2002

In the matter of the adoption of Jeremiah Halloway v. Navajo Nation : Reply Brief

Utah Supreme Court

Richard B. Johnson; Attorney for Respondent.
Mary Ellen Sloan; Craig Dorsay; Attorneys for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ADOPTION OF)
)
JEREMIAH HALLOWAY,)
)
A person under eighteen years)
of age.)
)
NAVAJO NATION,)
)
Appellants.)

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The Indian Child Welfare Act is referred to in this reply brief as the "ICWA". The legislative history of the Act is referred to as the "House Report" for H.R. REP. NO. 1386, 95th Cong, 2d Sess., reprinted at 1978 U.S. CODE, CONG. & ADMIN. NEWS 7530, and the "BIA Guidelines" for "Part III, Department of the Interior; Bureau of Indian Affairs; Guidelines for State Courts; Indian Child Custody Proceedings", 44 Fed. Reg. 67584 (Nov. 26, 1979).

The transcript of the hearing of April 7, 1983, is referred to as Transcript I. The transcript of the hearing of October 22, 1984, is referred to as Transcript II. The consent proceeding of May 30, 1980, is attached to this brief as Exhibit K.

STATEMENT OF FACTS

Respondents' Statement of Facts is virtually identical to the Summary of Facts attached as an exhibit to Respondents' brief. As alleged in Appellants' recent Motion to Strike, Respondents have deliberately distorted some of the relevant testimony. The Court is urged to read the actual testimony rather than to rely on the summary prepared by Respondents.

Two examples are given to illustrate the nature of this problem. On page 3, line 14, Respondents allege that the natural mother testified that there were times when Jeremiah was found unattended because the grandmother was drunk. This is false. The only person who testified to this was Respondents' attorney.

Twice he tried to put testimony into the mouth of the Navajo Nation witnesses. In both cases, he was expressly corrected, by the natural mother (Transcript I, p.23, line 24) and the tribe's social worker (Transcript I, p.136, lines 1-3), that there was only one time when Jeremiah was taken into custody by the police.

Respondents also assert that the natural mother only had limited contact with her son while he was on the reservation. (Resp. Br. at 3-4, No.5). Again, this is false. Cecelia testified that she saw Jeremiah almost everyday while he stayed with his grandmother pursuant to tribal custom, Transcript I, p.25, lines 14-16, and in addition used to have sole custody of him for several days every couple of weeks. Transcript I, p.25, line 4; p.26, lines 18-25.

POINT I

THE DISTRICT COURT WAS WITHOUT JURISDICTION OVER AN ADOPTION PROCEEDING INVOLVING JEREMIAH HALLOWAY.

Respondents have attempted to completely mischaracterize this case as an intrusion into "areas of traditional state interest." Resp. Br. at 14. Respondent's view of this proceeding, however, is wrong. Internal affairs of a tribe are historically the exclusive province of the tribe, and state authority is completely preempted absent express legislative permission by Congress. The Indian Child Welfare Act is express federal law designed to protect and even enhance tribal control over Indian children. Respondents' argument that the ICWA is designed to grant jurisdiction to states is absurd and without merit.

The principles governing resolution of jurisdictional disputes between Indian tribes and states were recently discussed at great length by the Supreme Court in New Mexico v. Mescalero Apache Tribe, 462 US 324, 76 L Ed 2d 611, 103 S Ct 2378 (1978). The Court noted at the beginning of its discussion the strong presumption of exclusive tribal jurisdiction over internal affairs, holding that

> in demarcating the respective spheres of state and tribal authority over Indian reservations, we have continued to stress that Indian tribes are unique aggregations possessing "attributes of sovereignty over both their members and their territory." (citation). Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a (sic) "historic immunity from state and local control",

> Mescalero Apache Tribe v. Jones, 411 US at 152, and tribes retain any aspect of their historical status not "inconsistent with the overriding interests of the National Government." (citations).
>
> The sovereignty retained by tribes includes "the power of regulating their internal and social relations", (citations). A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that "absent governing Acts of Congress", a State may not act in a manner that "infringed on the right of reservation Indians to make their own laws and be ruled by them." (citations, including Fisher v. District Court, 424 US 382, 388-89 (1976) (adoption)).

462 US at 332-33.

The Supreme Court then discussed the role of "Indian preemption" in resolving disputes between states and tribes. After noting that preemption rules developed in regular constitutional cases are inapplicable when Indian affairs are involved because of "'the unique historical origins of tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination," 462 US at 334, the Court enunciated the rule of Indian preemption:

> State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. (citations, including Hines v. Davidowitz, 312 US 52, 67 (1941) (state authority precluded when it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress")).
>
> Certain broad considerations guide our assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial "backdrop," (citations), against which any assertion of state authority must be assessed. Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes.... Thus when a

> tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against interference with the successful accomplishment of the federal purpose. (citations).
>
> 462 US at 334-36.

The United States Supreme Court in a unanimous opinion has ruled that a state has no interest in an adoption proceeding involving an Indian child arising on the reservation. Fisher v. District Court, 424 US 382, 47 L Ed 2d 106, 96 S Ct 943 (1976). The Court concluded that: "State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the (tribe) and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." 424 US at 387-88. The Court also found that there was no federal statute which sanctioned state interference with tribal self-government. Id. at 388.

The fact that the Fisher case involved only Indians while in the present case the adoptive petitioners were non-Indians is of no impact. As the Fisher decision noted, where the litigation "arise(s) out of conduct of an Indian reservation," even disputes between non-Indians and Indians are subject to exclusive tribal jurisdiction. 424 US at 386, citing Williams v. Lee, 358 US 217, 220, 3 L Ed 2d 251, 79 S Ct 269 (1959). All of the conduct in the present case before the adoption petition was filed took place on the Navajo reservation. The Fisher decision concluded that in an adoption proceeding, "arising on the reser-

vation" is determined by the legal residence of the parties. The ICWA adopted this standard by basing jurisdiction on the domicile of the child. 25 USC Section 1911(a).

With this preliminary discussion in mind, the ICWA itself must be looked at to discern its intent. Nothing in the ICWA evidences any intent to interfere with the well-settled rules of exclusive tribal jurisdiction over adoption proceedings involving Indian children discussed above. Section 1911(a) was included to expressly preserve this jurisdiction, and the legislative history states that the section's intent is to confirm Federal and State law which holds that a tribe has exclusive jurisdiction over its children. House Report, supra, at 21. Congress recognized its duty to protect and preserve Indian tribes and their children, 25 USC Sections 1901(2), (3), and found that there was no greater threat to the integrity of tribal self-government than the loss of a tribe's children. Id. The express policy of the ICWA is to "[defer] to tribal judgment on matters concerning the custody of tribal children." BIA Guidelines, supra, 44 Fed Reg at 67585, Section A.1 (Policy).

