and decided to return Jeremiah back to her
23 mother, Bessie Begay, regardless of her drinking problems.

24 15. In an ICWA case update report dated January 20, 1981, it

1 is indicated that Cecilia and her family were residing with her
2 mother-in-law, Ada Antonio and that she had two children by her
3 marriage, Sonya and Tonya Saunders. The note indicates that
4 Arthur Saunders, the step-father, could not accept Jeremiah as his
5 step-child. The report says that Cecilia gave consent to Polly
6 Dick to place the child in Utah for several reasons. The first
7 reason was that Bessie wasn't able to take care of the child because
8 she abuses alcohol heavily. The second reason the child was given
9 to Bessie was to save her marriage with Arthur Saunders. She
10 reported that Arthur dislikes the child very much, that he often
11 abuses and neglects the child which Cecilia cannot tolerate. Cecili
12 could not tolerate seeing her child being hurt. The report conclude
13 that Cecilia Saunders is from a big family. She has several sisters
14 but all are unstable and do not have a house of their own. In
15 fact, they have done the same thing, they have given up their childr
16 to save their marriages. They all don't seem to show any interest
17 in the child. In a proposed draft letter to Cecilia Saunders, the
18 natural mother of the child, the case worker explicitly asked
19 Cecilia whether or not she still consents to allowing the Carters
20 to adopt Jeremiah.

21 16. In a protective service report dated March 23, 1981, con-
22 tact was made with Cecilia Saunders and states that thus far,
23 only one relative is interested in the child but the mother Cecilia
24 refuses to give up the child to this certain relative due to persona

1 reasons. The report says Cecilia still wants the child to remain
2 with the Carters in Utah, she does not want the child to return to
3 the reservation but if he should return, she wants him placed back
4 with his maternal grandmother regardless of her drinking problems
5 and unstableness.

6 17. The ICWA narrative for March 23, 1981 indicates that
7 Cecilia still has her mind set on letting the Carters adopt Jeremiah
8 She does want to consider the Tolths to take custody of her child
9 due to personal reasons such as it might lead to a family conflict
10 among themselves. She stated that if Jeremiah should ever be
11 returned to the reservation, she wants him returned to the maternal
12 grandmother, Bessie Begay regardless of her drinking problems and
13 unstableness. Cecilia was rather rude in discussing the child's
14 adoption.

15 18. The report for March 25, 1981 indicates that the worker
16 strongly advises against returning the child to Bessie Begay because
17 of the large and heavy alcohol abuse. Again the note states that
18 Cecilia was very upset about discussing Jeremiah.

19 19. The note for March 26, 1981 indicates that Cecilia got
20 mad and took off with her only infant baby and left the other little
21 girl home. The note for April 17, 1981 indicates that Cecilia had
22 come home two days later after she took off.

23 20. The note for July 28, 1981 indicates that Cecilia's plans
24 are to let Jeremiah remain in the foster home with the Carters and

1 if she should return to the reservation she wants Jeremiah returned
2 to her mother. She does not want the Tolths to have him because he
3 will still be around his step-father. The grandmother also wants
4 him back but she abuses alcohol quite frequently and is not stable.
5 The grandmother herds sheep for different people and is not always
6 home which would interfere with the child's education. The note
7 concludes that Cecilia was quite confused.

8 21. The protective service report for September 30, 1981
9 indicates Cecilia continues to refuse to give her consent to have
10 Jeremiah placed with the Tolths due to personal reasons.

11 22. The note for October 8, 1981 with the social worker indi-
12 cates that Cecilia does not feel comfortable talking about Jeremiah
13 because her husband dislikes and mistreats Jeremiah a lot according
14 to Cecilia. Observing from past home visits, the case worker stated
15 that Cecilia dreads to have the social worker come to see her about
16 her son. The case worker determines that by the expression on the
17 natural mother's face and by the rolling of the eyes. Cecilia was
18 also rather rude towards the worker when the visits were made.

19 23. In a memorandum dated March 24, 1982, by Marty Whitehair,
20 a social worker to Mr. Anslem Ronhorse, Jr., Director of the Indian
21 Child Welfare Project, it states that there have been several
22 attempts to have Mrs. Chato meet with the natural mother but those
23 attempts had been futile. It is also indicated that Cecilia is
24 still confused about whether she should let the Carters keep

1 Jeremiah or let him return to her maternal grandmother, Bessie
2 Begay.

3 24. In a letter dated March 22, 1982 to Richard Maxfield,
4 attorney at law from Lauren Bernally, a social worker, the letter
5 states that Cecilia's reason for consenting to the adoption is that
6 her present spouse has not accepted Jeremiah as a step-son. He has
7 rejected Jeremiah since his initial meeting with Cecilia. The
8 letter states explicitly that "to complicate things more, she could
9 no longer tolerate the harsh treatment Arthur exhibited towards
10 her son, Jeremiah." The letter states that on almost every occasion
11 of social worker visits, Cecilia has changed her mind, her reasons
12 are somewhat easily swayed by different family members. The letter
13 states that she is beginning to resent the somewhat "pestering" visit
14 with the social worker and spends more time away from home to avoid
15 contacts.

16 25. The case worker's note for March 19, 1982 indicates that
17 the immediate family of Jeremiah have developed feelings of not
18 wanting to talk with the case worker.

19 26. On September 1, 1982, Cecilia mentioned to the case
20 worker that it would also be very difficult financially for them
21 to take Jeremiah back. They have no money. Later in the discus-
22 sion, the cas worker learned that Cecilia was fearful of continuing
23 with the hearing. Cecilia felt that she could not give Jeremiah
24 the things that the Carters gave him. Cecilia recalled the way

1 Jeremiah appeared at the court hearing and how well dressed he was.
2 Most strikingly, Cecilia recalled seeing Jeremiah and Pat Carter
3 walking out holding hands and Jeremiah referring to her as mom.

4 27. On September 1, 1982, the social worker noted that Cecilia
5 was torn and confused and appears to be backing out.

6 28. On September 17, 1982, Cecilia indicated to the social
7 worker that she had really thought about Jeremiah for the past week
8 and decided to go ahead and have the Carters adopt him. Cecilia
9 indicated that they felt that they did not the return because
10 Jeremiah was better situated in Utah. Cecilia recalled the day she
11 had spent in placement. She felt Jeremiah would be able to become
12 better educated and possibly do more for himself. Cecilia's thoughts
13 of placement with another Indian family were not too good. She
14 felt Jeremiah had established ties and to remove him would cause him
15 more harm.

16 29. During the months of 1983, the social working office
17 tried to contact various experts to testify as to the stability of
18 the Saunders family. The first doctor contacted did not want to
19 testify. Thereafter, contact was made with Dr. Thomas and Dr.
20 Muller on providing an evaluation of the Saunders family. Both
21 doctors were reluctant to testify in court of the stability of the
22 Saunders family. They felt that it would be unfair to testify on
23 behalf of the family and not be able to express what might develop
24 later as a result of Cecilia's family history. Both doctors indicate

1 they did not want to testify in court.

2 CONCLUSION

3 As stated initially, it should be noted that there are a great
4 many records which are still not in the Court's file. There are
5 large gaps in time when there are no social worker notes and there
6 are references to reports that are not in the file. Accordingly,
7 petitioners are simply submitting a summary of the documents that
8 have now been submitted and certainly not attesting at to their
9 completeness or their similarity to the original documents previously
10 submitted to the Court.

