No. 20-0081

# In the Supreme Court of Texas

IN THE INTEREST OF Y.J., A CHILD

On Petition for Review
from the Second Court of Appeals, Fort Worth

## CROSS-PETITION FOR REVIEW OF THE OFFICE OF THE ATTORNEY GENERAL


KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General
State Bar No. 24094710
Kyle.Hawkins@oag.texas.gov

BETH KLUSMANN
Assistant Solicitor General

DAVID J. HACKER
Special Counsel to the First
Assistant Attorney General

Counsel for Respondent/Cross-
Petitioner the Office of the
Attorney General

## Identity of Parties and Counsel

**Cross-Petitioner/Respondent:**
Office of the Attorney General

**Appellate and Trial Counsel for Cross-Petitioner/Respondent:**
Ken Paxton
Jeffrey C. Mateer
Ryan L. Bangert
Kyle D. Hawkins (lead counsel)
Beth Klusmann
David J. Hacker
Charles K. Eldred
P.O. Box 12548
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov

**Additional Cross-Petitioners/Respondents:**
C.B. and J.B.

**Appellate and Trial Counsel for Cross-Petitioners/Respondents:**
Ashley E. Johnson
Scott K. Hvidt
Gibson, Dunn & Crutcher LLP
2100 McKinney Ave., Suite 1100
Dallas, Texas 75201
ajohnson@gibsondunn.com

Matthew D. McGill
Gibson Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
mmcgill@gibsondunn.com

Kellye Hughes
Hughes Law Center, PC
3615 West Pioneer Parkway, Ste. C
Pantego, Texas 76013
kellye.hughes@yahoo.com

Tawanna Lynn Cesare
Philip A. Vickers
Brian Singleterry
Cantey Hanger LLP
600 W. Sixth Street, Suite 300
Fort Worth, Texas 76102
pvickers@canteyhanger.com

**Petitioner/Cross-Respondent:**
Navajo Nation

**Appellate and Trial Counsel for Petitioner/Cross-Respondent:**
Anna McKim
Field, Manning, Stone, Hawthorne & Aycock, PC
2112 Indiana Ave.
Lubbock, Texas 79410
amckim@lubbocklawfirm.com

C. Alfred Mackenzie
Texas Appellate Attorney
P.O. Box 2003
Waco, Texas 76703
amackenzie@texas-appeals.com

Cindy V. Tisdale
Law Office of Cindy V. Tisdale, LLP
220 West Pearl St.
Granbury, Texas 76048
cindy@cindytisdalelaw.com

**Other parties and counsel:**
Y.J.
John T. Eck (Guardian Ad Litem)
Robert T. Stites, Attorney at Law P.C.
933 West Weatherford
Fort Worth, Texas 76102
john@stitesattorney.com

M.M. and Unknown Father
Kathlynn K. Pack
Sarah Seltzer
Seltzer & Dally PLLC
3617 Hulen Street
Fort Worth, Texas 76107
kathlynn@yourtexasfamilylawyer.com
sarah@yourtexasfamilylawyer.com

J.J. (biological mother of Y.J.)
Justin D. Murray
Law Office of Justin D. Murray
10901 County Road #528
Mansfield, Texas 76063
justin@justinmurraylaw.com

Texas Department of Family and Protective Services
Joseph W. Spence
Kristine A. Soule
Ashley Basnett
Tarrant County Criminal District Attorney's Office
2700 Ben Avenue
Fort Worth, Texas 76103
COAappellatealerts@tarrantcountytx.gov
anbasnett@tarrantcountytx.gov

A.J. (maternal great aunt)
Daniel P. Webb
Law Office of Daniel P. Webb
106 S. Jones
Granbury, Texas 76048
dwebb@danielpwebb.com

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## STATEMENT OF THE CASE

| | |
|---|---|
| *Nature of the Case*: | This is a suit affecting a parent-child relationship brought to terminate parental rights and place Y.J., an Indian child as defined by the Indian Child Welfare Act (ICWA), in a new home. CR.10-31. C.B. and J.B. sought to adopt Y.J., CR.443-48, and the Navajo Nation has sought to place Y.J. with her maternal great aunt A.J., CR.398-400. |
| *Trial Court*: | 323rd Judicial District Court, Tarrant County<br>The Honorable Alex Kim |
| *Disposition in the Trial Court*: | The trial court concluded that ICWA did not preempt state law and that Texas Family Code section 152.104(a), which requires Texas courts to implement ICWA, was unconstitutional. Supp.CR.55-57. Declining to apply ICWA or otherwise address its constitutionality, the trial court split conservatorship of Y.J. between C.B./J.B. and A.J. CR.668-82, 686. |
| *Parties in the Court of Appeals*: | Appellant/Cross-Appellee – Navajo Nation<br>Cross-Appellants/Appellees – C.B., J.B., and the Office of the Attorney General |
| *Disposition in the Court of Appeals*: | The Second Court of Appeals reversed the conservatorship ruling and remanded. *In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728 (Tex. App.—Fort Worth Dec. 19, 2019, pet. filed) (Birdwell, J.; Sudderth, C.J. and Gabriel, J., concurring without opinion). The court did not decide the constitutionality of ICWA. *Id.* at *7-8. |

## Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(a), as this case presents a question of law that is important to the jurisprudence of the State, namely, whether Congress can require Texas to implement a federal regulatory scheme that discriminates on the basis of race in child-custody cases. Although this case involves a single child, the Indian Child Welfare Act controls any child-custody proceeding in Texas whenever the child is an Indian child, requiring different procedures and results. Whether this federal scheme is constitutional impacts not only the jurisprudence of Texas but also the lives and futures of Indian children and their prospective parents.

## Issue Presented

Do the Indian Child Welfare Act and its implementing regulations violate the United States Constitution?

## To the Honorable Supreme Court of Texas:

The federal Indian Child Welfare Act rewrites Texas family law, dragoons Texas officials and courts into carrying out Congress's race-based child-custody scheme, and interferes in Texas's authority over domestic relations. Treating Indian children as tribal "resources," Congress has required Texas (and all other States) to apply different laws, use different procedures, and seek different results in child-custody cases involving Indian children. But the Constitution prohibits Congress from commandeering Texas officials and courts, discriminating against Indian children and non-Indian parents on the basis of their race, and enacting legislation to control state-court child-custody cases in the first place.

The Navajo Nation is correct that this law deserves the Court's attention. But ICWA should not be upheld as constitutional. Instead, the Court should grant the petitions and hold that ICWA violates the Fifth and Tenth Amendments, is outside of Congress's constitutional authority, and should not be applied in this case.

## Statement of Facts

The court of appeals correctly stated the nature of the case. *See In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at *2-5 (Tex. App.—Fort Worth Dec. 19, 2019, pet. filed).

## I. Legal Background

### A. The Indian Child Welfare Act

When a child-custody suit concerns the termination of parental rights or placement of a child in an adoptive home, the Texas Legislature requires Texas courts and

the Department of Family and Protective Services (DFPS) to do what is in the child's best interest. Tex. Fam. Code §§ 161.001(b)(2), 162.016(a)-(b). Indeed, the Texas Family Code's "entire statutory scheme for protecting children's welfare focuses on the child's best interest." *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003).

The Texas Legislature's judgment is overridden by Congress, however, if the child is an "Indian child," as defined by ICWA, that is, the child is unmarried, under eighteen, and either (1) a member of an Indian tribe, or (2) eligible for membership in an Indian tribe and the biological child of a member. 25 U.S.C. § 1903(4). In any child-custody proceeding involving an Indian child, Congress has mandated different rules, laws, procedures, and outcomes. *See* 25 U.S.C. §§ 1901-52; 2.RR.104 (counsel for Navajo Nation stating that "best interest doesn't come into play under ICWA").[1]

For example, under Texas law, parental rights may be terminated for specific statutory reasons, such as voluntary abandonment, child endangerment, certain criminal convictions, and continued substance abuse, and proof is by clear and convincing evidence. Tex. Fam. Code § 161.001(b). But under ICWA, parents of Indian children may have their rights terminated only if it is proven beyond a reasonable doubt that continued custody by the parent "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). And in meeting that burden, ICWA requires the testimony of "qualified expert witnesses," 25 U.S.C. § 1912(f),

[1] ICWA's implementing regulations may be found at 25 C.F.R. §§ 23.1-144. References to ICWA in this petition generally include its regulations.

who can testify about "prevailing social and cultural standards of the Indian child's Tribe," 25 C.F.R. § 23.122(a).

Adoptions under Texas law also follow the best-interest standard, Tex. Fam. Code § 162.016(b), and may not be delayed or denied because of the race or ethnicity of the child or her prospective parents, *id.* § 162.015(a). But adoptions of Indian children under ICWA are exempt from the anti-discrimination statute, *id.* § 162.015(b), and must follow a race-based order of placement preferences mandated by Congress: (1) a member of the child's extended family; (2) any other member of the Indian child's tribe; or (3) any other Indian family, regardless of tribe, 25 U.S.C. § 1915(a).[2] Texas courts may deviate from those preferences only for "good cause," *id.*, which requires proof by clear and convincing evidence of five specific factors. 25 C.F.R. § 23.132(b), (c).