Section 1911(a) takes up but a small part of the ICWA's space, but it is the most significant piece of the Act. The remainder of the Act covers only that small portion of Indian child custody proceedings where the State is exercising its "recognized" judicial and administrative jurisdiction over Indian child custody proceedings. 25 USC Section 1901(5). This recognized jurisdiction, as discussed above, exists only where it has

not been preempted by inherent tribal sovereignty or federal law. Then the Act goes further. Even where a state has valid jurisdiction over an Indian child, the ICWA intrudes significantly into this "traditional state area" by requiring the state court to follow federal standards rather than its own laws, 25 USC Section 1902, and even to give up its own recognized jurisdiction upon the request of the tribe unless good cause to the contrary exists. 25 USC Section 1911(b). See House Report, supra at 13-16. To argue that the ICWA contemplates a loss of tribal jurisdiction in the face of such plain statutory language is patently absurd.

The facts of the present case create precise legal implications under this analysis. Jurisdiction was clearly with the Navajo Nation under any theory of law up to the time Cecelia Saunders executed her consent to adoption before the tribal court. Jeremiah grew up on the reservation. Both the mother and grandmother have always resided and been domiciled on the reservation. The Navajo tribal government was exerting voluntary jurisdiction over Jeremiah and his family by providing a variety of social services to them.

It is undisputed that when Jeremiah was first removed from the reservation the mother thought it was for the purpose of foster placement only (Transcript I, p.53, lines 22-25). The aunt who removed Jeremiah, Polly Dick, concealed the fact that she had already made arrangements to place Jeremiah for adoption in a non-Indian home, (Transcript I, p.66, lines 17-19, and p.78,

lines 7-16), and only broached the subject of adoption with Cecelia after Jeremiah had been placed for over a month (Transcript I, p.32, lines 6-8). The first formal evidence of any intent to consent to adoption took place at the consent proceeding of May 30, 1980 (Exhibit K).

This point is important because it is this brief consent hearing, and the consent executed in front of the court at that time, which the trial court ruled effected a change of domicile from the Navajo Nation to the State of Utah. (See Ruling of July 14, 1982). The ICWA requires that a voluntary consent must be executed before a judge to be effective when an Indian child is involved. 25 USC Section 1913(a). Yet what was the jurisdiction of the Fourth Judicial District Court to receive that consent? If, as the trial court held, the domicile of Jeremiah Halloway was changed when Cecelia Saunders executed her consent where was his domicile immediately before? The answer is obvious -- it was on the reservation with his mother or grandmother. Yet if this was the case, how did the state court have jurisdiction to hear her consent, when the case law and ICWA state without equivocation that a tribal court has exclusive jurisdiction over such consents and all other aspects of adoption proceedings involving Indian children. 25 USC Section 1911(a); Fisher v. District Court, supra; Wakefield v. LittleLight, 347 A 2d 228 (Md. App. 1975). Indeed, the holding of Fisher is that an adult Indian cannot waive the exclusive jurisdiction of the tribal court by leaving the reservation and invoking the juris-

diction of the state court. Fisher, supra, 424 US at 390-91; Wakefield v. LittleLight, 347 A 2d at 239 (party may not confer subject matter jurisdiction by consent). If the attempted waiver of tribal jurisdiction was void in Fisher where the litigants left the reservation to invoke state jurisdiction, how can a different result be justified where the only off-reservation act was the execution of a consent to adoption?

The trial court committed error by bootstrapping itself into jurisdiction. The court should have determined the domicile of Jeremiah Halloway before it took the consent of Cecelia Saunders on May 30, 1980. The transcript of that proceeding shows, however, that while the court made some general inquiries as to where the mother resided, it never made a determination of domicile as required by the ICWA. Exhibit K, infra; 25 USC Section 1911(a); Wisconsin Band of Potowatomies v. Houston, 393 F Supp 719, 731 (D.W.D. Mich, N.D. 1973) ("the only rational approach is to determine the domicile of the children at the time their physical custody was gained" by the state court). Instead it assumed that it had jurisdiction to receive the mother's consent, at which time it took jurisdiction based on that consent. As was discussed in Appellants' opening brief, a consent to adoption does not change the domicile of a minor (App. Br. at 34-35). This discussion shows that even under the trial court's own reasoning, jurisdiction, over the present proceeding remained with the Navajo Nation.

Where the Navajo Nation has undisputed jurisdiction

over a minor child, and that jurisdiction is challenged (by the acts of the aunt in removing Jeremiah from the reservation, or the mother in consenting to adoption, or the state court in receiving the consent), the challenge must take place in the tribal court. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians, [citations]," Santa Clara Pueblo v. Martinez, supra, 436 US at 65-66, and state court authority is completely preempted where these essential tribal interests arose on a reservation. The ICWA preserves this exclusive tribal authority, and wherever the exclusive jurisdiction of the tribe is an issue, it is the tribal court which should first determine jurisdiction. The U.S. Supreme Court recently affirmed this rule in National Farmers Union Ins. Co. v. Crow Tribe, 53 USLW 4649 (June 3, 1985), where the Court concluded that

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.
>
> 53 USLW at 4652.

In the present case the aunt who removed Jeremiah from the Navajo reservation testified that her intent was to avoid the involvement of the Navajo Nation in the placement of Jeremiah (Transcript I, p. 62, line 18 to p.63, line 17). The propriety of this action was never checked with the Navajo tribe to determine whether it was valid under Navajo law. In addition, by denying the tribal court the right to determine its jurisdiction first, the trial court wrongly divested the tribe of the right to apply its own cultural standards to Jeremiah. The tribe argued repeatedly throughout this case that under Navajo custom the maternal grandmother had a legal responsibility to care for Jeremiah, and that under Navajo custom a Navajo mother has no power to cut off the legal rights of extended family members by executing a consent to adoption. See Navajo Common Law of Adoption. App. Exhibit B. Yet the trial court completely ignored the constitutionally protected right of the Navajo Nation to the practice of its own culture, and applied alien legal standards in holding that under Utah law the mother has the power to cut off the rights of other family members. Whether the domicile of Jeremiah remained on the Navajo reservation under Navajo law, and whether the actions of the mother in consenting to the adoption of Jeremiah were sufficient under Navajo law to divest the tribe of its jurisdiction and the relatives of their right to custody was never addressed by the trial court. It was addressed by the Navajo court in its ruling of October 12, 1984, however, App. Exhibit H, where the tribal court ruled that the

state court's ruling was completely contrary to the laws and public policy of the tribe. It is for this reason that the Utah Supreme Court should give full faith and credit to the ruling of the Navajo tribal court and reverse the decision of the state district court.