11 DATED this _____ day of October, 1984.
12

13
14 RICHARD B. JOHNSON, FOR:
HOWARD, LEWIS & PETERSEN
Attorneys for Petitioners
15

16 DELIVERED a copy of the foregoing SUMMARY OF TRIBAL RECORDS to
17 Ms. Mary Ellen Sloan and Mr. Craig Dorsay, Attorneys for the Navajo
18 Nation, at Provo, Utah this 22nd day of October, 1984.
19
20
21
22
23
24

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

5039
6823
097104

IN THE MATTER OF THE ADOPTION :
OF JEREMIAH HALLOWAY, : SUMMARY OF PRIOR TESTIMONY
DOB: 5/14/77
A person under eighteen years : :
of age. Probate No. 19981

COME NOW the petitioners and give the following summary of the testimony offered by the witnesses in prior hearings in this case. All references are to the transcript page numbers.

CECILIA DICK SAUNDERS TESTIMONY

1. Cecilia testified that she was in foster placement in Utah from the third grade to the eleventh grade (p. 17, lines 14-23).

2. Cecilia testified that the natural father of Jeremiah was Ernest Yazzie, Jr. and that the child was born May 14, 1977 in Gallop, New Mexico (p. 18, lines 17-22).

3. Cecilia testified that the initial care of the child was given by her mother, Bessie Begay (p. 19, lines 4-8). Cecilia did testify that she had access to the child up to the time he was six years of age (p. 19, lines 11-14).

4. Cecilia testified that during the initial six months, she lived with her mother, Bessie Begay and her step-father, Jack Begay (p. 19, line 15 to p. 20, line 5). After the six month period, Cecilia started seeing Arthur Saunders and did not live with her mother and stayed either at Arthur's house or at her house (p. 20, lines 2-14).

5. Cecilia testified that she married Arthur Saunders in July of 1978 but could not remeber the date (p. 20, lines 18-19).

6. Cecilia testified that the primary care of Jeremiah after the initial six month period was with her mother, Bessie Begay, (p. 20, lines 20-23). Additionally, that Bessie Begay and Jack

Begay had a drinking problem (p. 20, line 24 through p. 21, line 2).

7. Cecilia testified that at the time physical custody of the child was transferred to the grandmother, the step-father, Arthur Saunders was apparently abusing Jeremiah. Arthur didn't like the child because he wasn't his son (p. 20, lines 3-23). In addition, Arthur stated that he was not going to bother with the child and would not care for or support Jeremiah and would not give the child the normal love that a father would give a child (p. 22, line 23 through p. 23, line 9).

8. Cecilia testified there were times when the social workers found the child left unattended because Bessie was drunk (p. 23, lines 21-25). Cecilia testified that when Bessie would drink she would go ^{on} an alcoholic binge for a week (p. 23, lines 7-9). Cecilia testified that Jack Begay, her step-father, had the same drinking problem and accordingly never assumed any care of the child (p. 24, lines 10-15).

9. The only contact Cecilia had with the child from the time Jeremiah was six months of age on is when the child would be brought over for approximately two to three days at Arthur's house every two or three weeks (p. 25, lines 4-8 and p. 26, lines 22-25).

10. Two of Cecilia's six sisters, Rosita and Polly complained of the care that Jeremiah was receiving (p. 28, lines 2-6 and p. 20, lines 14-19).

11. Polly reported to Cecilia that she had found the child with Jack Begay who was drunk and that Jeremiah hadn't eaten. Polly was unsure as to the number of days that Jeremiah had not eaten (p. 30, lines 13-14). Cecilia testified that Polly got her consent to take the child (p. 42, lines 11-12). In addition, Bessie, the grandmother knew what had happened to the child (p. 42, lines 19-20).

12. Cecilia testified unequivocally that she did not object to the child being taken to Utah and that she thought it was in the

best interest[^] of the child to go to Utah (p. 31, lines 19-23). In addition, Cecilia told Polly adoption was alright inasmuch as was a subject they had talked about for along period of time (p. 32, lines 13-20).

13. Cecilia understood the consent to adoption when she signed it (p. 32, line 20-25 through p. 33, line 9). Cecilia testified two years after the child was taken to Utah, she was contacted by the Tribe who said that Jeremiah could not be adopted out of state (p. 35, lines 3-4). Cecilia was asked if she really wanted to give Jeremiah up for adoption and she answered that question by saying 'yes' (p. 35, lines 8-11).

14. Finally, Cecilia said there was only one sister who would take the child and that was Minie and she was determined not to be fit (p. 45, line 20 through p. 46, line 2).

POLLY DICK TESTIMONY

1. Polly testified that the child was passed to different people consisting of sisters, her mom, etc. (p. 57, lines 19-20).

2. Polly testified that when she picked Jeremiah up the child had a T-shirt and underwear and that was all (p. 58, lines 8-17). At the time she picked up the child, Jack Begay, the step-father told Polly that nobody takes care of the kid and to take them away (p. 58, lines 18-20).

3. Polly indicated that no one in the family ever resisted the adoption (p. 59, line 25).

4. Polly testified that Cecilia had told her that when the Tribe contacted her to get Jeremiah back that they told Jeremiah was going to be back on the reservation or they would put her in jail (p. 60, line 23 through p. 20 through p. 61, line 3).

DAN CARTER TESTIMONY

1. Dan Carter testified that when the child came to Utah, he had a viral skin infection and poor dental care (p. 71, lines 7-14).

that he would cover his head when you would raise your hand and that he had a habit of begging for money (p. 72, lines 9-16). Finally, Dan testified the child appeared to be very insecure (p. 73, lines 3-13).

SOCIAL WORKERS TESTIMONY

1. Most of the testimony of the social workers is set out in the summary of the social worker file attached hereto. Other than that, their testimony has been previously submitted to the court in the form of petitioners' motion for sanctions. In addition to that testimony, Lauren Bernally, testified that they could not have placed Jeremiah in the homes of Arlene, Minnie, and Rosita who were Cecilia's sisiters after doing the homestudy evaluations because they were not felt to be proper custodians (p. 128, lines 1-4). Although Lauren testified there were assessments of the family done, those assessments did not appear in any of the files presented to the Court (p. 133, lines 14-18). Finally, Lauren Bernally did not have any excuse for the termination of the note on 11-17-82 (p. 145, lines 23-25).

DATED this _____ day of October, 1984.

RICHARD B. JOHNSON, FOR:
HOWARD, LEWIS & PETERSEN
Attorneys for Petitioners

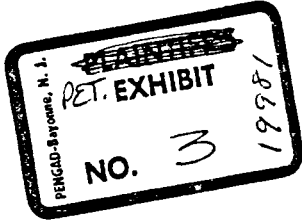
DELIVERED a copy of the foregoing SUMMARY OF PRIOR TESTIMONY to Ms. Mary Ellen Sloan and Mr. Craig Dorsay, at Provo, Utah, dated this 22nd day of October, 1984.

EXHIBIT "F"

Robert J. Howell, Ph.D.

Diplomate in Clinical Psychology
American Board of Professional Psychology

Diplomate in Forensic Psychology
American Board of Forensic Psychology



October 17, 1984

Richard B. Johnson, Esquire
Howard, Lewis and Petersen
120 East 300 North Street
Post Office Box 778
Provo, Utah 84603

Re: Dan and Patricia Carter v. Navajo Tribal Council in reference to
Jeremiah Halloway, aka Michael Chad Carter

Dear Mr. Johnson:

In response to your referral, I have examined Jeremiah Halloway, and Dan and Patricia Carter in reference to the dispute between the Carters and the Navajo Indian Council over the right for the Carters to have custody of Jeremiah. As you know, Jeremiah is called by the Carters, Michael Chad Carter. Indeed, he does not know his name, Jeremiah. Therefore, I will refer to him in this report as Michael. In conducting this examination, I interviewed both Mr. and Mrs. Carter, and I administered to them the Bipolar Psychological Inventory, and the Minnesota Multiphasic Inventory, both of which are objective personality tests, and the Shipley Institute of Living Scale, which is an intelligence test. I gave Michael the Rorschach Ink Blot Test, the Children's Apperception Test, and the Bender Gestalt Perceptual Motor Test. It is my understanding that I will have the opportunity to review the test protocols from Dr. Samuel Roll who examined Michael for the Navajo Tribal Council. You provided me a copy of his report, and I will refer to this report later.