ICWA does not stop there. It also requires Texas officials to send multiple notices, 25 U.S.C. §§ 1912(a), 1951(a); mandates transfer of child-custody cases to tribal courts in certain circumstances, *id.* § 1911(b); grants mandatory intervention to Indian tribes, *id.* § 1911(c); limits voluntary relinquishment of parental rights, *id.* § 1913; requires "active efforts" to prevent the breakup of Indian families, *id.* § 1912(d); and mandates several types of record-keeping, *id.* § 1915(e). And if DFPS employees and Texas courts fail to comply with certain portions of ICWA's

[2] ICWA also mandates the order of foster-care preferences for Indian children. 25 U.S.C. § 1915(b).

mandates, the placement may be undone, 25 U.S.C. § 1914, threatening the stability of any Indian child's new home.

### B. Federal litigation

Texas, Indiana, and Louisiana, along with several individuals seeking to adopt Indian children, have challenged the constitutionality of ICWA and its implementing regulations in federal court. *See Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018). The district court ruled that ICWA violated the anti-commandeering doctrine, the equal-protection component of the Fifth Amendment, and the non-delegation doctrine, and that ICWA could not be justified under the Commerce Clause. *Id.* at 536, 538, 541, 546. Although not a party in the district court, the Navajo Nation was allowed to intervene on appeal. *Brackeen v. Bernhardt*, 937 F.3d 406, 420 (5th Cir. 2019).

In August 2019, a divided panel of the Fifth Circuit reversed the district court's judgment and upheld ICWA as constitutional. *Id.* at 441. Judge Owen dissented in part, arguing that portions of ICWA commandeered the States. *Id.* at 442-46 (Owen, J., dissenting). The panel's ruling, however, was vacated when the court granted en banc review. *Brackeen v. Bernhardt*, 942 F.3d 287 (5th Cir. 2019). The en banc court heard argument on January 22, 2020, but has not yet issued a decision.

## II. Procedural History

### A. District court

Days after Y.J. was born and tested positive for marijuana and amphetamines, DFPS removed Y.J. from her mother J.J. and filed a petition to terminate J.J.'s

parental rights and those of Y.J.'s unknown father. CR.10-38. The petition noted that Y.J. may be an Indian child, a fact later confirmed by the Navajo Nation. CR.10, 102, 461. As required by ICWA, DFPS informed the Navajo Nation of a need to find a placement for Y.J. CR.51-56.

The Navajo Nation first identified an unrelated Navajo couple in Colorado who were willing to adopt Y.J., and the court and DFPS began the process of approving the out-of-state placement. CR.149-51. The Navajo Nation also subsequently intervened in the lawsuit, as permitted by ICWA. CR.224-26 (citing 25 U.S.C. § 1911(c)).

C.B. and J.B., who are not Indian but who previously adopted Y.J.'s half-brother (also an Indian child), then intervened and sought to adopt Y.J. CR.229-34. The Navajo Nation opposed the request. CR.250. Faced with ICWA's placement preferences that may have prohibited them from adopting Y.J., C.B. and J.B. argued that ICWA was unconstitutional and inapplicable. CR.304-67. The Texas Office of the Attorney General (OAG) filed an amicus brief also urging the court to find that ICWA was unconstitutional. CR.379-92. The Navajo Nation subsequently learned that Y.J.'s maternal great aunt—A.J.—was willing to adopt Y.J. and sought to have the court place Y.J. with her. CR.398-400.

The trial court ruled that it would not apply ICWA. CR.459. Although the trial court "conscientiously refrain[ed] from ruling" on ICWA's constitutionality in light of the pending federal litigation, CR.458, it concluded that ICWA was not a valid form of preemption because it "regulates state courts and agencies rather than individuals." Supp.CR.77 (citing *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018)). The court then sua sponte determined that Texas Family Code

section 152.104(a), which requires Texas courts to apply ICWA in certain cases, violated multiple provisions of the Texas Constitution. Supp.CR.77-78.

After the trial court declared Texas Family Code section 152.104(a) unconstitutional, the OAG intervened and asked the court to declare ICWA unconstitutional under the Commerce Clause, Tenth Amendment, and Fifth Amendment. CR.644-49; *see* Tex. Civ. Prac. & Rem. Code § 37.006(b) (allowing the Attorney General "to be heard" in a constitutional challenge to a state statute).

Following an evidentiary hearing, the trial court rendered judgment making C.B./J.B. and A.J. joint non-parent managing conservators of Y.J. CR.669. The trial court also issued alternative findings that "good cause" existed to deviate from ICWA's placement preferences and place Y.J. with C.B./J.B. Supp.CR.37-38. The Navajo Nation, C.B. and J.B., and the OAG filed notices of appeal.

### B. Court of appeals

On appeal, the Second Court of Appeals also refrained from ruling on ICWA's constitutionality. The court first held that Texas Family Code section 152.104(a) does not apply to these circumstances. *In re Y.J.*, 2019 WL 6904728, at *7. The court then reasoned that, because the trial judge's conservatorship ruling required remand regardless of ICWA's constitutionality, it would also not reach the constitutional questions. *Id.* at *8.

Next, the court held that it was error for the trial court to split conservatorship of Y.J. between C.B./J.B. and A.J. *Id.* at *15. The court also concluded that the trial court's alternative good-cause finding to deviate from ICWA's placement preferences was not supported by clear and convincing evidence, as required by ICWA's

implementing regulations. *Id.* at *16-17 (citing 25 C.F.R. § 23.132(b)). The court, therefore, reversed the portion of the trial court's order appointing C.B./J.B. and A.J. as joint managing conservators and remanded for a new decision on conservatorship or adoption. *Id.* at *18.

The Navajo Nation petitioned this Court for review on January 30, 2020, asking the Court to address the constitutionality of ICWA. The OAG now files this cross-petition and urges the Court to conclude that ICWA is unconstitutional.

## Summary of the Argument

The constitutionality of ICWA may well determine Y.J.'s future home—whether she will be placed in accordance with her best interests, as Texas law requires, or on the basis of her race and ancestry, per ICWA. It is, therefore, of paramount importance to Y.J. that this Court determine whether Texas courts must apply ICWA.

But the constitutional issues implicate bigger questions of federalism, discrimination, the scope of Congress's control over Indian affairs, and whether Congress can override Texas's authority in child-custody cases. As more cases concerning ICWA arise, this Court's guidance is essential. The Court should grant the petitions and hold that ICWA is unconstitutional and inapplicable, as it commandeers Texas officials and courts, discriminates in violation of the Constitution's guarantee of equal protection, and exceeds Congress's authority.

## ARGUMENT

# I. ICWA Violates the United States Constitution.

ICWA displaces Texas child-custody law when the child at issue is Indian by setting out numerous rules, standards, obligations, and tests that are designed to further Congress's race-based policy goals. ICWA accomplishes its unconstitutional end through unconstitutional means: it violates the Fifth and Tenth Amendments and exceeds Congress's enumerated powers. The Court should grant the petitions and hold that ICWA is unconstitutional.[3]

## A. ICWA commandeers Texas actors.

Derived from the Tenth Amendment, the anti-commandeering doctrine provides that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992). But that is exactly what ICWA does—it compels Texas to administer a federal regulatory program regarding the custody of Indian children. Congress cannot commandeer Texas officials and courts to carry out Congress's demands. ICWA is, therefore, unconstitutional.

### 1. ICWA issues commands to Texas officials and courts, rewriting Texas law.

As "one of the Constitution's structural protections of liberty," *Murphy*, 138 S. Ct. at 1477 (quoting *Printz v. United States*, 521 U.S. 898, 921 (1997)), the anti-

[3] ICWA also violates the non-delegation doctrine by allowing Indian tribes to alter the placement preferences enacted by Congress. 25 U.S.C. § 1915(c); *see Loving v. United States*, 517 U.S. 748, 758 (1996). There is, however, no evidence that the Navajo Nation has altered the preferences in this case.

commandeering doctrine divides federal and state power in order to protect individuals from tyranny and abuse, hold Congress politically accountable for its actions, and force Congress to pay for its own programs. *Id.* The doctrine is a limit on the *means* that Congress may use to achieve its goals, rather than the *ends* it seeks to accomplish.

Stated simply, "Congress [has] the power to regulate individuals, not States." *Id.* at 1476. Therefore, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 1477 (quoting *New York*, 505 U.S. at 178). As a result, Congress may not "dragoon[]" state officials "into administering federal law." *Printz*, 521 U.S. at 928. Even an intrusion as small as the federal Brady Act's requirement that state law-enforcement officers perform background checks on handgun purchasers was found "incompatible with our constitutional system of dual sovereignty" and unconstitutional. *Id.* at 935.