Respondents' brief contains no discussion in opposition to the settled rule that undefined terms in federal statutes are to be defined by the federal common law, because there is no contrary law. Instead they deliberately falsify the legislative history of the Act in an attempt to argue that the Act leaves the issue of domicile for state courts to decide according to state law. Res. Br. at 16. This falsification occurs when Respondents write that "many commentators recommend (sic) that the Act include a uniform definition of residence and domicile." Id. (emphasis added). These commentators were not referring to the Act, however, they were referring to the inclusion of a definition of domicile in guidelines issued over one year after the Act itself was passed. 44 Fed. Reg. at 67585. The Bureau of Indian Affairs commented on the meaning of domicile at the time the Act was passed and nowhere mentioned that state law would in any way control its definition. House Report, supra, at 31 (comment on section 101(a)). See State, ex rel Juvenile Dept. v. England, 640 P2d 608, 613 (Or 1982) (definition of Indian custodian expressly refers to state law).

Federal courts had already adopted the Restatement of Conflicts rule, a summary of existing state law, as the federal

common law for the domicile of a minor in Ziady v. Curley, supra. Creation of federal common law from state law requires that the state law be consistent with the purposes of the underlying federal statute, and the Bureau's certification that existing state law definitions of domicile were consistent with the purposes of the ICWA fulfills that requirement. 44 Fed. Reg. at 67585. Nowhere, however, does this statement by the Bureau indicate that state law controls the outcome of domicile.

The trial court did not follow existing law, however, in determining the domicile of Jeremiah Halloway; instead it created new law. Even the BIA Guidelines did not authorize such a tactic. The statement of the Bureau, issued in 1979, stated that state law existing at that time defined domicile in a manner consistent with the purposes of the ICWA. The trial court used the doctrine of in loco parentis to justify its ruling that the domicile of Jeremiah had unilaterally shifted from the Navajo reservation to Utah, Order of October 6, 1983, No. 4, but this doctrine does not apply to anyone except blood relatives. Restatement (Second) of Conflicts of Law, Section 22, comment i.

Once again the Respondents are selective in their citation of relevant law in an attempt to obfuscate the truth. As Respondents quote the Restatement (Resp. Br. at 17), comment i (the in loco parentis doctrine) does say that the doctrine should apply to persons who are not blood relatives. But this is only a recommendation; it is not existing law. The sentence before this, which Respondents conveniently omit from their brief,

states: "To date, the cases have placed the child's domicile, in the circumstances dealt with here, at the home of a grandparent or other close relative." (emphasis added). This statement is the existing law, and the ruling of the trial court on this point was clear error.

In addition, before the adoption of new state law can be considered for purposes of the federal common law, such new law must comport with the underlying policies of the federal statute. E.g., Ziady v. Curley, supra. A cursory glance at the policies of the ICWA is clear evidence that the in loco parentis doctrine cannot be extended under the ICWA to non-Indian strangers. The Act is designed to keep Indian children with their families, to defer to tribal judgment on Indian child custody matters, and to place Indian children within their own culture. BIA Guidelines, supra, 44 Fed. Reg. at 67585, Section A.1 (Policy). Any result contrary to these preferences is strongly disfavored. Id. at 67586. Yet what is the result if the new doctrine of in loco parentis created by the trial court is adopted? Removal of Jeremiah from the family with no opportunity to contest is upheld, the tribe is divested with no say from exercising any authority over its children, and the placement of Jeremiah in a non-Indian home in violation of the placement preferences is ratified. The trial court's ruling on this issue therefore must be rejected.

Only one case is cited by Respondents to justify this result, Gribble v. Gribble, 583 P2d 64 (Utah, 1978). This case

does not discuss the effect of the in loco parentis doctrine on the issue of domicile. Gribble concerned only the rights of a step-father as a parent under a specific Utah statute, UTAH CODE ANN. Section 30-3-5, where the father already had legal custody of the child under a court order. 583 P2d at 68. The Court also noted that a specific hearing would have to be conducted on whether the step-father should be granted any other in loco parentis rights beside a statutory right of visitation, Id. at 68, and noted that in general a step-parent relationship conferred no legal rights at common law. Id. at 65. A case more on point is Application of Morse, 7 Utah 2d 312, 324 P2d 773 (1958), where the Utah court ruled that domicile remained with the mother despite her initial attempt to abandon all parental rights.

Respondents also cite another section of the Restatement to justify their contention that the domicile of Jeremiah could shift away from the Navajo reservation, but this argument makes no sense. Resp. Br. at 18. Respondents argue that an "emancipated" child can acquire his own domicile upon being abandoned by the parents. Restatement (Second) Conflict of Laws, Section 22, comment f. But emancipation only applies to children who have become "adults" and who no longer need the supervision of a parent. Respondents cannot seriously argue that a three year-old infant became emancipated in the present case. Respondent's recitation of several Utah cases on abandonment to justify this position is therefore completely irrelevant. See

Restatement, Section 22, comment e (domicile of an abandoned child).

The decision of the Arizona Court of Appeals in Matter of Appeal in Pima County Juvenile Action No. S-903, 635 P2d 187 (Ariz App 1981), cert denied, 455 US 1007 (1982), is identical in its important facts to the present case. It should first be noted that the trial court attempted to diminish the impact of the Pima County case by altering the facts. Order of January 28, 1985, pp. 6-7. The trial court states that the adoptive parents only had custody of the child for four months in Pima County, But the important issue here is abandonment, and the natural mother in Pima County had met the statutory requirement by giving up custody of her child for over six months. 635 P2d at 190. Thus in both cases the mother had "abandoned" their child as required by state law. Both parents had executed a voluntary consent to adoption. Both parents had revoked their consents. In addition, the Pima County case even had worse facts. The mother in that case was not living on the reservation. The adoptive parents were given legal custody of the child under a temporary custody order. The child was born off the reservation. Yet despite all these facts, the Arizona Court of Appeals concluded that the domicile of the child remained with the mother on the reservation until legally changed by a valid court order. Id. at 191. It is this decision which should control the outcome of the present case.

Respondents acknowledge the inadequacy of their own

case citations when they state that none of them were decided since the passage of the ICWA in 1978. Resp. Br. at 23. All of the cited cases have either been overruled by passage of the ICWA or are irrelevant to Respondents' argument.