I asked a doctoral graduate student, Emily Fallis, to administer to Michael the Wechsler Intelligence Scale for Children, Revised Edition, and I asked another graduate student, Lura Tibbitts-Kleber, who is doing her doctoral research on parental attachment under my direction, to provide me a summary of the affect of removing a child from his "psychological parents." I will attach a copy of her summary to this report. In addition, I talked to the three school teachers that Michael has had, a Linda Coray, who was his

Dan and Patricia Carter v. Navajo Tribal Council
In Reference to Jeremiah Halloway
October 17, 1984
Page 2

kindergarten teacher during the school year, 1982-83, to Patricia Farrer, who was Michael's first grade teacher during the school year 1983-84, and to Virginia Hansen, who is Michael's present second grade teacher. I also talked to Mrs. Ann Carter, the mother of Dan Carter, to Mr. Albert Hawkins, the father of Patricia Carter.

I talked to Mrs. Marian Seamons, a person who lives in Orem, Utah, and who with her husband, have had a number of Indian children live in their homes, to Mr. and Mrs. Melvin Carter, (no relationship to Dan and Patricia) who have also had a number of Indian children living in their home. I also asked Mr. Paul Buckingham, who is a social worker, and who has worked with Indian children placements to examine the family. I will attach his report.

As you know, I asked that you try to arrange for me to interview Cecelia Ann Dick Sanders, Michael's biological mother, but apparently this could not be arranged. I also would have liked to have talked to Michael's maternal aunt, Polly, but the Carters have been unable to provide me with a telephone number for her. At this point, I have spent in excess of twelve hours in interviewing these people, and testing them as indicated above, and in scoring the tests and synthesizing the material, and dictating the report. I told all the people I interviewed that I had been retained by you, and you in turn, are working for the Carters. I will, first, present the material that I have gathered, and then, I will offer some opinions and recommendations in this case.

ISSUE:

It is my understanding that the court will be considering only one question which is raised by the Indian Child Welfare Act, which in paragraph F, states:

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.

As I read Dr. Roll's report, it seems to me that the issue revolves around the possible damage that will be done to Michael, should he be taken from the Carter home, versus (to quote from Dr. Roll's report) "if Jeremiah stays with the Carters, he will likely to continue to try to be more and more white by hating Indians. When he becomes an adolescent, he will hate himself. Acting out behavior, self destructive behavior are very strong liklihoods."

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OPINION:

It is my opinion that the probability of emotional damage taking place which would result from removing Michael from the Carter home, far outweighs the potential conflict as to Michael not having a clear identity of himself as an Indian, and yet, also knowing that he is not Caucasian. It is my belief that the probability of emotional damage is at a very high level of certainty- -beyond a reasonable doubt. I will amplify this more in the Opinions and Recommendations Section.

DATA AND REASONING:

DAN LEWIS CARTER:
856 East 100 North
Spanish Fork, Utah, 84660
Telephone: 798-9268
Date of Birth: December 22, 1951
Date of Interview: October 5, 1984

Dan Carter is a 32 year old, Caucasian male who is 5 feet, 8 inches in height, and weighs 175 pounds. He has blonde hair and blue eyes. He presents himself in a very straight forward and direct, and yet, non-confrontive and non-abrasive manner.

Dan comes from a family that consists of his father, Earl Carter, who is now 57 years of age, and is a plumber. With the exception of hypertension, Mr. Carter is said to be in good health. Dan's mother, Ann Carter, is 53 years of age, and is in good health. Dan is the oldest child in the family. There was a older sister that died when Dan was six. Dan has a brother who is 30 years of age, and is married, and is in computer programming, and he and his wife are the parents of two children. Kathy is 26 years of age, married, and she her husband have two children. Christine is 22 years of age. Her husband is in computer programming at the Brigham Young University. They do not have any children. The two youngest children in the family are Matthew, 13 years of age, and Karen, 7 years of age.

Dan said he had a very good relationship with his parents. There were many family projects. They had a cabin at Strawberry Reservoir, and spent much time in the outdoors.

Dan graduated from Provo High School in 1970. He then, went to Brigham Young University for a semester, and then, filled a mission in Austria, for the then, two years period of time. He received an honorable release from his mission. He then, attended Brigham Young University for another

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semester and one-half, and then, went to the Utah Technical College for two quarters so he could play baseball . Since that time, he has been working with his father and currently is a journeyman plumber.

Dan married in 1975 to Pat Hawkins and they have had no biologic children from this marriage. Thus, Michael is the only child in the home.

Dan said he and Pat have a good relationship with each other. They are active in the L.D.S. Church. Dan is in the elder's quorum presidency. Neither of them use street drugs or alcohol, nor do they smoke. Dan said the only legal problems that he has had was when he was a youngster, he was picked up for setting off firecrackers and he has had a few traffic tickets as an adult. The couple are buying their home in Spanish Fork.

Dan said he continues to enjoy the outdoors. He and Pat take Michael fishing a good deal, and as Michael gets a little older, he will go hunting with Dan.

Dan indicated that he had no mental illnesses in his family. He said his mother, when she was Relief Society president, seemed to develop a anxiety reaction briefly and was hospitalized for this. There were no evidences of alcohol abuse in the immediate or extended family.

Dan said he sleeps well at night. He is usually in bed by 10:30 at night. He is asleep within 10 minutes. He sleeps until the alarm goes off at 7:00 in the morning. He said he has a very good appetite. He said his moods are very stable. He seldom finds himself depressed, although, he is quite concerned about the possibility of losing Michael.

The Carters have had Michael since the latter part of March in 1980. Dan told me how a friend of theirs had been contacted by Aunt Polly and this person referred Aunt Polly to them. They were asked if they would like to adopt Michael. They received Michael when he was about two years and ten months of age. Michael has lived with them continuously. Dan indicated that the biological mother, Cecelia Sanders, has never visited Michael. He said in one court hearing (there have been two prior hearings) the mother claimed that she was not allowed to visit him but he said this is not true. They have never prohibited the mother from visiting Michael. He told me that Michael lived primarily with the maternal grandmother, Bessie Begay, and this is what you told me.

You indicated in your letter that there was considerable evidence that Grandmother Begay was alcoholic, and that the child was often left unattended. Further, you indicated that the mother, Cecelia Dick Sanders, "had little or no interest in him during that period of time."

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Dan Carter said that they have never had any problems with Michael, that he is average to above average in school; he reads well, and he is good in arithmetic. He said Michael enjoys the church activities (with the exception that he fidgets in sacrament meeting) and he has a number of friends who play with him. Dan said he has never been teased because he is an Indian.

Dan told me that, at one point, Cecelia told Judge Sam that Michael's biologic father was Anglo but in court, said the father was Indian. He also told me that after one of the court hearings, that the mother is reported to have said that she would prefer that Michael stay with the Carters.

Dan told me that both the kindergarten teacher and the first grade teacher noticed that Michael became withdrawn and had a worried look when he knew that the court hearings were coming up. At the time of the second court hearing, Dan told me that Michael had nightmares and indicated that in his dreams, people and monkeys were coming to take him away.