But ICWA goes far beyond background checks in its commands to Texas. As demonstrated in this case, ICWA has required DFPS and Texas courts to (1) notify the Navajo Nation of Y.J.'s child-custody proceedings, CR.51-56; 25 U.S.C. § 1912(a); (2) allow the Navajo Nation to intervene, CR.224-26, 25 U.S.C. § 1911(c); (3) make "active efforts" to provide remedial services and rehabilitation programs to prevent the breakup of the Indian family, CR.14, 25 U.S.C. § 1912(d); (4) make efforts to place Y.J. with a Navajo couple in Colorado selected by the Navajo Nation, CR.149-65, 25 U.S.C. § 1915(a); (5) prefer A.J. as a placement, 25 U.S.C. § 1915(a);

and (6) require C.B./J.B. to meet a heightened standard of proof before deviating from the placement preferences, *id.* § 1915(c); *In re Y.J.*, 2019 WL 6904728, at *16.

There can be no doubt that ICWA is a federal regulatory program that must be administered by Texas. It is unconstitutional, and this Court should reject Congress's attempts to conscript Texas officials and courts into carrying out Congress's commands.

**2. ICWA is not permissible preemption.**

Contrary to the Navajo Nation's argument, Navajo Pet. 17-18, ICWA cannot be justified as mere "preemption" of Texas's child-welfare laws. Under *Murphy*, Congress may preempt state laws only if (1) it is exercising a power conferred on Congress by the Constitution, and (2) the federal law may be "best read as one that regulates private actors." 138 S. Ct. at 1479. But ICWA is not the exercise of a power conferred by the Constitution. *See infra* Part I.C.

Nor is ICWA "best read" as regulating private actors. While ICWA determines where a private person (an Indian child) may be placed, it does so by controlling the Texas courts and officials charged with making that decision. As explained above, ICWA affected every aspect of this case, from beginning (when the Navajo Nation was notified) through today (when the Navajo Nation has appealed the failure to follow ICWA). *See supra* pp. 9-10. A far smaller intrusion into state affairs doomed the Brady Act, which controlled the purchase of handguns between private retailers and customers by requiring state officials to conduct background checks. *Printz*, 521 U.S. at 902-03. When Congress alters the duties of state officials, it is "tantamount to

forced state legislation" and unconstitutional commandeering. *Koog v. United States*, 79 F.3d 452, 458 (5th Cir. 1996).

Congress cannot force Texas to regulate its residents according to Congress's instructions. The Court should grant the petitions and hold that Congress cannot commandeer Texas courts, officials, and even the legislative process, in order to achieve Congress's preferred policy outcomes.

### B. ICWA mandates unconstitutional race discrimination.

At a minimum, ICWA's placement preferences, 25 U.S.C. § 1915(a)-(b), violate the equal-protection component of the Fifth Amendment's Due Process Clause. These preferences apply only to "Indian" children and discriminate against non-Indian prospective parents like C.B. and J.B. who must stand at the end of the line—behind every other Indian family in America who is willing to adopt—before getting a chance to adopt Y.J. ICWA's discrimination between Indians and non-Indians is a race-based classification of children and their prospective parents. *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013) (recognizing the ICWA raises equal-protection concerns). It cannot survive strict scrutiny and should not be applied here.

#### 1. ICWA draws race-based distinctions.

The Navajo Nation attempts to justify ICWA's discrimination by calling it a political, not racial, distinction, subject only to rational-basis review. Navajo Pet. 14. The source of this rationale is *Morton v. Mancari*, which rejected an equal-protection challenge to a statutory preference for hiring Indians at the Bureau of Indian Affairs. 417 U.S. 535, 537-38 (1974). The Supreme Court concluded the preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-

sovereign tribal entities whose lives and activities are governed by the [Bureau] in a unique fashion." *Id.* at 554. The preference was political, and therefore constitutionally permissible, because it was related to a "nonracially based goal." *Id.*

But *Mancari* does not exempt every Indian classification from scrutiny. In *Rice v. Cayetano*, the Supreme Court stated that governments cannot use tribal classifications to limit the participation of non-Indians in critical state affairs, such as voting. 528 U.S. 495, 520, 522 (2000). And the Supreme Court's reliance on *Mancari* to justify Indian-specific laws has generally been in the context of promoting Indian self-government or the regulation of Indian lands. *See, e.g.*, *Fisher v. Dist. Ct. of the Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382 (1976) (per curiam) (permitting exclusive tribal jurisdiction over adoption proceedings when all participants were tribal members living on the reservation); *United States v. Antelope*, 430 U.S. 641, 646 (1977) (federal regulation of criminal conduct within Indian country); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (federal authority to control sale of liquor on Indian reservations).

But ICWA does not further Indian self-government or even apply on Indian lands, as it does not apply to child-custody proceedings in Indian tribal courts. 25 C.F.R. § 23.103(b)(1). Instead, ICWA is designed to deny to non-Indians, like C.B. and J.B., equal participation in child-custody cases involving Indian children.

ICWA's focus on race is apparent from its text. An "Indian child" does not need to be a member of a tribe, just a potential member with a biological connection. 25 U.S.C. § 1903(4); *see also Adoptive Couple*, 570 U.S. at 641 (ICWA applied because the child was 1.2% Cherokee). Here, ICWA applied because of Y.J.'s Navajo blood

quantum and ancestry, making her eligible for, and now an enrolled member of, the Navajo Nation. CR.102, 461. The third adoption preference, for any Indian family regardless of tribe, is a naked racial preference for any Indian over any non-Indian. 25 U.S.C. § 1915(a). And Congress has specifically exempted ICWA from anti-discrimination laws regarding adoption and foster care. 42 U.S.C. § 1996b.

ICWA is designed to keep Indian children in Indian communities, something afforded no other race or culture. It has an impermissible racial purpose and must be subjected to strict scrutiny.

**2. ICWA fails strict scrutiny.**

ICWA cannot withstand strict scrutiny, as it is not narrowly tailored to serve a compelling governmental interest. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). There is no compelling governmental interest in judging a child or prospective parent on the basis of his or her race. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (finding equal-protection violation in child-custody case when the lower court "made no effort to place its holding on any ground other than race"); *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967) (stating that distinctions based on ancestry are "odious to a free people whose institutions are founded upon the doctrine of equality") (quotation marks and citation omitted).

And even if ICWA were necessary to preserve Indian culture, as the Navajo Nation contends, Navajo Pet. 14-15, ICWA is not narrowly tailored. Nothing in the placement preferences ensures that a child will be raised in Indian culture—only that she will be raised by Indians. Making broad judgments about the child-raising practices of different races is the antithesis of narrow tailoring. ICWA cannot survive

strict scrutiny. The Court should grant the petitions and hold that Y.J. be placed in accordance with her best interest, not her race.

### C. Congress lacked constitutional authority to enact ICWA.

Finally, Congress has no constitutional authority to interfere in Texas child-custody cases. Congress claims to have enacted ICWA pursuant to the Commerce Clause and "other constitutional authority." 25 U.S.C. § 1901(1). But no constitutional provision gives Congress the authority to enact ICWA.

The Commerce Clause gives Congress the power to "regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. But child-custody cases do not involve "commerce" as currently understood. *United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (explaining the scope of the Commerce Clause). Indian children are not items of commerce, and child-custody proceedings do not substantially affect commerce. *See Adoptive Couple*, 570 U.S. at 658-66 (Thomas, J. concurring). Indeed, the United States Supreme Court has used child-custody cases as an example of what does not fall within the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 564 (1995). Instead, the subject of domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) (stating that "[t]he whole subject of the domestic relations of . . . parent and child[] belongs to the laws of the states, and not to the laws of the United States").

The Navajo Nation argues that the Commerce Clause has been interpreted to give Congress "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); Navajo Pet. 11. But a Texas

child-custody proceeding is not an "Indian affair," even if the child involved is a member of an Indian tribe. To hold otherwise would make every lawsuit an Indian affair, subject to congressional oversight, if one of the parties was an Indian. Congress's authority does not stretch that far.

The Supreme Court has already held that Congress's plenary authority over Indians "is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977). And the Supreme Court has traditionally approved the use of Congress's plenary power to legislate regarding Indian self-government or directly regulate Indians and their land. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 202 (2004) (permitting Congress to expand or contract tribal sovereignty); *Perrin*, 232 U.S. at 480 (federal control of liquor sales on Indian lands). Extending Congress's Commerce Clause authority to state-court child-custody cases would break new legal ground.

In addition to the Commerce Clause, the Navajo Nation cites a list of constitutional and "preconstitutional" powers on which Congress could rely. Navajo Pet. 11-13. None suffices. The Treaty Clause does not permit Congress to enact ICWA, as there is no treaty containing its terms, nor could Congress otherwise violate the Constitution through a treaty. U.S. Const. art. II, § 2, cl. 2; *Reid v. Covert*, 354 U.S. 1, 16 (1957). The Law of Nations Clause permits Congress to enact laws to define and punish offenses on the high seas and against the law of nations, not to control state-court child-custody proceedings. U.S. Const. art. I, § 8, cl. 10. And any purported "preconstitutional" powers of Congress refer only to military and foreign policy, not domestic law. *Lara*, 541 U.S. at 201.