In re Cantrell, 495 P2d 179 (Mont. 1972), and Matter of Duryea, 563 P2d 885 (Ariz, 1977) have both been overruled by passage of the ICWA. Both cases involved a state taking jurisdiction of an Indian child where the Indian parent remained domiciled on the reservation. Contrary to the assertions of Respondents, Resp. Br. at 23, neither of these cases based its assertion of state jurisdiction on a finding that the domicile of the child was off reservation. Both took jurisdiction because a portion of the child's conduct took place off reservation. See 563 P2d at 886. This jurisdiction was based on state statutes, see A.R.S. Section 8-532, giving a state jurisdiction whenever a child is found within a state. Under the ICWA a child can be physically present off-reservation but still domiciled on reservation, and the state court would be without jurisdiction over the child. 25 USC Section 1911(a).

The Cantrell decision was expressly considered and rejected by the Maryland Court of Appeals in Wakefield v. LittleLight, supra (the Maryland court noted that in Cantrell, "At the time jurisdiction was assumed the child was apparently domiciled on the reservation," 347 A2d at 235. (emphasis added). The Wakefield decision concluded that state jurisdiction should be decided by the domicile of the child when the child first

appears before the court. Id. at 238. The holding of the Wakefield case was expressly adopted by the Congress. See House Report, supra, at 21.

The Duryea decision, 563 P2d 985, supra, has also been overruled. Its decision was based on the Cantrell decision, and is therefore no longer good law. It has also been overruled by the ICWA case of Matter of Appeal in Pima County Juvenile Action, 635 P2d 187, supra. In Duryea, jurisdiction was taken because "conduct of the parents in leaving the children...took place completely off the reservation." 563 P2d at 887. In the Pima county case all of the conduct of the mother took place off the reservation. Finding that the mother was domiciled on the reservation, however, and the domicile of the child was the same as here, the court held that state jurisdiction was preempted. This decision overrules Duryea.

The other cases cited by Respondents actually support Appellant's position that the domicile of Jeremiah remains on the reservation. In DeCoteau v. District Court, 420 US 425, 43 L Ed 2d 300, 95 S Ct 1082, the Supreme Court found that the land where the mother lived was no longer part of the reservation. The mother and child were therefore not domiciled on the reservation and state jurisdiction was proper.

Adoption of Doe, 555 P2d 906 (N.M.App. 1976), also involved a case where both the mother and child lived off the reservation. Id. at 916-917. Since the child was not domiciled on reservation, state jurisdiction was proper. Jurisdiction

where the mother is domiciled on the reservation is covered by Matter of Adoption of a Baby Child, 700 P2d 198 (N.M. App. 1985). Doe was also attacked by Congress because it held that a Navajo grandfather's right to custody under Navajo custom would not be recognized by state law, and that "New Mexico need not subordinate its own policy to a conflicting Navajo custom." 555 P2d at 913-914. In the ICWA Congress specifically defined "Indian custodian," 25 USC Section 1903(6), to give extended family members legal rights to custody. See House Report, supra, at 20 ("While such a custodian may not have rights under state law, they do have rights under Indian custom which this bill seeks to protect"). Doe is no longer good law.

Respondents have cited no cases since passage of the ICWA because there is no law which supports their position. The decision of the Arizona Court of Appeals in Matter of Appeal in Pima County Juvenile Action, supra, 635 P2d 187, and the New Mexico Court of Appeals in Matter of Adoption of a Baby Child, supra, 700 P2d 198, control the present case. Both cases held that the domicile of an Indian child remains that of the mother until a decree of adoption is granted. The decision of the Utah Supreme Court in Application of Morse, supra, 7 Utah 2J 312, 324 P2d 773, is entirely in accord with these cases. The Court should find that the District Court was without jurisdiction over Jeremiah Hallway in the present proceeding.

POINT II

THE DECISION OF THE DISTRICT COURT TERMINATING THE PARENTAL RIGHTS OF THE NATURAL MOTHER WITHOUT A FINDING OF UNFITNESS, AND GRANTING A DECREE OF ADOPTION, WAS IN ERROR.

The Navajo Nation argued in its opening brief to this Court that the Indian Child Welfare requires a finding of unfitness on the part of the parent before parental rights can be terminated. Respondents' brief in response is the most eloquent argument possible that the Navajo Nation is correct on this point. Out of a 15 page discussion on the standard for termination (Resp. Br. pp. 34-49), one page (Resp. Br., p.46) is spent on circumstantial and irrelevant evidence of fitness. Respondents spend one sentence (Resp. Br. p. 35) on their argument that the ICWA does not require a showing of unfitness before parental rights can be terminated. No statutory authority or legislative history is cited. No case law is cited because all of the ICWA case law is completely opposed to Respondents' argument. E.g., Matter of Appeal in Pima County Juvenile Action No. S-903, 635 P2d 187 (Ariz. App. 1981), cert. denied, 455 US 1007 (1982). Apparently, Respondents' argument is to be accepted on faith alone.

Respondents concentrate instead on two arguments: 1. that termination is justified because Jeremiah is so bonded to his present custodians that removal in and of itself will cause him emotional harm; and 2. that the natural mother, Cecelia

Saunders, abandoned Jeremiah under Utah law. Both of these arguments are irrelevant, however, to the present proceeding. The ICWA does not permit abandonment as a justification for termination of parental rights, and conflicting Utah law is therefore preempted. Termination based solely on the condition of the child, without finding any unfitness on the part of the parent, violates the U.S. Constitution, the ICWA, Utah law, and Navajo law.

The ICWA establishes one standard for termination of parental rights, a finding "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 USC Section 1912(f). This standards preempts all conflicting state law regarding termination. E.g. House Report No. 1386, 95th Cong, 2d Sess. 19 (1978), reprinted at 1978 U.S. CODE, CONG. & ADMIN. NEWS 7541 ("While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction...it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings...."). See 25 USC Section 1921.

The ICWA standard requires a showing that the parent is unfit. See Matter of Appeal in Pima County, supra, 635 P2d at 192 ("the issue in these termination proceedings is...the unfitness of the parent"), and as such is identical to the requirements of UTAH CODE ANN. Section 78-38-48(a). This section requires a finding "That the parent or parents are unfit or

incompetent by reason of conduct or condition which is seriously detrimental to the child...." (emphasis added). A quick glance at the ICWA shows that the same showing is required under its terms. The Act requires that: "The evidence must show the causal relationship between the conditions that exist (in the home) and the damage that is likely to result," BIA Guidelines, supra, 44 Fed. Reg. at 67593 (Section D.3(c)), and proof showing that it is "likely that the conduct of the parents will result in serious physical or emotional harm to the child." BIA Guidelines, supra, 44 Fed. Reg. at 67593 (Section D.4 Commentary).