Apparently, Michael was examined in your office by Dr. Roll. The report indicates it was on January 14, 1983 but according to Dan and Pat, it was on December 10, 1983. Dan indicated that Dr. Robert Crist saw Michael on December 8, 1983, and advised the Carters not to tell Michael about these court hearings. Finally, Dan indicated to me that he grew up with a Navajo Indian, Ralph Wilson. Apparently, Ralph was in Dan's neighborhood from the time he was in the fifth grade until he was in his last year of high school.

On the Shipley Institute of Living Scale, Dan obtained a vocabulary I.Q. of 114, an abstraction I.Q. of 140, with a fullscale I.Q. of 126. Dan's lowered (though above average) vocabulary score is the result of Dan's not reading very much when he was in school. It is obvious, though, that Dan is a very bright person, and now, he is trying to build his vocabulary. On the Bipolar Psychological Inventory, Dan, like so many parents that are involved in custody disputes, had a high score on the Lie scale. The other scores were all in the normal range. He scored as being a very open individual, one who was very optimistic, with good self-esteem, self-sufficiency, achieved oriented, gregarious, as a person who enjoyed family harmony, as a person who was socially conforming, with a good deal of self-control, and kindness, and empathy. On the Minnesota Multiphasic Inventory, again, there was an effort made by Dan to put himself in as good of a light as possible, and all the scores were in the normal range. Once again, he showed himself to be a very gregarious and social individual.

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PATRICIA HAWKINS CARTER:
856 East 100 North
Spanish Fork, Utah, 84660
Telephone: 798-9268
Date of Birth: September 24, 1953
Date of Interview: October 5, 1984

Patricia Carter, who prefers to be called Pat, is a 31 year old, Caucasian female, who stands five feet, one and one-half inches in height, and weighs 175 pounds. She has blonde hair and hazel eyes. Pat comes from a family that consists of her father who is 58 or 59 years of age, and who runs a fast food restaurant. She said her father is in good health. Her mother, Helen Hawkins, is one or two years younger than Mr. Hawkins and is also in good health. The oldest child of this family is Kathy. She is 36 years of age. She is married and is the mother of three children. Her husband teaches at a University in California. Pam is next. She is 34 years of age. She is married and her husband works at the Utah State Prison. This couple have five children. Next is Ryan. He is 33 years of age. He and his wife have four children. He works at a convenience gas station and store. Finally, Pat is the youngest child in the family. She described herself as being a tomboy while she was growing up. She said she and Ryan were very good friends. She said that in school, she did well on those things she was interested in, but frequently, she was not interested in school. She said she graduated from Provo High School in 1971, and then, went to the Technical College where she did well. She continued there for one term. She started dating Dan in 1975. They became engaged in June of 1975 and they were married September 23, 1975.

Pat has had a number of female problems. She had a tubal pregnancy, and because of this, she only has a small piece of ovary left. She has never been able to get pregnant. The couple tried to investigate invitro fertilization but this has not been successful. Pat described herself as being in good health. She said there were no mental illnesses in her immediate or extended family. She said there was no alcohol or street drug abuse in her family, and she described hers and Dan's activity in church. She indicated that she thought she and Dan had a very good marriage. She said Dan had a temper. She said she sleeps very well at night. She goes to sleep immediately, and she has a good appetite. She said, like her husband, her moods seldom fluctuate.

She told me they received Michael on March 23, 1980 and she said when he came to them, he did not speak english. He almost immediately became adjusted well in the family. She said initially, he knew how to beg moeny from people who came to her parent's restaurant, and he also tried to erotically, kiss her and he would get erections when he did this.

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Pat described Michael's mother, Cecelia, as being a very nice person. She said Cecelia has said many times that she wants Michael to be happy. She also described Michael's worries and nightmares at the times of the first and second court hearing and told me many of the same things that her husband, Dan, told me. She said she is worried as to what would happen if Michael were to go back to the reservation, that the biological mother is not active in church and Cecelia's current husband, "hates Mormons." She also told me that, at one point, Cecelia said that Michael's father was Anglo but "is now saying Michael's father is a fullblooded Navajo.

She told me Michael is large for his age; that he enjoys physical contact with people, and she described how well the children both at school and in church have accepted him. She described him as being "tougher than other kids."

On the Bipolar Psychological Inventory, Pat scored high on the Lie scale. (Once again, this is not at all unusual for people in custody disputes to have a high score on this.) She showed herself to be a very dependent individual, as an individual who did not have a high degree of motivation, and as an individual who, when she was a child, felt that there was a fair amount of family discord. In contrast, she scored as having a good deal of psychic comfort, as being optimistic, as being socially conforming, and showing good self-control. On the Minnesota Multiphasic Personality Inventory, she also tried to put herself in a good light, and all other scores were in the normal range. On the Shipley Institute of Living Scale, she received a vocabulary I.Q. of 120, an abstraction I.Q. of 120, and a fullscale I.Q. of 120.

MICHAEL CHAD CARTER:

Date of Birth: May 14, 1977

Date of Interview: October 5, 1984

Michael Chad Carter is seven years and five months of age. When I saw him, he was in the 92nd percentile in weight, and the 87th percentile in height. Michael has dark brown hair, and brown eyes. He quickly adjusted himself to the interview and was outgoing and friendly. He told me of the friends he had, and told me how much he liked school, and how much he liked church. He said he has a bedroom of his own and that he and his father (Mr. Carter) played catch with football and baseball. They go fishing a lot and Michael said he was very happy with his parents. Michael told me that he had no memories of having lived with anybody else but the Carters, and he made it very clear to me that he wanted to stay with them. He told me about a cat that he had, a cat that his parents gave him. He talked about going to movies with his parents, and he talked about having five grandparents. These refer to the four anglo grandparents (Mr. and Mrs. Hawkins and Mr. and Mrs. Carter, and then, the father of Mr. Carter).

Michael indicated that when he grows up, he would probably marry a white girl and he said he wanted to do things like his dad (Mr. Carter) did.

As I indicated, Emily Fallis, one of my doctoral students, gave Michael the Wechsler Intelligence Scale for children, Revised Edition. On this, he obtained a verbal I.Q. of 107, an non-verbal or performance I.Q. of 100, and a fullscale I.Q. of 103. Ms. Fallis indicated that Michael was a very open and personable child. She indicated that he was quick to admit when he didn't know an answer, and would sometimes ask her for the correct answer. She described him as having a mature and flexible manner as opposed to a dependent manner, and said that he was talkative but was attentive to the tasks at hand. It is interesting to note that on the subtests that Michael's general fund of information was above average, as was his ability to abstract, as was his vocabulary. It was also noted that his writing and arithmetic ability were at the average to above average range. As I indicated, I gave Michael the Children's Apperception Test. On this test, he showed the usual boy (masculine) type of stories. The Rorschach indicated a very good reality testing on Michael's part. His identity formation has formed quicker than children his age and there is no evidence of any emotional or psychological disturbance. The computer printout indicates the following:

1. The personality style is well entrenched and stable currently due to the presence of a preponderance of organized psychological activity over more disruptive and irritating activity.
2. Mature and organized controls are adequate to the controlled expression of these needs.
3. Emotional discharges will not be well modulated. (However) sufficient controls exist that the client may be seen simply as very colorful or creative.
4. There is a clear potential for impulsivity, inappropriate behavior, and or affective excesses.
5. There is an average degree of perceptual accuracy or reality testing, both at times when emotions and thoughts are allowed free expression and when these activities are kept under stricter control.
6. The client's aspirations appear comensurate with his or her abilities.

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7. The client is quite aware of other people and may even be overly concerned about them."