Congress's powers are limited to those listed in the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.). Nothing in that document permits Congress to tell Texas where it must place Y.J. or any other Indian child, much less how to make that decision. The Court should grant the petitions and hold that Congress was without authority to enact ICWA.

## II. The Court Should Grant the Petitions.

The Court should grant all of the petitions in this case. The constitutional issues raised are significant, and there is no reason to wait for the trial court to rule again—potentially using the wrong legal standard. As the Court has previously stated, "[j]ustice demands a speedy resolution of child custody and child support issues." *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (per curiam).

The use of ICWA in Texas is increasing, making this Court's consideration of its constitutionality all the more urgent. In the first twenty years of ICWA's existence, there was one appellate case in Texas concerning ICWA. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding [leave denied]). Last year alone, four child-custody orders were overturned for failing to comply with ICWA. *In re Y.J.*, 2019 WL 6904728, at *16-17 (failure to meet ICWA's standard for deviating from placement preferences); *In re S.J.H.*, No. 08-19-00182-CV, 2019 WL 6696533 (Tex. App.—El Paso Dec. 9, 2019, no pet. h.) (failure to contact tribe to determine child's status); *N.M. v. Tex. Dep't of Family & Protective Servs.*, No. 03-19-00240-CV, 2019 WL 4678420 (Tex. App.—Austin Sept. 26, 2019, no pet.) (failure to call expert witness qualified under ICWA); *In re*

*D.L.N.G.*, No. 05-19-00206-CV, 2019 WL 3214151 (Tex. App.—Dallas July 17, 2019, no pet.) (failure to call expert witness qualified under ICWA).

The existence of federal litigation regarding the constitutionality of ICWA is not a hindrance to this Court's consideration of the issues here. Absent a ruling from the United States Supreme Court, this Court may determine the constitutionality of federal law itself. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993). And there is certainly no guarantee that the Fifth Circuit's en banc ruling in *Bernhardt* will determine whether ICWA should apply to Y.J., given the multiple constitutional and jurisdictional issues involved in that litigation.

Texas courts would, however, be bound by and benefit from a decision from this Court on the constitutionality of ICWA. As the actions of the trial court and court of appeals reflect, lower courts will likely avoid the constitutional issues, if possible. *In re Y.J.*, 2019 WL 6904728, at *8; CR.458. A ruling by this Court is necessary.

* * *

The goal of Texas family law is to act in the best interest of Y.J. and all other Indian children whose lives are upended through no fault of their own. As the court of appeals observed in this case,

> Failing to comply with certain provisions of ICWA can result in a challengeable, infirm judgment well after the trial court has made a ruling and the child has bonded with a caregiver . . . a result which goes against bedrock principles underpinning Texas family law that are focused on promoting stability and permanence for children.

*In re Y.J.*, 2019 WL 6904728, at *8 n.18. Y.J. deserves to be placed in a permanent home, but that cannot happen unless and until this Court decides which law—Texas family law or ICWA—applies.

## Prayer

The Court should grant the petitions for review and hold that ICWA is unconstitutional.

Respectfully submitted.


Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General
State Bar No. 24094710
Kyle.Hawkins@oag.texas.gov

Beth Klusmann
Assistant Solicitor General

David J. Hacker
Special Counsel to the First Assistant Attorney General

Counsel for Respondent/Cross-Petitioner the Office of the Attorney General

## Certificate of Service

On March 2, 2020, this document was served electronically on (1) Matthew D. McGill and Ashley E. Johnson, lead counsel for C.B. and J.B., at mmcgill@gibsondunn.com and ajohnson@gibsondunn.com; (2) Anna McKim, Cindy V. Tisdale, and C. Alfred Mackenzie, lead counsel for the Navajo Nation, at amckim@lubbocklawfirm.com, cindy@cindytisdalelaw.com, and amackenzie@texas-appeals.com; (3) John T. Eck, lead counsel for Y.J., at john@stitesattorney.com; (4) Sarah Seltzer, lead counsel for M.M. and Unknown Father, at sarah@yourtexasfamilylawyer.com; (5) Justin D. Murray, lead counsel for J.J., at justin@justinmurraylaw.com; (6) Joseph W. Spence and Ashley Basnett, lead counsel for the Texas Department of Family and Protective Services, at COAappellatealerts@tarrantcountytx.gov and anbasnett@tarrantcountytx.gov; and (7) Daniel P. Webb, lead counsel for A.J., at dwebb@danielpwebb.com.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

## Certificate of Compliance

Microsoft Word reports that this document contains 4479 words, excluding the portions of the document exempted by Rule 9.4(i)(1).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

**No. 20-0081**

# In the Supreme Court of Texas

IN THE INTEREST OF Y.J., A CHILD

On Petition for Review
from the Second Court of Appeals, Fort Worth

## APPENDIX


| | | Tab |
|---|---|---|
| 1. | Trial court's judgment | A |
| 2. | Trial court's first amended findings of fact and conclusions of law | B |
| 3. | Court of appeals' opinion | C |
| 4. | Court of appeals' judgment | D |

# Tab A: Trial Court's Judgment

CAUSE NO. 323-107644-18

| | | |
|---|---|---|
| IN THE INTEREST OF | § | IN THE DISTRICT COURT OF |
| | § | |
| Y[redacted] R[redacted] J[redacted], | § | TARRANT COUNTY, TEXAS |
| | § | |
| A CHILD | § | 323rd JUDICIAL DISTRICT |

***ORDER OF TERMINATION OF THE PARENT-CHILD RELATIONSHIP AND ORDER IN SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP AND ORDER ON MOTION FOR PLACEMENT***

On May 3, 2019 the Court heard this case.

***Appearances***

Petitioner, TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, ("the Department") appeared through their representative, KAREN SOTO, and through their attorney of record, ASHLEY BASNETT, Assistant District Attorney, Tarrant County, Texas.

Respondent, J[redacted] R[redacted] JA[redacted] AKA [redacted] R[redacted] J[redacted], executed an affidavit of relinquishment of parental rights which included a waiver of appearance. However, J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted]'S attorney, JUSTIN MURRAY appeared in person and announced ready. JUSTIN MURRAY was then excused by the court because J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] executed the affidavit of relinquishment of parental rights.

Respondent, M[redacted] M[redacted], who was cited by publication, did not appear. Respondent, M[redacted] M[redacted], was represented by the "Diligent Search" attorney, KATHLYNN PACK.

Respondent, UNKNOWN FATHER, did not appear. The UNKNOWN FATHER was represented by the "Diligent Search" attorney, KATHLYNN PACK.

Intervenor, the NAVAJO NATION appeared in person through their representative, CELESTE SMITH, and their attorney of record, CINDY TISDALE.

Intervenor, C[redacted] B[redacted] and J[redacted] B[redacted], appeared in person and through their attorney of record, KELLYE HUGHES.

The child the subject of the suit, Y[redacted] R[redacted] J[redacted], was represented by her guardian and Attorney Ad Litem, JOHN T. ECK.

A[redacted] J[redacted], the child's maternal great aunt, who was not a party to this proceeding appeared in person.

The OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS, who intervened on June 24, 2019, appeared through Charles K. Eldred, Assistant Attorney General.

***Jurisdiction***

The Court, having examined the record and heard the evidence and argument of counsel, finds the following:

a. a request for identification of a court of continuing, exclusive jurisdiction has been made as required by Section 155.101 of the Texas Family Code.

b. this Court has jurisdiction of this case and of all the parties and that no other court has continuing, exclusive jurisdiction of this case.

The Court, having examined the record and heard the evidence and argument of counsel, finds that the State of Texas has jurisdiction to render final orders regarding the child the subject of this suit pursuant to Subchapter C, Chapter 152, Texas Family Code, by virtue of the fact that Texas is the home state of the child.

The Court finds that all persons entitled to citation were properly cited.

The Court further finds that the Department served *Notice of Pending Custody Proceeding Involving Indian Child* on each parent or Indian custodian, each tribe identified, the Bureau of Indian Affairs (BIA) and the Secretary of the Interior pursuant to 25 U.S.C. Section 1912(a) on the following:

[redacted] AKA [redacted]

NAVAJO NATION
C/O Celeste Smith
P.O. Box 769
St. Michael, Arizona 86511

The Court further finds that the Department has properly served *Notice to Bureau of Indian Affairs (BIA); Parent, Custodian or Tribe of Child Cannot Be Located or Determined* on the Bureau of Indian Affairs, as necessary pursuant to 25 U.S.C. Section 1912(a).

***Jury***

A jury was waived, and all questions of fact and of law were submitted to the Court.

***Record***

The making of a record of testimony was made by the official court reporter for the 323rd Judicial District Court.

***Child***

The Court finds that the following child is the subject of this suit:

Name: Y[redacted] J[redacted]
Sex: [redacted]
Birth date: [redacted]
Home state: [redacted]

***Termination of Mother's Parental Rights***

The Court finds by evidence beyond a reasonable doubt that J[redacted] AKA J[redacted] has –

1. executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided for by chapter 161 of the Texas Family Code, pursuant to Section 161.001(b)(1)(K); and

2. constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months and: 1) the Department has made reasonable efforts to return the child to the mother; 2) the mother has not regularly visited or maintained significant contact with the child; and 3) the mother has demonstrated an inability to provide the child with a safe environment, pursuant to Section 161.001(b)(1)(N) of the Texas Family Code.