Because the standard under the ICWA and Utah Code Ann. Section 78-38-48(a) are identical, Appellants in their opening brief discussed the holdings of several recent Utah cases which addressed termination under this fitness standard. In re J.P., 648 P2d 1364 (Utah 1982); Interest of Walter B., 577 P2d 119 (Utah, 1978); State, In Interest of E.V.J.T., 578 P2d 831 (Utah, 1978); State v. Lance, 464 P2d 395 (Utah, 1970). These cases also discussed abandonment as a separate issue, but abandonment is not the issue in the present case and Respondents' concentration on abandonment is merely a smokescreen to divert attention way from the Court's discussion of fitness. These cases make clear that the grounds for termination in the present case -- the bonding of the child to substitute custodians and the damage that will be caused by separation from those custodians -- are wholly improper without a finding beyond a reasonable doubt that the parent was unfit. State, In Interest of E.v.J.T., supra, 578 P2d

at 834. This is the relevant point of Utah law for the present case.

The argument of abandonment raised by Respondents is therefore completely irrelevant to the present proceeding. The fact that the Utah Code has a separate section for abandonment, UTAH CODE ANN. Section 78-38-48(b), shows that fitness and abandonment are different standards. See In re J.P., supra, 648 P2d at 1367 (unfitness or abandonment). The ICWA contains no language or legislative history giving any indication that abandonment is an acceptable ground for termination of parental rights. See Matter of Appeal in Pima County, supra, 635 P2d at 190 (reversal of trial court ruling that mother "abandoned" the child). Indeed the express language of the ICWA preempts and excludes any termination standard of abandonment, because a parent has the right to revoke a voluntary consent "for any reason at any time prior to the entry of a final decree of termination or adoption...and the child shall be returned to the parent"). 25 USC Section 1913(c) (emphasis added). Congress could have placed a six month limit on the right to revoke consent; they did not. If parental rights can be terminated under the ICWA after six months of abandonment, Section 1913(c) would be stripped of any meaning.

Respondents rely heavily on abandonment in their brief ("inasmuch as abandonment...has been proven to the trial court, there was absolutely no need to establish a separate basis of "unfitness" of the natural mother," Resp. Br. at 37), because

there was no other evidence to justify the trial courts' termination order. There was not sufficient evidence that the mother was unfit, and therefore the success of Respondents must succeed or fail solely on a finding that abandonment by itself is sufficient under the ICWA. The trial court itself could only find that there was "some testimony regarding the fitness" of the parents, Decision of January 28, 1985, p.5, but even that evidence was four years old.

The decision of the Arizona Court of Appeals in Matter of Appeal in Pima county Juvenile Action, supra is directly on point again regarding the standard for termination of parental rights. The trial court recognized the holding of the Pima County which concluded that an Indian mother has an absolute right to revoke her consent to adoption and "is entitled to the return of her child in the absence of evidence of her fitness...." Decision of January 28, 1985, p.6; see 635 P2d at 193. The trial court then attempted to distinguish the Pima County case based on the length of time the Indian child had been with the adoptive parents, finding that in Pima County it had only been four months, less than the six months required to meet the state standard for abandonment. But abandonment is calculated on the length of time the child has been abandoned by the natural parents, not the length of time the child has been with new parents. In Pima County the mother relinquished her parental rights on March 18, 1980. 635 P2d at 189. She requested the return of her child on September 29, 1980, Id., more than six

months after she first relinquished her rights. She therefore met the Arizona state standard for abandonment. Yet the Pima County Court found that abandonment under state law was completely irrelevant under the ICWA, which required a showing of unfitness before return of the child could be avoided. 635 P2d at 193. There is no legal difference between this case and the present appeal. Basing termination solely on the bonding and "best interests" of the child, as was done in the present case, has been soundly rejected by this Court. State, In Interest of E.v.J.T., supra. The trial court's attempt to distinguish and "belittle" the Pima County decision, therefore, is incorrect.

An analysis of the findings of the trial court shows that there was no evidence of present unfitness and certainly not "evidence beyond a reasonable doubt", 25 USC Section 1912(f), that Cecelia Saunders was unfit. In In re J.P., supra, the Utah Supreme Court clearly required present conduct to justify termination of parental rights. 648 P2d at 1377. See Appellants' Opening Brief at 45-46.

The findings of the trial court regarding fitness can be divided into several groups. The first is the adoption of dicta from a South Dakota case that the conduct of other persons besides the parents can be used to support a finding of termination. Matter of J.L.H., 316 NW2d 350 (S.D. 1982); Decision of Jan. 28, 1985, pp. 5-6. This is an incorrect standard. The ICWA refers only to the conduct of the parent in finding grounds for termination, 25 USC Section 1912(f). The extension of the Act

adopted by the trial court in the present case is not justified by the Act itself or by any principles of statutory construction. See BIA Guidelines, supra, 44 Fed. Reg. at 67593, Section D.3.(c). The ICWA is designed to protect the rights of Indian parents to their children, not to make it easier to break the Indian family up as the trial court attempted to do. 25 USC Section 1921.

The J.L.H. case also does not say what the trial court claims it says -- that the character of other people in the community may be grounds in and of itself for terminating parental rights. The J.L.H. decision at 316 NW2d 350 is actually the second opinion of the South Dakota Supreme Court in that case; the first opinion appears at 299 NW2d 812 (S.D. 1980), and explains the factual background behind the second opinion. The court noted that the mother held drinking parties at her home and did not exclude intoxicated people from the house. 299 NW2d at 814. It was the failure of the mother to control the conduct of such other persons in her own house which was the basis for terminating her parental rights. The evidence showed the unfitness of that mother. In the present case the trial court's finding that parental rights can be terminated based on the conduct of other persons living in the same community oversteps constitutional grounds in the power of a court to pass judgment on the legitimacy of another culture and lifestyle. See In Interest of J.R.H., 358 NW2d 311, 321-22 (Iowa 1984) (cultural and socio-economic conditions on a reservation inappropriate

grounds to remove an Indian child).

The trial court's reliance on the grandmother's alcoholism (no finding was made that the alcoholism had caused damage to Jeremiah) to justify terminating Cecelia Saunders' parental rights is ironic, given the total rejection the trial court gave to any legal rights the grandmother might have to the custody of Jeremiah under tribal or federal law. Jeremiah lived with the grandmother for two and one-half years before he was removed from her house by a maternal aunt who lived off-reservation. She had a legal right to Jeremiah's custody under the ICWA (see definition of "Indian custodian", 25 USC Section 1903(6)) and under tribal custom (See Navajo Common Law of Adoption, Exhibit B to Appellants' Opening Brief), which could not be cut off by the actions of the mother in executing a consent to adoption. Jeremiah's domicile was the same as hers on the Navajo reservation. Yet the trial court never even mentioned the rights of the grandmother, and granted the adoption of Jeremiah without terminating her custodial rights. How is it that she has no rights to the custody of a child stolen out of her home without her consent, yet later her alleged conduct becomes the primary grounds for terminating the custodial rights of a completely different person? Looked at in this light it appears that the grandmother was given a "legal" interest to affect the future custody of her grandson only when it was convenient for the trial court to do so. The grandmother has always resided and been domiciled on the Navajo reservation.