LINDA CORAY:
Interview: October 6, 1984
Telephone: 798-2463

Linda Coray, Michael's kindergarten teacher, said that Michael was very quiet when he first came to school, but in late October and November, they had a unit on Indians at Thanksgiving, and he was the Indian in the program, "and he blossomed from that experience." She said he did very well in school. While he wasn't the fastest student, he was a very good student in school. She said she thought Mr. and Mrs. Carter may have had too high of expectations at first, but the parents kept in close contact with the school, and they quickly adjusted their expectations in keeping with suggestions from Mrs. Coray. She said Michael frequently would bring things such as animal skins that Mr. Carter had tanned to school, and she commented that both parents came to every parent-teacher meeting that was held. She said it was uncommon for both parents of children in her class to always come to these meetings. She commented that Michael became more withdrawn when the (first) court hearing was imminent. She commented that he had never talked about things that happened when he was living with his "Indian parents" and when he was on the reservation. She said that he soon learned to speak as well as the other children. She said she lives in the neighborhood where the Carters live, and that Michael has fit in very well at church. She said he tries diligently to please other people and he is well accepted by other people.

PAULA FARRER:
Telephone: 377-1313
Date of Interview: October 8, 1984

Ms. Farrer was Michael's first grade teacher. She had Michael for six hours each day during the school year. She said he was never a behavior problem, that he was very talkative, and that he was a physical child. She said he excelled in reading and math. He was well accepted by the other children. She said he was upset during the court hearing and he seemed quite nervous. She said he told her once, "I'm going to see a man to see if I can stay at home with my Mom and Dad." She said she thought he had a very good relationship with both parents. She said the father (Mr. Carter) did many things with him in sports and outdoor activities. She said the mother would come to school as a mother's helper, and she could see that Michael and Pat got along well with each other. She said he scored well on the standardized achievement tests, especially, in reading comprehension and science. Finally, she said he was as well adjusted as any of the other children and that "he never mentioned anybody but the Carters as being

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parents."

VIRGINIA HANSEN:
Telephone: 798-3421
Date of Interview: October 8, 1984

Ms. Hansen told me that Mike was doing very well in the second grade. He has a very good self concept. He has many friends. She said he did well in reading and math, that he was not a discipline problem. She described him as being a very happy child, and he was in the best reading group in her class. She said she was impressed with the Carters as parents because they kept up on his reading assignments, and that it was obvious that they are helping him with his schoolwork. She said Mike has talked about the family vacations and doing things both with his parents and with his grandparents and his cousins.

ANN CARTER:
280 West 1730 North
Provo, Utah, 84604
Telephone: 373-3197
Date of Interview: October 8, 1984

Mrs. Carter is Dan's mother. She described Dan as being a very good person, both as a child and as a father and husband. She said Dan had worked with his father for many years and enjoyed working with his father. She said she thought that Pat and Dan got along with each other very well and that they were surprisingly compatible, especially, considering the fact that Pat had never been involved in sports and outdoors. "Now, she does everything with Dan." She said Dan, Pat, and Michael are always doing things as a family. She said they do so much as a family that they seldom ask her to babysit Michael. She told me about when Dan was growing up that the neighbors had Indian children. She specifically mentioned Ralph Wilson and the fact that Dan associated with Ralph as one of his best friends. She told me that Dan was broken hearted when the social worker said they were going to take Mike back to the reservation. She is happy that Dan and Pat are fighting "to keep Mike with them."

She described Mike as being surprisingly alert and inquisitive, and said that he asked many questions.

ALBERT HAWKINS:
Telephone: 377-2495
Date of Interview: October 8, 1984

Mr. Hawkins is Pat's father. He described Pat and Dan as being very devoted to Mike. He said that Pat and Dan had an excellent relationship

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with each other and that Mike is much better behaved and minds better than some of their other grandchildren. He said he thinks the best interests of Mike would be met by Mike continuing to live with Pat and Dan. He concluded by saying that Michael gets along very well with his cousins "especially, the boys his size."

MRS. MARIAN SEAMONS:
Telephone: 225-1916
Date of Interview: October 8, 1984

Mrs. Seamons and her husband have had number of Indian children live with them during the school year. Especially, a Ralph Wilson, who was with them from the time when he was in the fifth grade to the time he was in his last year of high school. She said that Ralph and Dan were very good friends and she thought that they got along well with each other and that Dan was appreciative and accepting of Ralph. She said she had seen Dan and Pat and Michael together. She described Michael as being well adjusted and happy and said Michael is very well cared for. She said if she had a child that needed to have parents, she would choose Pat and Dan as the parents for the child.

MR. AND MRS. MELVIN CARTER:
Telephone: 798-6296
Date of Interview: October 8, 1984

Mr. and Mrs. Carter have also had a number of Indian children in their home. They currently have a Navajo girl. They know the Carters quite well. She said Pat and Dan are good parents to Mike. They allow him freedom to have friends and yet, they have expectations for him and they are good disciplinarians for him.

MATERIAL FROM DR. ROLL'S REPORT:

It is interesting to read Dr. Roll's report on Michael. He describes Michael as having a well developed capacity to relate to other people and he indicated:

Jeremiah is very closely and warmly bonded and attached to the Carters. It is clear that he sees them as faithful and powerful sources of stimulation, confidence, and security. He also looks to them for positive, productive discipline. His love and bonding to them very strongly speaks to the value that the relationship with Carters has for him. It is very difficult for Jeremiah to make a break with the Carters and will cause considerable pain and period of painful mourning. It is clear that Jeremiah will not be able to go through this period

successfully without close supervision and professional help.

On the other side, Dr. Roll indicates that Jeremiah is suffering from a mild to moderate depression. (I did not see this when I examined him.) He indicated that:

He sees Indians as bad, ugly, and frightened. He sees his Indian mother, particular, as bad, ugly, and weak, dumb, and dishonest. He sometimes refers to characters in his fantasies as ugly, brown Indians and generally, represents Indians as being destructive or damaged. (Further, he indicates that Jeremiah) reports he is an Indian now but when he grows up, he will be a white man, which he explains is better because they are stronger. All Indians are weak, can't chop wood and white men can. He also said his baby will be white. Further, he explains the Indian part of him will come out in the baby by the baby playing with Indians. This extreme confusion about his own racial identity, a very serious and negative view of Indians, and about his own specific origins are striking and pathological."

(Dr. Roll concludes), it will be safer in the long run if after a period of visitation and preparation, Jeremiah be returned to the Navajo family. The period of preparation will take, at least, a year and will require supervised visitation of increasing lengths and frequency. During this time, the families involved and Jeremiah are going to need professional assistance in the form of supportive social work and family therapy. In sum, there is no way to avoid hurting Jeremiah. My recommendation that in the long run, the least pain to Jeremiah will result by returning him to his Navajo family. Whether this is done or not, he and those caring for him are going to have to take extensive steps in order to keep an evitably painful process from becoming even more painful."

LIBRARY SEARCH BY LURA TIBBITTS—KLEBER:

As indicated, I have attached a library search to this report and will not repeat the contents of this in this report. I will only note that the literature as known by Mrs. Tibbitts—Kleber, who is doing her doctoral research on parental and child attachment disorders clearly points to family and parental disruption as being much more serious than racial confusion.