The Court also finds beyond reasonable doubt that termination of the parent-child relationship between J[redacted] AKA J[redacted] and the child the subject of this suit is in the best interest of the child.

The Court further finds by evidence beyond a reasonable doubt that:

1. The Department made active efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that these efforts proved unsuccessful; and

2. The evidence, including testimony of a qualified expert witness, demonstrates that the continued custody of the child by JACQUELENE ROSE JAMES AKA J[redacted], parent or Indian Custodian, is likely to result in serious emotional or physical damage to this child.

IT IS THEREFORE ORDERED that the parent-child relationship between J[redacted] AKA J[redacted] and the child the subject of this suit is terminated.

In accordance with Section 161.001(c) of the Texas Family Code, the Court finds that the order of termination of the parent child relationship as to [redacted] AKA J[redacted] is not based on evidence that J[redacted] AKA J[redacted]

1. homeschooled the child;

2. is economically disadvantaged;

3. has been charged with a nonviolent misdemeanor other than:

   a. an offense under Title 5 of the Texas Penal Code;

   b. an offense under Title 6 of the Texas Penal Code; or

   c. an offense that involves family violence, as defined by Section 71.004 of the Texas Family Code;

4. provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169 of the Texas Occupations Code; or

5. declined immunization for the child for reasons of conscience, including a religious belief.

***Termination of Father's Parental Rights [redacted]***

The Court finds by clear and convincing evidence that M[redacted] M[redacted] has not registered with the paternity registry under Chapter 160 of the Texas Family Code. The Court finds by clear and convincing evidence that Petitioner has filed in this case a certificate of paternity registry search that indicates that no man has registered as the father of this child.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship, if any exists or could exist, between any alleged father and the child the subject of this suit is in the best interest of the child.

IT IS THEREFORE ORDERED that the parent-child relationship, if any exists or could exist, between M[redacted] M[redacted] or any alleged father and the child the subject of this suit is terminated.

***Termination of Alleged Father's Parental Rights—UNKNOWN FATHER***

The Court finds by clear and convincing evidence that no man has registered with the paternity registry under chapter 160 of the Texas Family Code. The Court finds by clear and convincing evidence that Petitioner has filed in this case a certificate of paternity registry search that indicates that no man has registered as the father of this child.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship, if any exists or could exist, between any UNKNOWN FATHER or alleged father and the child the subject of this suit is in the best interest of the child.

IT IS THEREFORE ORDERED that the parent-child relationship, if any exists or could exist, between any UNKNOWN FATHER or any alleged father and the child the subject of this suit is terminated.

***Conservatorship***

The Court finds that the following orders are in the best interest of the child.

IT IS ORDERED that C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] and A[redacted] J[redacted] are appointed Joint Non-Parent Managing Conservators of the following child: Y[redacted] R[redacted] J[redacted]

IT IS ORDERED that, at all times, C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] as a non-parent joint managing conservator, shall have the following rights:

1. the right to receive information from any other conservator of the child concerning the health, education, and welfare of the child;

2. the right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;

3. the right of access to medical, dental, psychological, and educational records of the child;

4. the right to consult with a physician, dentist, or psychologist of the child;

5. the right to consult with school officials concerning the child's welfare and educational status, including school activities;

6. the right to attend school activities;

7. the right to be designated on the child's records as a person to be notified in case of an emergency;

8. the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and

9. the right to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

IT IS ORDERED that, at all times, A[redacted] J[redacted], as a non-parent joint managing conservator, shall have the following rights:

1. the right to receive information from any other conservator of the child concerning the health, education, and welfare of the child;

2. the right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;

3. the right of access to medical, dental, psychological, and educational records of the child;

4. the right to consult with a physician, dentist, or psychologist of the child;

5. the right to consult with school officials concerning the child's welfare and educational status, including school activities;

6. the right to attend school activities;

7. the right to be designated on the child's records as a person to be notified in case of an emergency;

8. the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and

9. the right to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

IT IS ORDERED that, at all times, C[redacted] B[redacted] T B[redacted] and [redacted] K[redacted] B[redacted] and A[redacted] J[redacted], as non-parent joint managing conservator, shall each have the following duties:

1. the duty to inform the other conservator of the child in a timely manner of significant information concerning the health, education, and welfare of the child;

2. the duty to inform the other conservator of the child if the conservator resides with for at least thirty days, marries, or intends to marry a person who the conservator knows is registered as a sex offender under chapter 62 of the Texas Code of Criminal Procedure or is currently charged with an offense for which on conviction the person would be required to register under that chapter. IT IS ORDERED that notice of this information shall be provided to the other conservator of the child as soon as practicable, but not later than the fortieth day after the date the conservator of the child begins to reside with the person or on the tenth day after the date the marriage occurs, as appropriate. IT IS ORDERED that the notice must include a description of the offense that is the basis of the person's requirement to register as a sex offender or of the offense with which the person is charged. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE;

3. the duty to inform the other conservator of the child if the conservator establishes a residence with a person who the conservator knows is the subject of a final protective order sought by an individual other than the conservator that is in effect on the date the residence with the person is established. IT IS ORDERED that notice of this information shall be provided to the other conservator of the child as soon as practicable, but not later than the thirtieth day after the date the conservator establishes residence with the person who is the subject of the final protective order. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE;

4. the duty to inform the other conservator of the child if the conservator resides with, or allows unsupervised access to a child by, a person who is the subject of a final protective order sought by the conservator after the expiration of sixty-day period following the date the final protective order is issued. IT IS ORDERED

that notice of this information shall be provided to the other conservator of the child as soon as practicable, but not later than the ninetieth day after the date the final protective order was issued. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE; and

5. the duty to inform the other conservator of the child if the conservator is the subject of a final protective order issued after the date of the order establishing conservatorship. IT IS ORDERED that notice of this information shall be provided to the other conservator of the child as soon as practicable, but not later than the thirtieth day after the date the final protective order was issued. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE.

IT IS ORDERED that, during his periods of possession, C[redacted] B[redacted] AND J[redacted] K[redacted] B[redacted], as non-parent joint managing conservator, shall have the following rights and duties:

1. the duty of care, control, protection, and reasonable discipline of the child;

2. the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

3. the right to consent for the child to medical and dental care not involving an invasive procedure; and

4. the right to direct the moral and religious training of the child.

IT IS ORDERED that, during her periods of possession, A[redacted] J[redacted], as non-parent joint managing conservator, shall have the following rights and duties:

1. the duty of care, control, protection, and reasonable discipline of the child;

2. the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

3. the right to consent for the child to medical and dental care not involving an invasive procedure; and

4. the right to direct the moral and religious training of the child.

IT IS ORDERED that C[redacted] B[redacted] and J[redacted] B[redacted], as non-parent joint managing conservators, shall have the following rights and duty:

1. the exclusive right to designate the primary residence of the child within the State of Arizona and within two states contiguous to the State of Arizona (which includes Texas);

2. the independent right to consent to medical, dental, and surgical treatment involving invasive procedures;

3. the independent right to consent to psychiatric and psychological treatment of the child;

4. the independent right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

5. the independent right to consent to marriage and to enlistment in the armed forces of the United States;

6. the exclusive right to make decisions concerning the child's primary, intermediate and secondary education;

8. except as provided by Section 264.0111 of the Texas Family Code, the independent right to the services and earnings of the child;

9. except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the independent right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;

10. the independent duty to manage the estate of the child to the extent the estate has been created by community property or the joint property of the parent; and

11. the independent right to enroll the child in classes during their periods of possession.

IT IS ORDERED that A[redacted] J[redacted], as a non-parent joint managing conservator, shall have the following rights and duty:

1. the independent right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

2. the independent right to consent to marriage and to enlistment in the armed forces of the United States;

3. except as provided by Section 264.0111 of the Texas Family Code, the independent right to the services and earnings of the child;

4. except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the independent right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;

5. the independent duty to manage the estate of the child to the extent the estate has been created by community property or the joint property of the parents;

6. the independent right to enroll the child in any non-primary, intermediate or secondary classes during her periods of possession.

7. the independent right to consent to medical, dental, and surgical treatment involving invasive procedures; and

8. the independent right to consent to psychiatric and psychological treatment of the child.

***Primary Residence and Geographical Restriction***

IT IS ORDERED that the primary residence of the child shall be within the State of Arizona and within two states contiguous to the State of Arizona, and the parties shall not remove the child from the State of Arizona and within two states contiguous to the State of Arizona for the purpose of changing the primary residence of the child until this geographic restriction is modified by further order of the court of continuing jurisdiction or by a written agreement that is signed by the parties and filed with that court.

IT IS FURTHER ORDERED that C[redacted] B[redacted] and J[redacted] B[redacted] shall have the exclusive right to designate the child's primary residence within the State of Arizona and within two states contiguous to the State of Arizona.