Under these circumstances, what gives Utah the right to decide whether she has a legal interest in her grandson under Navajo custom? What gives a non-Indian state court the right to decide whether her lifestyle and conduct, performed completely outside the State of Utah, is proper? As an internal social relation of the Navajo Nation, any examination on these issues is solely the province of the Navajo courts. Santa Clara Pueblo v. Martinez, supra, 436 US at 65-66.

Other evidence allegedly supporting the "unfitness" of the mother consists of a statement that the stepfather did not like Jeremiah and did not want him in the family relationship. Decision of January 28, 1985, p.6. This statement concerned the attitude of the father before Jeremiah was removed from the reservation five years ago. There is no evidence more recent to justify its finding. The present evidence is uncontroverted that both the stepfather and mother desire very deeply the return of Jeremiah and that they are fit custodians. Transcript II, pp. 237-230. (Testimony of Dr. Roll). Yet the trial court does not even mention this evidence. This failure is clear error.

The trial court also attempted to characterize the events surrounding the mother's consent to adoption and subsequent revocation of that consent as evidence of unfitness. It should be noted that this evidence is irrelevant since the mother has expressed her present intent to obtain the return of her son, is raising three other children of her own with no problems, and she and the step-father are presently fit and proper parents.

Aside from this, however, the court's characterization of events is incorrect and reflects a fundamental misperception of Navajo life and culture.

The trial court concluded that the mother willingly gave the child up for adoption. The mother testified, however, that she wished she had not had to have Jeremiah adopted but felt she had no other options at the time (Transcript II, p.302, lines 17-22). The Indian Child Welfare Act was not explained to the mother when she consented to the adoption of Jeremiah before the trial court in 1980. Respondents dispute this contention, Resp. Br., p.12, line 12, but Respondents are wrong. A copy of the complete transcript of the May 30, 1980 consent proceeding is attached to this brief as Exhibit K; the ICWA is never mentioned in that proceeding to the mother. In addition, the mother was not appointed independent legal counsel to advise her of the ICWA as required by the Act, 25 USC 1912(b) (right to counsel in any placement proceeding); In re M.E.M., 635 P.2d 1313, 1316-17 (Mont, 1981). Independent legal advice was one of Congress' prime concerns in enacting the ICWA. House Report, supra, at 11.

Another aspect of the consent proceeding must be brought up at this point. Nowhere in this entire proceeding did the trial court ever satisfy itself of the mother's understanding of English. The facts show that the mother did not fully understand English. For example, the mother's answers in the consent proceeding were rarely more than one syllable. Respondents themselves testified that when Jeremiah first appeared at their

house, he spoke no English at all. Transcript I, p.76, lines 13-22).

The most important example of the mother's comprehension of English involves the revocation of her consent to adoption. The trial court found (without citing any evidence) that the mother revoked her consent only after the tribe disapproved of the adoption and put pressure on her. Decision of January 28, 1985, p.6. There is another explanation, however, which requires some consideration and understanding of Navajo culture. At the hearing of April 7, 1983, a Navajo social worker testified that she tried to explain the ICWA to the mother in English, but that the mother did not understand her. Transcript I, p.121, lines 1-9). A social worker who spoke Navajo came and explained the ICWA to her in Navajo. Id. Immediately after this explanation, the mother, who understood her rights for the first time in two years, asked for her son back. Id.

Cecelia initially concealed the fact that she had consented to the adoption of Jeremiah. Cecelia told the worker that Jeremiah was on LDS foster placement. When Cecelia was finally confronted with evidence that she had consented to termination of her parental rights, she became upset. The trial court and Respondents twisted this statement into a conclusion that Cecelia was "disgruntled" because she really wanted the adoption to go through. Resp. Br. at 2, line 8. There is no independent evidence to support this conclusion, however, and an alternative explanation is likely if aspects of Navajo culture

are given even minimal consideration. Children are the most important aspect of Navajo society. See Navajo Common Law of Adoption, Appellants' Exhibit B., p. A-3 ("Child Abuse and Neglect - A Navajo Perspective"). Under Navajo tradition, the loss of one's child is the worst thing that can happen, and subjects the parent to societal embarrassment and even possible ostracism from the community. When Cecelia was confronted with the fact that she had given up her son, was she upset because she really wanted to give him up or was she upset because she knew that knowledge of her actions would subject her to severe embarrassment within the Navajo community. The Utah trial court came to its own conclusion of these events; the Navajo Nation suggests that if these facts had been presented to a tribal court or at least a trier of fact with some understanding of Navajo culture, there may have been a different result.

Finally, we address the trial court's finding that there was "testimony, although not uncontroverted, that the mother revoked her consent only after being subject to duress by the Navajo Nation." Decision of January 28, 1985. A short review of the actual facts shows that the trial court's finding violates all known standards of evidence, and that there was not even a scintilla of reliable evidence to support the trial court's finding on this point. The cited transcript pages turn out to be the testimony of Polly Dick, the maternal aunt who removed Jeremiah to begin with from the Navajo reservation for adoptive placement in Utah. What was her "proof" of duress?

Several sisters told her that tribal workers were harrassing Cecelia. Transcript I, p.61, lines 12-17. So we are immediately presented with the fact that this testimony is second or third-hand hearsay, with no reliability. Polly testified that she hardly ever visited the reservation and had no first-hand information about the allegations. Id. at p.66, line 25 to p.67, line 4.

In addition, Polly's testimony was shown to have no reliability. Polly testified that when she first removed Jeremiah to Utah, she intended to raise him herself. Transcript I, p.64, lines 20-25. Immediately following her testimony Dan Carter, the adoptive father, who had listened in the courtroom to Polly testify, took the stand. He was asked whether Polly's version of events was true and stated that it was not true, that Polly had arranged to place Jeremiah for adoption with him over a month before she removed him from the reservation! Id. at p.70, lines 10-25. Not only is Polly's testimony hearsay, but Polly created testimony to suit her own purposes whenever she thought it was convenient.