REPORT FROM PAUL BUCKINGHAM:

As I indicated, I asked Mr. Paul Buckingham to examine the Carters and Michael. Mr. Buckingham has worked for a number of years in placing

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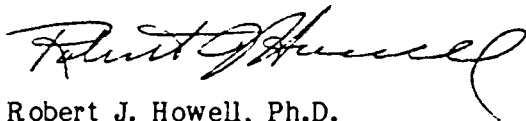
Indian children and adolescents in foster homes. Mr. Buckingham's report, based on his first visit (and one or two more visits have been scheduled) is attached and indicates that Michael and Mr. and Mrs. Carter are firmly bonded to each other. To separate this bonding is precarious at best. Mr. Buckingham is of the opinion that should Michael be allowed to stay with the Carters, he will undoubtedly become a bicultural person. Mr. Buckingham does not see this as detrimental to Michael's well being

OPINIONS AND RECOMMENDATIONS:

1. Michael is a bright youngster who has no memory of his life for, two years and ten months on the reservation.
2. Michael is well adjusted in the home that he is now in and sees Mr. and Mrs. Carter as his parents. In my opinion, the Carters are his psychological parents.
3. It is my opinion that Michael will be emotionally damaged by taking him out of the home. The nearly five years that he has spent with the Carters, especially, when considering the early age that he came with them, clearly speaks to the importance of his continuing to live with them.
4. I agree with Dr. Roll that effort should be made to inculcate in Michael an appreciation for his heritage, and I see no reason why contact could not be effected between Cecelia Sanders and Michael.
5. I could not find any evidence that Michael was depressed. If he was depressed when Dr. Roll saw him, it is likely that this was a reaction to his fears that he would be taken away from the Carters. He told his school teacher Paula Farrer that he was going to see a man to determine if he could keep living with the Carters.

If I may be of any further help in this matter, please feel free to contact me.

Sincerely yours



Robert J. Howell, Ph.D.
1190 North Ninth East #285
Provo, Utah 84604

RJH:mr
Attachments

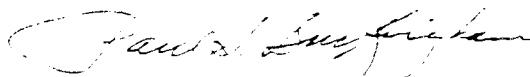
Interview with Michael Chad Clark.
Dan L. Clark. and Patricia Clark
October 10, 1984

On October 10, 1984, I had the opportunity to observe and interview Mike Carter in the presence of his parents, Dan and Pat. The interview lasted approximately forty-five minutes. I observed Mike to be relaxed and open in his conversation and answers. During the interview, he stood for a little while but mostly leaned, layed and sat on his father's lap. His overall demeanor was relaxed and comfortable with the setting, and throughout the interview he maintained a physical attachment with his father. His answers were assured and discriptive. His communication, both verbal and nonverbal, demonstrated a close bond between himself and his parents. We discussed the expression of emotion, both positive and negative, (i.e., he is affectionate and says he loves his parents almost daily, he glares and at times yells when he is very unhappy, angry, or very disappointed). It is evident that Mike is bonded to the Carters.

We discussed what is planned as far as the maintainance of heritage and Navajo culture in Mike's life. The parents plan to utilize relatives and the resources at BYU to instill pride in his ethnicity and recover traditions of his people. Trips to the reservation, the parents having more intense study of the Navajo culture, and the re-learning of the language, are all future goals of the parents to have their son maintain his heritage while learning to function well in the dominant white man's society.

It would appear that the intent of the parents presently is to guide the child to bi-culturality rather than to make him white, or assimilated into a traditional Wasatch white mormon youth. Presently his relationship with his parents appears to be excellent and very close. Disruption of this bond in the name of ethnic heritage would probably cause retardation of self-worth, identity, and ability to cope and problem solve in the future.

Respectfully,



Paul S. Buckingham
License #

MSW CSW
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EXHIBIT "G"

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

NAVAJO NATION; NAVAJO NATION, as
parens patriae for JEREMIAH
HALLOWAY, CECELIA SAUNDERS,
BESSIE BEGAY,

Plaintiffs,

vs.

DISTRICT COURT FOR UTAH COUNTY,
FOURTH JUDICIAL DISTRICT, STATE
OF UTAH; HONORABLE DAVID SAM;
DAN and PATRICIA CARTER,

Defendants.

MEMORANDUM DECISION
IN FURTHERANCE OF
ORDER GRANTING
SUMMARY JUDGMENT

Civil No. C85-317G

This matter came on regularly for hearing on August 29, 1985, on plaintiffs' Motion for Summary Judgment, the Motion for Summary Judgment of defendants District Court for Utah County, Fourth Judicial District, State of Utah, and Honorable David Sam; and the Motion to Dismiss or in the Alternative, for Summary Judgment of defendants Dan and Patricia Carter. Craig J. Dorsay of the Navajo Nation Department of Justice appeared on behalf of the plaintiffs, Stephen J. Sorenson of the Utah Attorney General's office appeared on behalf of defendants District Court for Utah County, Fourth Judicial District, State of Utah and Honorable David Sam, and Richard B. Johnson of Howard, Lewis & Sorenson appeared on behalf of defendants Dan and Patricia Carter. Having reviewed extensive memoranda of law and exhibits which were filed with the Court, and having heard extensive oral

arguments of all counsel, the Court granted the defendants' Motions for Summary Judgment and denied the plaintiffs' Motion for Summary Judgment. Having further reviewed all matters and being fully advised, the Court now sets forth its Memorandum Decision as was contemplated at the time the oral orders were rendered. This Memorandum Decision is incorporated into the orders made on August 29, 1985.

FACTUAL BACKGROUND

This action arose out of an adoption proceeding in the District Court for Utah County, Fourth Judicial District, State of Utah. Jeremiah Halloway, the subject of the proceeding, was born on May 14, 1977, to plaintiff, Cecilia Saunders, a full-blooded Navajo, a member of the Navajo Tribe and a domiciliary of the Navajo Reservation. Jeremiah lived the first six months of his life with his mother, after which he was under the care of his maternal grandmother, Bessie Begay. In March of 1980, a maternal aunt removed Jeremiah from the reservation with the oral consent of the mother and took him to Utah for adoptive placement with defendants Dan and Patricia Carter. In May of 1980, the natural mother appeared in the District Court for Utah County and executed a Consent to Adoption after which defendants Dan and Patricia Carter then filed a petition for adoption. Defendant Judge David Sam ordered counsel for defendants Dan and Patricia Carter to give notice seeking the consent of the Navajo Tribe before proceeding with the adoption, and notification was given approximately five months later to plaintiff Navajo Nation. Some two years after the petition for adoption was filed, in May of

1982, the Navajo Nation appeared in the lawsuit as intervenor and filed a motion to dismiss the proceeding and transfer jurisdiction to the tribe on the basis of the Indian Child Welfare Act of 1978 (ICWA), Pub. L. No. 95-608 (codified at 25 U.S.C. § 1901 et seq.). After a hearing on the matter, on July 14, 1982, defendant Judge David Sam awarded temporary custody to Dan and Patricia Carter, and ruled that the domicile of the child was that of the adoptive parents, that good cause existed for the State Court to retain jurisdiction, and that the requirements of the ICWA had been satisfied. The State Court gave the parties additional opportunity to present further evidence on the domicile issue, and after receiving that evidence, entered an order dated October 6, 1983, reaffirming its finding that the child's domicile was that of the adoptive parents and that good cause existed under the ICWA for the State Court to retain jurisdiction. The Court also ruled that there had been an abandonment of the child.

On October 12, 1984, the District Court of the Navajo Nation for Window Rock found that, pursuant to Navajo common law and statute, the domicile of Jeremiah had at all times remained within the boundaries of the Navajo Reservation and that the Navajo Tribe had exclusive jurisdiction under tribal statutes, common law and the ICWA to determine the custody of Jeremiah Halloway. Just prior to the date set for trial on termination of the parental rights, the Navajo Nation filed a Motion for Full Faith and Credit and to Dismiss in the state court proceedings, based upon the ruling of the Navajo District Court that it had

exclusive jurisdiction over the adoption proceedings and that the Fourth District Court was without jurisdiction. At the beginning of the trial on October 22, 1984, the State Court denied the motion as untimely, and went ahead with the trial on the termination of parental rights. On January 28, 1985, defendant Judge David Sam entered his decision, finding:

- (1) That the evidence (including expert testimony) established beyond a reasonable doubt that to return Jeremiah to his Indian custodians would result in serious emotional or physical damage to him;
- (2) That active efforts have been undertaken to attempt the rehabilitation of the Indian family and have failed; and
- (3) That the biological mother knowingly and voluntarily abandoned the child as defined in Utah Code Annotated 78-3a-48(1).