Each conservator, during that conservator's period of possession, is ORDERED to ensure the child's attendance in the schools in which C[redacted] B[redacted] and J[redacted] B[redacted] have enrolled the child.

If C[redacted] B[redacted] and J[redacted] B[redacted] apply for a passport for the child, Y[redacted] R[redacted] J[redacted] B[redacted] are ORDERED to notify A[redacted] J[redacted] of that fact no later than 10 days after the application.

***Possession and Access***

IT IS ORDERED that each conservator shall comply with all terms and conditions of this Possession Order. IT IS ORDERED that this Possession Order is effective immediately and applies to all periods of possession occurring on and after the date the Court signs this Possession Order. IT IS, THEREFORE, ORDERED:

1. Mutual Agreement or Specified Terms for Possession

   IT IS ORDERED that the conservators shall have possession of the child at times mutually agreed to in advance by the parties, and, in the absence of mutual agreement, it is ORDERED that the conservators shall have possession of the child under the specified terms set out in this Possession Order.

2. Summer Possession by A[redacted] J[redacted]-2019

   A[redacted] J[redacted] shall have possession of the child for a period of one week beginning July 20, 2019, at 6:00 p.m. and ending on July 27, 2019, at 6:00 p.m.

Travel expenses shall be paid by C E B and J E B. C E B and/or J K B are ORDERED to deliver the child to the residence of A J at the beginning of her period of possession. A J is ORDERED to surrender the child to C E B and/or J K B at the residence of A J at the end of her period of possession.

3. Summer Possession by A J –2020

A J shall have possession of the child for a period of two continuous weeks during the summer of 2020. Travel expenses shall be paid by C E B and J K B. By January 1, 2020, A J must designate in writing to C E B and J K B, which two weeks she desires to exercise. These periods of possession shall begin and end at 6:00 p.m. on each day. The period of possession to be exercised will begin no earlier than the day after school is dismissed for the summer vacation and will end no later than the seventh day before school resumes. C E B and/or J K B are ORDERED to deliver the child to the residence of A J at the beginning of her period of possession. A J is ORDERED to surrender the child to C E B and/or J B at the residence of J at the end of her period of possession.

4. Summer Possession by A J –2021

A J shall have possession of the child for a period of three continuous weeks during the summer of 2021. Travel expenses shall be paid by C E B and J B. By January 1, 2021, A J must designate in writing to C E B and J K B, which three weeks she desires to exercise. These periods of possession shall begin and end at 6:00 p.m. on each day. The period of possession to be exercised will begin no earlier than the day after school is dismissed for the summer vacation and will end no later than the seventh day before school resumes. C E B and/or J K B are ORDERED to deliver the child to the residence of J at the beginning of her period of possession. A J is ORDERED to surrender the child to C E B and/or J K B at the residence of A J at the end of her period of possession.

5. Summer Possession by A J –2022

A J shall have possession of the child for a period of four continuous weeks during the summer of 2022. Travel expenses shall be paid by C E B and J K B. By January 1, 2022, A J must designate in writing to C E B and J B, which four weeks

she desires to exercise. These periods of possession shall begin and end at 6:00 p.m. on each day. The period of possession to be exercised will begin no earlier than the day after school is dismissed for the summer vacation and will end no later than the seventh day before school resumes. C[redacted] B[redacted] B[redacted] and/or J[redacted] K[redacted] B[redacted] are ORDERED to deliver the child to the residence of A[redacted] J[redacted] at the beginning of her period of possession. A[redacted] J[redacted] is ORDERED to surrender the child to C[redacted] B[redacted] B[redacted] and/or J[redacted] K[redacted] B[redacted] at the residence of A[redacted] J[redacted] at the end of her period of possession.

6. Possession Order for A[redacted] J[redacted] Beginning 2023

Except as otherwise expressly provided in this Possession Order, A[redacted] J[redacted] shall have the right to possession of the child as follows:

a. Weekends–Al[redacted] J[redacted] shall have the right to possession of the child not more than one weekend per month of A[redacted] J[redacted]'S choice beginning at 6:00 p.m. on the day school recesses for the weekend and ending at 6:00 p.m. on the day before school resumes after the weekend. A[redacted] J[redacted] shall give C[redacted] B[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] fourteen days' written notice preceding a designated weekend. The weekends chosen shall not conflict with the provisions regarding Christmas, Thanksgiving, and the child's birthday below.

b. Weekend Possession Extended by a Holiday–

Except as otherwise expressly provided in this Possession Order, if a weekend period of possession by A[redacted] JA[redacted] begins on a student holiday or a teacher in-service day that falls on a Friday during the regular school term, as determined by the school in which the child is enrolled, or a federal, state, or local holiday during the summer months when school is not in session, that weekend period of possession shall begin at the time the child's school is regularly dismissed on the Thursday immediately preceding the student holiday or teacher in-service day and 6:00 p.m. on the Thursday immediately preceding the federal, state, or local holiday during the summer months.

Except as otherwise expressly provided in this Possession Order, if a weekend period of possession by A[redacted] J[redacted] ends on or is immediately followed by a student holiday or a teacher in-service day that falls on a Monday during the regular school term, as determined by the school in which the child is enrolled, or a federal, state, or local holiday that falls on a Monday during the summer months when school is not in session, that weekend period of possession shall end at 6:00 p.m. on that Monday.

c. Spring Vacation in All Years - Every year, beginning at 6:00 p.m. on the day the child is dismissed from school for the school's spring

vacation and ending at 6:00 p.m. on the day before school resumes after that vacation.

d. Extended Summer Possession by A[redacted] J[redacted]–

With Written Notice by January 1–If A[redacted] J[redacted] gives C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] written notice by January 1 of a year specifying an extended period or periods of summer possession for that year, A[redacted] J[redacted] shall have possession of the child for forty-two days beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than seven days before school resumes at the end of the summer vacation in that year, to be exercised in no more than two separate periods of at least seven consecutive days each, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each applicable day.

Without Written Notice by January 1–If A[redacted] J[redacted] does not give C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] written notice by January 1 of a year specifying an extended period or periods of summer possession for that year, A[redacted] J[redacted] shall have possession of the child for forty-two consecutive days beginning at 6:00 p.m. on June 15 and ending at 6:00 p.m. on July 27 of that year.

Notwithstanding the weekend periods of possession ORDERED for A[redacted] J[redacted], it is expressly ORDERED that C[redacted] E[redacted] and J[redacted] K[redacted] B[redacted] shall have a superior right of possession of the child as follows:

a. Summer Weekend Possession by C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted]–If C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] gives A[redacted] J[redacted] written notice by January 15 of a year, C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall have possession of the child on any one weekend beginning at 6:00 p.m. on Friday and ending at 6:00 p.m. on the following Sunday during any one period of possession by A[redacted] J[redacted] during A[redacted] J[redacted] extended summer possession in that year, provided that if a period of possession by [redacted] J[redacted] in that year exceeds thirty days, C[redacted] E[redacted] B[redacted] and J[redacted] B[redacted] may have possession of the child under the terms of this provision on any two nonconsecutive weekends during that period and provided that C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] picks up the child from A[redacted] J[redacted] and returns the child to that same place.

b. Extended Summer Possession by C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted]–If C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] E[redacted] gives A[redacted] J[redacted] written

notice by January 15 of a year, C[redacted] B[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] may designate twenty-one days beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than seven days before school resumes at the end of the summer vacation in that year, to be exercised in no more than two separate periods of at least seven consecutive days each, during which A[redacted] J[redacted] shall not have possession of the child, provided that the period or periods so designated do not interfere with A[redacted] J[redacted] period or periods of extended summer possession. These periods of possession shall begin and end at 6:00 p.m. on each applicable day.

Notwithstanding the weekend periods of possession of A[redacted] J[redacted] C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] and A[redacted] J[redacted] shall have the right to possession of the child as follows:

a. Christmas Holidays in Even-Numbered Years–In even-numbered years, A[redacted] J[redacted] shall have the right to possession of the child beginning at the time the child's school is dismissed for the Christmas school vacation and ending at noon on December 28, and C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall have the right to possession of the child beginning at noon on December 28 and ending at 6:00 p.m. on the day before school resumes after that Christmas school vacation.

b. Christmas Holidays in Odd-Numbered Years–In odd-numbered years, C[redacted] E[redacted] B[redacted] and J[redacted] B[redacted] shall have the right to possession of the child beginning at the time the child's school is dismissed for the Christmas school vacation and ending at noon on December 28, and A[redacted] J[redacted] shall have the right to possession of the child beginning at noon on December 28 and ending at 6:00 p.m. on the day before school resumes after that Christmas school vacation.

c. Thanksgiving in Odd-Numbered Years–In odd-numbered years, A[redacted] J[redacted] shall have the right to possession of the child beginning at the time the child's school is dismissed for the Thanksgiving holiday and ending at 6:00 p.m. on the Sunday following Thanksgiving.

d. Thanksgiving in Even-Numbered Years–In even-numbered years, C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall have the right to possession of the child beginning at the time the child's school is dismissed for the Thanksgiving holiday and ending at 6:00 p.m. on the Sunday following Thanksgiving.

e. Child's Birthday–If a conservator is not otherwise entitled under this Possession Order to present possession of the child on the child's birthday, that conservator shall have possession of the child beginning

at 6:00 p.m. and ending at 8:00 p.m. on that day, provided that that conservator picks up the child from the other conservator's residence and returns the child to that same place.