The mother's testimony on the other hand was first-hand. Subjected to repeated questions by counsel for Respondents in an attempt to be "as clear as possible", she stated four times when asked whether she had been forced to revoke her consent by the tribe with a simple and eloquent "no". Transcript I, p. 36, line 15, to p.37, line 9. In light of Cecelia's direct testimony and the fact that the opposing evidence consisted only of second

or third-hand hearsay which was likely made up, the finding of the trial court that the tribe subjected the mother to duress is completely without merit and should be reversed.

The previous discussion has shown that the ICWA requires a finding of unfitness before parental rights can be terminated, and that there was no evidence presented to the trial court that the parents were presently unfit. Under such circumstances, the ruling of the trial court to terminate the parental rights of Cecelia Saunders was in error, and must be reversed.

POINT III

RELIANCE ON HEARSAY EVIDENCE WHICH WAS PROPERLY OBJECTED TO, IN MEETING THE BURDEN OF SHOWING ACTIVE REHABILITATIVE EFFORTS AND THE UNFITNESS OF THE NATURAL MOTHER, IS REVERSIBLE ERROR.

Respondents' arguments on the fitness of Cecelia Saunders as a parent and on the evidence "proving" that active remedial and rehabilitative efforts had been attempted with Cecelia and had proven unsuccessful are completely dependent on Navajo social work records which were admitted into the trial court record, and later made part of the evidence, over the objection of the tribe. For example, Respondents state: "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." (Resp. Br. at 27). These notes, however, were hearsay testimony which were inadmissable in the trial court proceeding. A short chronology is necessary first before showing that the trial court's admission into evidence of these records and its reliance on these records for termination was clear error.

A social worker for the Navajo nation, Lauren Bernally, testified at the hearing on April 7, 1983, and stated that she had referred to caseworker notes in preparing her testimony. Counsel for Respondents was permitted to examine the records and to use them in his cross-examination. At the end of the hearing the court made the caseworker notes "part of the record since

extensive referrals was (sic) made reference to this file and if an appellate court has to review this matter, then I think it would be well that they have the contents of that file as well." Transcript I, at 168. There was no attempt by Respondents at any time during the hearing to formally move the notes into evidence. It is axiomatic that documents which are part of a trial court record are not necessarily admissable evidence.

Counsel for Respondents, however, began referring to the notes as "admitted evidence" soon thereafter. The Navajo Nation immediately objected to this characterization. See, Letter of April 27, 1983, from Craig Dorsay to Honorable David Sam; Letter of May 4, 1983, from Richard Johnson to Honorable David Sam; Letter of August 8, 1983, from Craig Dorsay to Honorable David Sam. The issue remained unresolved until the termination hearing on October 22, 1984. The Navajo Nation again objected to Respondents use of hearsay testimony within the caseworker's notes as admissable evidence. Transcript II, pp.73, 75. The District Court overruled the objection of the Navajo Nation. Transcript II, p.76.

This ruling was incorrect, and is reversible error. It is a violation of Rule 805 of the Utah Rules of Evidence, involving hearsay within hearsay. See McCormick on Evidence (3rd ed., 1984), Section 324.3. While the caseworker notes might qualify in appropriate situations (where a proper foundation is laid) under the business records exception to the hearsay rule, Rule 803(6), this does not make all statements within those notes

admissable evidence. Admissable evidence within those notes is limited to statements which are the first-hand observations of the maker of the statements. All other hearsay opinions, recordations of hearsay statements of other parties, and other hearsay statements are not admissable unless they fall within some other independent exception to the hearsay rule. The District Court violated this rule in admitting and using the caseworker notes.

Other courts have easily found that such a ruling is reversible error. A New York decision for example, Matter of Leon RR, 397 N.E.2d 374 (N.Y. App. 1979), is directly on point. In that case the state offered the entire caseworker file into evidence. The parents objected, arguing that admission of the materials "en masse" would be severely prejudicial because they could contain damaging hearsay. Id. at 377. The trial court rejected this argument. The Court of Appeals held that the trial court's ruling was reversible error because of the improper effect hearsay evidence could have on the trier of fact, concluding: "These considerations are pointedly illustrated by this case in which the courts below placed strong reliance upon hearsay evidence to terminate respondents' parental rights. (emphasis added)." 397 N.E. 2d at 377-78. The court discussed the requirements for the admission of each statement in a caseworker's notes, finding that each statement in the records must be qualified independently as admissable evidence. The mere fact that the recording of statements by third parties may be a

routine practice of the caseworker does not make these statements reliable and "imports no guarantee of the truth...." Id. at 178. The court concluded that third party statements contained in caseworker notes are inadmissable for the truth of the matter asserted: "[T]o construe those statements as admissable simply because the caseworker is under a business duty to record would be to open the floodgates for the introduction of random, irresponsible material beyond the usual test of accuracy - cross examination and impeachment of the declarant." Id.

The trial court fulfilled the worst nightmares of the New York Court of Appeals in the present case. One example will suffice to show the effect of the trial court's erroneous decision. On page 27 of Respondents' brief, Respondents quote the results of a meeting with two psychiatrists, in which the tribal social worker wrote down a summary of their comments. Respondents attempt to use these statements of third parties who were not in the courtroom in Provo to testify or be cross-examined for the truth of the statement asserted. Indeed Respondents have classified these hearsay declarations as their "most important" evidence supporting the failure of remedial and rehabilitative services.

A cursory examination of the actual statements shows how an out-of-court statement can be twisted and distorted by an overzealous advocate if the rules of evidence are ignored. The caseworker reported that the two psychiatrists were "reluctant to testify in court of the stability of the Saunders family" because

it would be unfair to testify on behalf of the family and not be able to express what may be developed later." (R. 122-123). Respondents now assert that this proves that Cecelia's family was unstable. In actuality, the psychiatrists thought Cecelia was a fit parent. A letter from one of the psychiatrists who is the subject of this entry, M.E. Mueller, is attached to Appellants' Opening Brief as Exhibit A. Dr. Mueller states: "I have interviewed Cecelia Saunders, and can find no indication from our interview that she might have a mental disorder that would make her incapable of caring for a child." He cannot, however, testify as to whether Cecelia would be a better parent than Respondents. The truth therefore is quite different than the false picture painted by Respondents of the doctors' statements, based on inadmissible hearsay.