The State Court therefore granted the petition for adoption, and on February 28, 1985, the Navajo Nation filed a Notice of Appeal of Judge David Sam's decision to the Utah Supreme Court. That appeal presently is pending and being pursued by all parties. On March 15, 1985, plaintiffs filed the instant action in the United States District Court for the District of Utah.

The action before this Court contains fifteen separate claims for relief based on alleged violation by the defendants of the ICWA and the United States Constitution. Six claims seek recovery under 42 U.S.C. § 1983, alleging violation of civil rights; eight claims seek declaratory relief under 28 U.S.C. § 2201, alleging that the exercise of state jurisdiction was void; and one pendent claim alleges that the placement of Jeremiah with the adoptive parents violated the Interstate Compact on Placement

of Children, Utah Code Ann. § 55-8b-1, et seq. The plaintiffs also seek monetary relief against all defendants for violation of civil rights, and declaration of their rights under the ICWA, the United States Constitution and state law.

INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act was enacted in 1978 to remedy perceived inequities in adoption standards for Indian children. The Act represents congressional recognition of the interest of Indian Tribes in the preservation of their valuable heritage. Background and cultural differences between society generally and the Indian nations had greatly influenced social and adoptive agencies to increase the numbers of Indian children being placed in foster and adoptive homes. A general misunderstanding of Indian culture compounded the numbers of Indian children being separated from their families. In 1978, after recognizing that greater than one-fourth of all Indian children were separated from their families and placed in foster homes, adoptive homes or institutions, Congress declared that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." H. Rep. No. 1386, 95th Cong., 2d Sess., 9, reprinted in 1978 U.S. Code Cong. & Ad. News 7530, 7531. Therefore, in 1978, Congress enacted ICWA, the purpose of which was

to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster

or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs.

Id. at 1. This Court is aware of and shares that concern. As one court stated:

Each individual is an amalgam of the predominant religious, linguistic, ancestral and educational influences existent in his or her surroundings. Indian people, whether residing on a reservation or not, are immersed in an environment which is in most respects antithetical to their traditions. Furthermore, the cultural diversity among Indian tribes is unquestionably profound yet often not fully appreciated in our society

. . . .
Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. Absent the next generation, any culture is lost and necessarily relegated, at best, to anthropological examination and categorization.

Matter of M.E.M., 635 P.2d 1313, 1317 (Mont. 1981). This Court is cognizant of the responsibility to promote and protect the unique Indian cultures of this and other states. This Court also is aware, however, that the ICWA and principles of equity require that the interests of the individual also must be protected, not in derogation of the Act but in compliance with its specific provisions.

In order to further Congress' desire to promote the welfare of Indian children, families and culture, the ICWA lays jurisdiction over Indian child adoption proceedings in the tribe or the state respectively, depending on the domicile of the

child. The Indian tribe has exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation. 25 U.S.C. § 1911(a) (1982). A state court has jurisdiction over foster care placement or termination of parental rights of Indian children not domiciled or residing within the reservation, but the Act requires the state court to transfer the proceeding to the tribe upon petition of either parent, the custodian or the child's tribe, absent good cause to the contrary or objection of either parent. Id. § 1911(b). The Act also requires that the United States, every state and territory and every Indian tribe "give full faith and credit to the public acts, records, and judicial proceedings of Indian tribes applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." Id. § 1911(d).

The Act necessarily contemplates the state court's involvement in Indian child adoption proceedings. Indeed, the ICWA grants concurrent jurisdiction in state and federal courts over adoption proceedings brought under its provisions. 25 U.S.C. §§ 1911, 1921 (1982); 28 U.S.C. 1360(a) (1982). "Where the Act applies, the state court has a duty to exercise its jurisdiction over actions brought thereunder, since to decline jurisdiction in such a case would violate the supremacy clause of the federal [C]onstitution." E.A. v. State, 623 P.2d 1210, 1215 n.13 (Alaska 1981) [citing Testa v. Katz, 330 U.S. 386 (1947); Mondou v. New York, New Haven & Hartford Ry. Co., 223 U.S. 1

(1911)]. A state court therefore has a right and a need to determine its own jurisdiction in Indian child adoption cases brought before it, and a judge making such a determination clearly would be acting within the scope of his judicial capacity, regardless of the propriety of his ruling on the jurisdictional question.

JURISDICTION IN INDIAN CHILD ADOPTION PROCEEDINGS

Jurisdiction in such proceedings is based upon a determination of the domicile of the child. That question was squarely before the state District Court, which took cognizance of the issue and made its determination after fully hearing evidence and arguments of the parties. That Court found that the child's domicile was in Utah with the adoptive parents, and that transfer of the proceedings to the tribal court would not be in the best interests of the child. Those findings are currently on appeal before the Utah Supreme Court.

Plaintiffs ask this Court to render a declaration of their rights under the ICWA and the United States Constitution, contending that these are additional issues not raised in the state court proceedings. But those claims presented here as alleged constitutional and statutory infringements will live or die on a determination of the issue of domicile, an issue that was fully presented and litigated in the state proceeding which is now pending before the Utah Supreme Court. Reversal on the domicile issue in state court basically would give the plaintiffs the declaratory relief they seek in this Court. On the other hand, affirmance would open the avenue of redress before the

Supreme Court of the United States on the constitutional issues. It would be premature and inappropriate for this Court to enter rulings of any kind in the present posture of this litigation.

CLAIMS FOR DECLARATORY RELIEF

Because the issue of domicile was fully litigated in the state court proceeding, and now the question of the propriety of the State Court's application of law and determination of domicile is pending before the state's highest court, this Court exercised its discretion under the Declaratory Judgment Act by dismissing plaintiffs' claim for declaratory relief. It is appropriate for federal courts to deny a declaratory judgment under 28 U.S.C., Section 2201 where the issues raised are likely to be fully adjudicated in an action pending in state court at the time the declaratory judgment action is filed in federal court. Moore's Federal Practice ¶ 0.220, at 2387-88 (1985) [citing Miller v. Miller, 423 F.2d 145 (10th Cir. 1970).] The United States Supreme Court has recognized and upheld exercise of discretion by district courts in such circumstances, ruling that a district court is under no compulsion to exercise jurisdiction, and recognizing that:

The decision in such circumstances is largely committed to the discretion of the District Court. . . . (and) . . . that such deference may be equally appropriate even when matters of substantive federal law are involved in the case. (Footnote omitted.)

Will, U.S. District Judge v. Calvert Fire Insurance Co., 437 U.S. 655 (1978) cited in Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1130-31 (10th Cir. 1979). See also, State Farm Mut.

Auto Ins. Co. v. Scholes, 601 F.2d 1151, 1155 (10th Cir. 1971), and Arizona v. San Carlos Apache Tribe of Arizona, 103 S. Ct. 3201 (1983), wherein the Court affirmed district court orders granting motions to dismiss federal actions seeking adjudication of water rights, where concurrent state court actions had previously been initiated. The issue of domicile and whether it was appropriate for the state court to assume jurisdiction over the adoption proceedings in this case is precisely the question presented before the Utah Supreme Court. This Court does not sit as an appellate court for state decisions, and declaratory judgment should not be used to re-examine what has been adjudicated in another forum. 1A J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 0.220, at 2388 n.7 (1985). See American Benefit Life Ins. Co. v. United Founders Life Ins. Co., 515 F. Supp. 800, (W.D. Okl. 1980), and cases cited therein.