7. Undesignated Periods of Possession

C E B and J K E shall have the right of possession of the child at all other times not specifically designated in this Possession Order for A J.

8. General Terms and Conditions

Except as otherwise expressly provided in this Possession Order, the terms and conditions of possession of the child that apply regardless of the distance between the residence of a parent and the child are as follows:

a. Surrender of Child by C E B and J K B through August of 2022–C E B and J K B are ORDERED to surrender the child to A J at the beginning of each period of A J possession at the residence of A J beginning immediately and through August 2022.

Beginning September 1, 2022, C E B and J K B are ORDERED to surrender the child to A J at the beginning of each period of A J possession at the residence of C E B and J K B

b. Surrender of Child by A J through August of 2022–A J is ORDERED to surrender the child to C E B and J K E at the end of each period of A J possession at the residence of A J beginning immediately and through August of 2022.

Beginning September 1, 2022, A J is ORDERED to return the child to the residence of C E B and J B at the end of each period of possession.

c. Surrender of Child by A J –AI A JA is ORDERED to surrender the child to C E B and J B if the child is in A J possession or subject to A J control, at the beginning of each period of C E B and J K B 'S exclusive periods of possession, at the place designated in this Possession Order.

d. Return of Child by C E B and J K B –C E B and J

K[redacted] B[redacted] is ORDERED to return the child to A[redacted] J[redacted], if [redacted] J[redacted] is entitled to possession of the child, at the end of each of C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted]'S exclusive periods of possession, at the place designated in this Possession Order.

e. Personal Effects–Each conservator is ORDERED to return with the child the personal effects that the child brought at the beginning of the period of possession.

f. Designation of Competent Adult–Each conservator may designate any competent adult to pick up and return the child, as applicable. IT IS ORDERED that a conservator or a designated competent adult be present when the child is picked up or returned.

g. Inability to Exercise Possession–Each conservator is ORDERED to give notice to the person in possession of the child on each occasion that the conservator will be unable to exercise that conservator's right of possession for any specified period.

h. Written Notice–Written notice, including notice provided by electronic mail or facsimile, shall be deemed to have been timely made if received or, if applicable, postmarked before or at the time that notice is due. Each conservator is ORDERED to notify the other conservator of any change in the conservator's electronic mail address or facsimile number within twenty-four hours after the change.

9. Noninterference with Possession

Except as expressly provided herein, IT IS ORDERED that none of the conservators shall take possession of the child during another conservator's period of possession unless there is a prior written agreement signed by all conservators or in case of an emergency.

10. Long-Distance Access and Visitation

IT IS ORDERED that after the summer 2021 visitation, the following arrangements for the travel of that child shall control:

a. Adult to Accompany Child–IT IS ORDERED that A[redacted] J[redacted] shall travel with the child between the residence of C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] and that of A[redacted] J[redacted] at the beginning and end of each period of possession. In place of this requirement, A[redacted] J[redacted] is authorized to designate a responsible adult known to the child to travel with the child between the airport nearest to the residence of C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] and the residence of A[redacted] J[redacted] IT IS FURTHER ORDERED that the child shall not travel alone between the airport

nearest the residence of C E B and J K B and the residence of A J until the child reaches the age of five years.

b. Expenses Paid by A J–IT IS ORDERED that A J shall pay all travel expenses, charges, escort fees, and air fares incurred for the child from the time A J takes possession of the child from C E B and J K B at the beginning of a period of possession until the time A J returns the child to the possession of C E B and J K B at the end of the period of possession.

IT IS ORDERED that the following provisions shall govern the arrangements for the travel of the child to and from A J after the child reaches the age of five years.

a. Notice of Place and Time of Possession–IT IS ORDERED that, if A J desires to take possession of the child at an airport near A J 'S residence, A J shall state these facts in a notice letter to C E B and J K B:

i. the airport where C E B and J K B is to surrender the child;

ii. the date and time of the flight on which the child is scheduled to leave;

iii. the airline and flight number of the airplane on which the child is scheduled to leave;

iv. the airport where the child will return to C E B and J K B at the end of the period of possession;

v. the date and time of the flight on which the child is scheduled to return to that airport; and

vi. the airline and flight number of the airplane on which the child is scheduled to return to C E B and J K B at the end of the period of possession.

b. Flight Arrangements–IT IS ORDERED that A J shall make airline reservations for the child only on major commercial passenger airlines on flights having no change of airplanes between the airport of departure and the airport of final arrival (a "nonequipment change flight"). IT IS FURTHER ORDERED that

A[redacted] J[redacted] shall make airline reservations for the child on flights that depart from a commercial airport near the residence of C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] that offers regularly scheduled passenger flights to various cities throughout the United States on major commercial passenger airlines.

IT IS FURTHER ORDERED that A[redacted] J[redacted] shall make airline reservations for the child on flights that depart the airport of departure nearest the time A[redacted] J[redacted] period of possession is to begin under the possession order and that arrive at the airport of final arrival nearest the time A[redacted] J[redacted] period of possession is to end under the possession order. IT IS FURTHER ORDERED, that A[redacted] J[redacted] shall not make airline reservations that would require the child to depart the airport of departure sooner than 8:00 a.m. or to arrive at the airport of final arrival later than 8:00 p.m. IT IS FURTHER ORDERED that A[redacted] J[redacted] shall not make flight arrangements that cause the child to be removed before the child's school is regularly dismissed on the date the period of possession is to begin or that cause the child to be returned to the child's school later than the time the child's school resumes on the date the period of possession is to end.

c. Delivery and Pickup by C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted]–IT IS ORDERED that C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall deliver the child to the airport from which the child is scheduled to leave at the beginning of each period of possession at least 2 hours before the scheduled departure time. IT IS FURTHER ORDERED that C[redacted] E[redacted] BR[redacted] and J[redacted] K[redacted] B[redacted] shall surrender the child to a flight attendant who is employed by the airline and who will be flying on the same flight on which the child is scheduled.

IT IS FURTHER ORDERED that C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall take possession of the child at the end of A[redacted] J[redacted] period of possession at the airport where the child is scheduled to return and at the security checkpoint, if applicable, or at the specific airport gate where the passengers from the child's scheduled flight disembark.

d. Pickup and Return by A[redacted] J[redacted]–IT IS ORDERED that A[redacted] J[redacted] shall take possession of the child at the beginning of each period of possession at the airport where the child is scheduled to arrive and at the security checkpoint, if applicable, or at the specific airport gate where the passengers from the child's scheduled flight disembark.

IT IS FURTHER ORDERED that A[redacted] J[redacted], at the end of each period of possession, shall deliver the child to the airport where

the child is scheduled to depart at least 2 hours before the scheduled departure time and surrender the child to a flight attendant who is employed by the airline and who will be flying on the same flight on which the child is scheduled to return.

e. Missed Flights–IT IS ORDERED that any conservator who has possession of the child at the time shall notify the other conservator immediately if the child is not placed on a scheduled flight at the beginning or end of a period of possession. IT IS FURTHER ORDERED that, if the child should miss a scheduled flight, the conservator having possession of the child when the flight is missed shall schedule another nonequipment change flight for the child as soon as is possible after the originally scheduled flight and shall pay any additional expense associated with the changed flight and give the other conservator notice of the date and time of that flight.

f. Expenses Paid by A[redacted] J[redacted]–IT IS ORDERED that A[redacted] J[redacted] shall purchase, in advance, the round-trip airline tickets (including escort fees) to be used by the child for the child's flight. IT IS FURTHER ORDERED that A[redacted] J[redacted] shall make necessary arrangements with the airlines and with C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] in order that the airline tickets are available to the child before a scheduled flight. IT IS FURTHER ORDERED that A[redacted] J[redacted] shall pay any other traveling expenses and charges incurred for the child from the time C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] surrender possession of the child by placing the child on the scheduled nonequipment change flight at the beginning of a period of possession until the time C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] take possession of the child at the termination of the scheduled nonequipment change flight at the end of the period of possession. IT IS FURTHER ORDERED that A[redacted] J[redacted] shall reimburse C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] for travel expenses of the child if, because of circumstances beyond C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] S control, C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] are required to pay travel expenses of the child on a nonequipment change flight to or from the possession of A[redacted] J[redacted]

g. Miscellaneous Expenses–IT IS ORDERED that the expenses of a conservator incurred in traveling to and from an airport, as well as related parking and baggage-handling expenses, are the sole responsibility of the conservator delivering or receiving the child.

This concludes the Possession Order.

***Dismissal of Parties***

IT IS ORDERED that JUSTIN MURRAY earlier appointed by the Court to represent [redacted], is relieved of all duties based on a finding of good cause.