None of the three "expert" witnesses presented by the Respondents testified on the fitness of the natural mother, or questioned the care of her other three children. Instead the Respondents relied on a hearsay declaration, recorded by a tribal caseworker, for the truth of an erroneous conclusion. The admission of this statement, which was the main support for the court's conclusion that 25 USC Section 1912(d) had been complied with, was error. Because of this erroneous ruling, the burden of disproving the notes' characterization was erroneously put on the tribe. See In re Appeal in Maricopa Juv. Action No. J-75482, 536 P2d 197, 202 (Ariz. 1975) ("By considering the report over the objection of appellant, the trial court shifted the burden to

appellant to attack the material in the report in much the same fashion as in a civil trial.") If Respondents in the present case wanted to prove that two psychiatrists found that Cecelia Saunders was unstable, they should have subpoened the psychiatrists to testify.

The caseworker herself was at the trial. She testified that Cecelia and Arthur Saunders were fit parents (Transcript I, p.122 lines 2-3), and that they required no remedial and rehabilitative services to become fit parents (Transcript I, p. 124, lines 12-23). The trial court did not even mention the existence of this first-hand testimony, however, and chose to rely instead solely on declarations in the caseworker notes which supported its conclusion to terminate parental rights. This failure is clear error.

POINT IV

NO REMEDIAL OR REHABILITATIVE SERVICES HAVE BEEN PROVIDED TO THE NATURAL MOTHER AS REQUIRED BY THE INDIAN CHILD WELFARE ACT.

One case has changed since submission of Appellants' opening brief. A decision of the Oregon Court of Appeals, Matter of Charles, 688 P2d 1354 (Or.App. 1984), has now been finalized. The Oregon Supreme Court denied review of the decision. The discussion and holding of the Court of appeals on the subject of remedial and rehabilitative services is quite useful in analyzing the testimony which the trial court held satisfies its burden under 25 USC Section 1912(d):

> The language of the provision is unequivocal: The state "shall satisfy the court that active efforts have been made to provide remedial services." (Emphasis in original). To do that, the state must show that the efforts have been made but have not worked. In the present case, the state did not make an explicit showing, but it points to testimony peppered throughout the hearing that indicates that some remedial efforts were made which were arguably unsuccessful and asks us to find on de novo review that the showing required by Section 1912(d) was made. We cannot conclude that the diffuse evidence to which the state points amounts to the affirmative showing that Congress contemplated when it enacted Section 1912(d).
>
> 688 P2d at 1359.

Respondents repeat the discussion of the trial court alleging that a Navajo social worker testified that the tribe stopped working with the natural mother. Resp. Br. at 26. This allegation is false. The worker was cross-examined by Respondents on whether she had enough first hand information on

this case to testify, and admitted that she did not. Transcript I, p. 107-108. She testified only as an expert on Navajo policy, and stated that the Navajo tribe does not permit the adoption of tribal children by non-Indians. See Transcript I, p. 109, lines 6-7, p.124, lines 1-11. Her testimony had absolutely nothing to do with whether the tribe actually provided remedial services to the natural mother.

CONCLUSION

Based on the foregoing discussion, the decision of the Fourth Judicial District Court should be reversed and Jeremiah Halloway should be returned to the jurisdiction of the Navajo Nation.

RESPECTFULLY SUBMITTED this 11 day of December, 1985.

M E Sloan

Mary Ellen Sloan
Craig J. Dorsay
of Attorneys for Appellants

COPY

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

* * *

IN THE MATTER OF THE ADOPTION OF: JEREMIAH HALLOWAY)
)
A Minor,)

Probate No. 19,981

CONSENT TRANSCRIPT

* * *

BE IT REMEMBERED that on the 30th day of May, 1980, the CONSENT was taken by Richard C. Tatton, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, before the Honorable David Sam at the Utah County Courthouse, Provo, Utah, 84601.

A P P E A R A N C E S

For the Petitioners: Mr. Richard Maxfield
Attorney at Law
Provo, Utah 84601

P R O C E E D I N G S

THE COURT: Alright, this is in the Matter of the Adoption of Jeremiah Halloway, Probate No. 19,981. Alright, counsel you may proceed.

CECELIA DICK

called as a witness by and on behalf of the petitioners, being first duly sworn was examined and testified as follows:

EXAMINATION

BY MR. MAXFIELD:

Q Would you state your name please?

A Cecelia Dick.

Q And Cecelia you are the mother of Jeremiah Halloway is that correct?

A Yes.

Q And he was born to you out of wedlock on the 14th day of March, 1977?

A No May.

Q Oh, excuse me May 17th?

A Yes.

Q 1977.

A Yes.

Q At Gallup, New Mexico.

A Yes.

Q And you do not know who the father is is that right?

A Yes.

Q Cecelia you have placed him with a couple here in Utah County Dan Lewis Carter and Patricia Carter and he has been living with them since March of this year is that right?

A Yes.

Q And is it your desire to have them adopt him and treat him as if he were their own child?

A Yes.

Q And you understand by doing this you are giving up all rights to him you can not come back and change your mind and claim him?

A Yes.

Q And I have discussed this fully with you and explained to you the circumstances is that right?

A Yes.

Q Now Cecelia have you been promised or paid anything for doing this ?

A Yes.

Q And what was that?

A Money that I came up on.

Q They agreed to pay you $50.00 to have you come so tha you could sign this is that right for gas and oil?

A Yes.

Q And I am to pay you after this so that you but anything else has there been any other money?

A No.

Q And they are not going to pay you anything else?

A No.

Q And this money here was only to pay the, for the gas and oil for coming here so you could sign this consent is that right?

A Yes.

Q And any other promise or anything else have been giv to you for doing this?

A No.

Q Now Cecelia you have read this consent before and you are willing to sign this consent at this time wherein you agree to all these things in writing?

A Yes.

MR. MAXFIELD: Your Honor do you have any questions?

THE COURT: Yes, I would like Cecelia to know what

is your nationality, what you are Indian is that right?

A Yes.

Q And what tribe are you from?

A Navajo.

Q Where was your home was it in New Mexico or Arizona?

A New Mexico.

Q And are you a member of the tribe there in New Mexico?

A Yes.

Q And are you full blooded Navajo?

A Yes.

Q Okay, well, let's have her sign the document counsel.

(WHEREUPON, Cecelia Dick signs the consent to adoption)

MR. MAXFIELD:And would you put the 30th right there.(ind) Today is the 30th of May. Okay, thank you.

THE COURT: Okay, Cecelia thank you very much.

(WHEREUPON, the consent proceedings was concluded)

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Reply Brief of Appellants on the following attorney:

Richard B. Johnson — Attorney for Respondents
P.O. Box 778
Provo, Utah 84603

by mailing ~~two~~ four certified copies thereof, first class mail, contained in a sealed envelope with postage paid thereon, addressed to said attorney at the address shown above and deposited the same in the post office at Salt Lake City, Utah on December 11, 1985.

DATED this 11 day of December, 1985.

Mary Ellen Sloan
of Attorneys for Appellants