All parties had full and complete opportunity to be heard in the state court proceedings. It would not be in the interests of judicial economy, federal-state comity or the avoidance of piecemeal and duplicative litigation for this Court to act upon plaintiffs' claims for declaratory relief or the Section 1983 claims.

SECTION 1983 CLAIMS

The United States Supreme Court has held that rules of res judicata and collateral estoppel are applicable to Section 1983 actions, where a final judgment on the merits of an action has been rendered in state court and the same issues that were or

could have been raised in that action are later sought to be raised in a federal action. Allen v. McCurry, 449 U.S. 90 (1980). The Court stated in the Allen case:

The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. . . . As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources and, by preventing inconsistent decisions, encourage reliance on adjudication.

Id. at 94 (citations omitted).

To allow relitigation of the question of the child's domicile, and ultimately the appropriateness of the state court's taking jurisdiction of the case for purposes of the Section 1983 claims now asserted, would be to deny the state court system the full faith and credit to which it is entitled, and would violate principles of res judicata and collateral estoppel. In the recent case of Migra v. Warren City School District Board of Education, 79 L. Ed. 2d 56 (1984), the Supreme Court stated:

It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered.

Id. at 61. Utah follows the general principles of res judicata and collateral estoppel as discussed above. See Penrod v. Nu Creation Creme, Inc., 669 P.2d 873 (Utah 1983); Bernard v. Attebury, 629 P.2d 892 (Utah 1981). This Court finds that the basis for the plaintiffs' claims for violation of civil rights under Section 1983 was fully litigated on the merits in the state proceeding and this Court is bound by the State Court's decision.

FULL FAITH AND CREDIT: DECISION OF THE
DISTRICT COURT OF THE NAVAJO NATION

As observed above, the decision of the District Court of Utah is entitled to full faith and credit. But plaintiffs ask this Court to find that the decision of the District Court of the Navajo Nation for Window Rock that the Navajo Tribe had exclusive jurisdiction over the adoption proceeding and that Jeremiah was domiciled on the reservation was entitled to full faith and credit by the State District Court. The determination by the District Court of the Navajo Nation was made some four and one-half years after the Consent of Adoption was given by the child's mother in open court in the District Court of Utah, and after extensive evidence was presented on the domicile issue following a substantial period of total inaction and inattention to the matter by the plaintiff Navajo Nation.

There is no question that the ICWA requires universal recognition of the acts, records and judicial proceedings of any Indian Tribe. The Act states:

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and

judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1911(d). This statute does not require, however, that the public acts, records, and judicial proceedings of any Indian tribe be accorded greater weight than the public acts, records, and judicial proceedings of a state. Indeed, an Indian tribe is bound to give full faith and credit to the public acts, records, and judicial proceedings of a state. Where the state court acts within the scope of its judicial capacity to determine personal jurisdiction and that issue is fully litigated, the State court clearly would not be required to relinquish jurisdiction based upon the court order of a sister state over a year later. The same is true of the subsequent Tribal Court Order.

JUDICIAL IMMUNITY

Although we need not reach the question of judicial immunity, this Court finds it appropriate to address this point as an additional basis for dismissal of the claims against defendant Judge David Sam. This Court holds that Judge Sam is absolutely immune from any claim for damages, and that injunctive and declaratory relief against him would serve no purpose.

A. Claims for Monetary Relief

It is a firmly established principle in our judicial system that judges are immune from liability for acts committed within their judicial capacity. The reason for this

judicial immunity, as outlined in Bradley v. Fisher, is that judges must be free to act upon their own convictions, without concern of personal consequences to themselves. 13 Wall. 335 (1871). Although judicial immunity is not without limitations, "a judge is entitled to judicial immunity if he has not acted in clear absence of all jurisdiction and if the act was a judicial one. An act is judicial if it is a function normally performed by a judge and the parties dealt with the judge in his judicial capacity . . . A judge is entitled to immunity even if he acted with partiality, maliciously, or corruptly." Martinez v. Winner, No. 82-2110, slip op. at 8 (10th Cir. Aug. 22, 1985) [citing Stump v. Sparkman, 435 U.S. 349, 359 (1978); Bradley v. Fisher, 13 Wall. 335, 348 (1871)]. Although there is danger that some wrongs may go unredressed as a result of the application of judicial immunity, our system of justice has found it more tolerable for a few wrongs to go unredressed than for the courts to be constantly harassed by suits brought by disappointed litigants. Id. slip op. at 12. The questions presented before this Court are whether the alleged wrongful conduct of Judge David Sam occurred outside of Judge Sam's judicial capacity or function and whether Judge Sam acted in clear absence of all jurisdiction. It is clear from the facts that at all times for which wrongful conduct is alleged Judge Sam was acting in his judicial capacity and that all his acts were judicial ones. Additionally, as has been thoroughly discussed, the ICWA contemplates state courts making determinations of personal jurisdiction in Indian child adoption proceedings and taking

jurisdiction in appropriate cases. The state court's jurisdiction under the Act to determine its own jurisdiction constituted judicial action on the part of Judge Sam. Determination of the issues as to domicile and personal jurisdiction certainly was not in clear absence of all jurisdiction, and at the very least constituted a colorable claim of jurisdiction. Therefore, this Court rules that as to the claims for monetary relief, defendant Judge Sam is absolutely immune.

b. Claims for Injunctive and Declaratory Relief

Although the United States Supreme Court recently found that judicial immunity is not a bar to prospective injunctive relief against a judicial officer, nor to the award of attorney's fees under 42 U.S.C. § 1988 in cases where prospective injunctive relief is granted, Pulliam v. Allen, 104 S. Ct. 1970 (1984), the question presented here is whether this case is appropriate for collateral prospective relief. Unlike the respondents in Pulliam, who sought to enjoin a state Magistrate from requiring bond for a nonincarcerable offense, the plaintiffs in his case do not seek the prospective enjoining of an ongoing unconstitutional practice, but rather seek to reverse a final judgment which resulted from evidentiary hearings in a specific case. The plaintiffs' request is more in the nature of appellate review of the State Court decision. Therefore, this Court finds that the narrow exception to the doctrine of judicial immunity as

articulated in the Pulliam decision does not apply to the facts of this case, and the claims for declaratory and injunctive relief against defendant David Sam are dismissed.

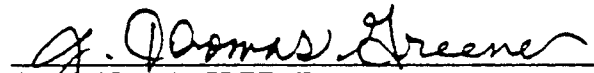
One additional question that is implicit in the plaintiffs' arguments is whether Section 1983 somehow overcomes the common law doctrine of judicial immunity. That point was thoroughly addressed in the recent case of Martinez v. Winner, 548 F. Supp. 278 (D. Utah 1982), aff'd. No. 82.2110 (10th Cir. Aug. 22, 1984). That case involved alleged intentionally wrongful and conspiratorial violations of the Civil Rights Act by a judge. Martinez asked the Court to find an exception in such conduct to the common law doctrine of judicial immunity. Chief Judge Jenkins of the District Court for Utah in the initial decision in Martinez pointed out that in Pierson [v. Ray], 386 U.S. 547 (1967), the United States Supreme Court held that the common-law doctrine of judicial immunity was not abridged by the enactment of the Civil Rights Act of 1871 as codified in 42 U.S.C. § 1983, and that "State judges are thus immune from suit under § 1983 for their 'judicial' acts." 548 F. Supp at 292.

This Court finds no basis in law or in fact for plaintiffs' claims against defendant David Sam for monetary or prospective injunctive relief.

For the foregoing reasons, defendants' Motions for Summary Judgment are granted, and plaintiffs' Motion for Summary Judgment is denied.

IT IS SO ORDERED.

DATED: September 30th, 1985.


J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

Copies to: Mary Ellen Sloan
Craig J. Dorway
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