IT IS ORDERED that KATHLYNN PACK earlier appointed by the Court to represent [redacted] and UNKNOWN FATHER, is relieved of all duties based on a finding of good cause.

IT IS ORDERED that JOHN T. ECK earlier appointed by the Court as Guardian and Attorney Ad Litem for the child [redacted], is relieved of all duties based on a finding of good cause.

IT IS ORDERED that the DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, earlier appointed by the Court as the Temporary Managing Conservator of the child [redacted], is dismissed.

***Language Program for Child***

IT IS ORDERED that as soon as a Navajo language program will accept the child for enrollment, [redacted] shall enroll the child [redacted] in a Navajo Language Program at their sole cost and expense. IT IS FURTHER ORDERED that [redacted] shall keep the child continuously enrolled in the Navajo Language Program until the child's fourteenth birthday.

IT IS ORDERED that if a Navajo Language Program is not available within 30 miles of the residence of [redacted], they shall enroll the child in an equivalent on-line program.

***Intervenor Navajo Nation's Motion for Placement***

IT IS ORDERED that the Intervenor, NAVAJO NATION'S Motion for Placement is hereby DENIED based on the finding that the Indian Child Welfare Act is inapplicable because Texas Family Code Section 152.104 violates the Texas Constitution as set forth in the order of this Court dated March 1, 2019. AND THE BEST INTERESTS OF THE CHILD. AK

***Required Information***

The information required for each party by section 105.006(a) of the Texas Family Code is as follows:

Name: [redacted]
Social Security number: [redacted]
Driver's license number: [redacted]
Current residence address: [redacted]
Mailing address: [redacted]
Home telephone number: [redacted]
Email Address: [redacted]
Name of employer: _____

Address of employment: _____
Work telephone number: _____

Name: [redacted]
Social Security number: [redacted]
Driver's license number: [redacted]
Current residence address: [redacted]
Mailing address: [redacted]
Home telephone number: [redacted]
Email Address: [redacted]
Name of employer: _____
Address of employment: _____
Work telephone number: _____

Name: [redacted]
Social Security number: [redacted]
Driver's license number: [redacted]
Current residence address: [redacted]

Mailing address: [redacted]
Home telephone number: [redacted]
Email Address: _____
Name of employer: _____
Address of employment: _____
Work telephone number: _____

***Required Notices***

**EACH PERSON WHO IS A PARTY TO THIS ORDER IS ORDERED TO NOTIFY EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OF EMPLOYMENT, DRIVER'S LICENSE NUMBER, AND WORK TELEPHONE NUMBER. THE PARTY IS ORDERED TO GIVE NOTICE OF AN INTENDED CHANGE IN ANY OF THE REQUIRED INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY ON OR BEFORE THE 60TH DAY BEFORE THE INTENDED CHANGE. IF THE PARTY DOES NOT KNOW OR COULD NOT HAVE KNOWN OF THE CHANGE IN SUFFICIENT TIME TO PROVIDE 60-DAY NOTICE, THE PARTY IS ORDERED TO GIVE NOTICE OF THE CHANGE ON OR BEFORE THE FIFTH DAY AFTER THE DATE THAT THE PARTY KNOWS OF THE CHANGE.**

**THE DUTY TO FURNISH THIS INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER, IS UNDER AN OBLIGATION TO PAY CHILD SUPPORT OR ENTITLED TO POSSESSION OF OR ACCESS TO A CHILD.**

**FAILURE BY A PARTY TO OBEY THE ORDER OF THIS COURT TO PROVIDE EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY WITH THE CHANGE IN THE REQUIRED INFORMATION MAY RESULT IN FURTHER**

**LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.**

**Notice shall be given to the other party by delivering a copy of the notice to the party by registered or certified mail, return receipt requested. Notice shall be given to the Court by delivering a copy of the notice either in person to the clerk of this Court or by registered or certified mail addressed to the clerk at 2700 Kimbo Rd., Fort Worth, TX 76111. Notice shall be given to the state case registry by mailing a copy of the notice to State Case Registry, Contract Services Section, MC046S, P.O. Box 12017, Austin, Texas 78711-2017.**

**NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE TERMS OF CHILD CUSTODY SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CLAIM, CIVIL OR OTHERWISE, REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THE ORDER THAT RELATE TO CHILD CUSTODY. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.**

**THE COURT MAY MODIFY THIS ORDER THAT PROVIDES FOR THE SUPPORT OF A CHILD, IF:**

**(1) THE CIRCUMSTANCES OF THE CHILD OR A PERSON AFFECTED BY THE ORDER HAVE MATERIALLY AND SUBSTANTIALLY CHANGED; OR**

**(2) IT HAS BEEN THREE YEARS SINCE THE ORDER WAS RENDERED OR LAST MODIFIED AND THE MONTHLY AMOUNT OF THE CHILD SUPPORT AWARD UNDER THE ORDER DIFFERS BY EITHER 20 PERCENT OR $100 FROM THE AMOUNT THAT WOULD BE AWARDED IN ACCORDANCE WITH THE CHILD SUPPORT GUIDELINES.**

***Warnings***

**WARNINGS TO PARTIES: FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.**

**FAILURE OF A PARTY TO MAKE A CHILD SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY RESULT IN THE PARTY'S NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.**

**FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT-ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT-ORDERED CHILD SUPPORT TO THAT PARTY.**

***Additional Findings***

The Court finds and declares that the Indian Child Welfare Act does not preempt Texas state law.

The Court finds and declares that Section 152.104 of the Texas Family Code is unconstitutional under the Texas Constitution.

***Attorney's Fees***

IT IS ORDERED that attorney's fees are to be borne by the party who incurred them.

***Costs***

IT IS ORDERED that costs of court are to be borne by the party who incurred them.

***Discharge from Discovery Retention Requirement***

IT IS ORDERED that the parties and their respective attorneys are discharged from the requirement of keeping and storing the documents produced in this case in accordance with rule 191.4(d) of the Texas Rules of Civil Procedure.

***Relief Not Granted***

IT IS ORDERED that all relief requested in this case and not expressly granted is denied.

***Date of Order***

This order judicially PRONOUNCED in court at Fort Worth, Tarrant County, Texas, on May 3, 2019, but signed on June 28th, 2019.

JUDGE PRESIDING

***APPROVED AS TO FORM ONLY:***

ASHLEY BASNETT
State Bar No. 24079190
Assistant Criminal District Attorney
2700 Ben Avenue
Fort Worth, Texas 76103
Tel: (817) 255-8733
anbasnett@tarrantcountytx.gov
Attorney for DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

KELLYE HUGHES
State Bar No. 00792864
HUGHES LAW CENTER, PC
3615 W. Pioneer Parkway, Suite C
Pantego, Texas 76013
Tel: (817) 465-4664
Kellye.Hughes@yahoo.com
Attorney for C[redacted] E[redacted] T B[redacted]
and J[redacted] K[redacted] B[redacted]

JUSTIN MURRAY
State Bar No. 24075466
10901 County Road #528
Mansfield, Texas 76063
Tel: (817) 456-9045
justin@justinmurraylaw.com
Attorney for J[redacted] E R[redacted] E J[redacted]
AKA J[redacted]

CHARLES K. ELDRED
State Bar No. 00793681
Assistant Attorney General
P.O. Box 12548, Mail Code 001
Austin, Texas 78711-2548
Tel: (512) 936-1706
charles.eldred@oag.texas.gov
Attorney for THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS

KATHLYNN PACK
State Bar No. 24095828
6777 Camp Bowie Blvd., Suite 340
Fort Worth, Texas 76116
Tel: (817) 887-6433
kathlynn@yourtexasfamilylawyer.com
Attorney for M[redacted]
UNKNOWN FATHER

***AGREES THE WORDING OF THIS ORDER CORRECTLY REFLECTS THE COURT'S RULING, BUT OBJECTS AND DISAGREES TO THE SUBSTANCE OF THE ORDER:***

CINDY V. TISDALE
State Bar No. 00792700
220 W. Pearl Street
Granbury, Texas 76048
Tel: (817) 573-6433
cindy@cindytisdalelaw.com
Attorney for the NAVAJO NATION

JOHN T. ECK
State Bar No. 00792480
933 W. Weatherford Street
Fort Worth, Texas 76102
Tel: (817) 336-7577
john@stitesattorney.com
Guardian and Attorney Ad Litem

***APPROVED AS TO FORM ONLY:***

ASHLEY BASNETT
State Bar No. 24079190
Assistant Criminal District Attorney
2700 Ben Avenue
Fort Worth, Texas 76103
Tel: (817) 255-8733
anbasnett@tarrantcountytx.gov
Attorney for DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

JUSTIN MURRAY
State Bar No. 24075466
10901 County Road #528
Mansfield, Texas 76063
Tel: (817) 456-9045
justin@justinmurraylaw.com
Attorney for J[redacted] R[redacted] J[redacted]
AKA J[redacted]

KATHLYNN PACK
State Bar No. 24095828
6777 Camp Bowie Blvd., Suite 340
Fort Worth, Texas 76116
Tel: (817) 887-6433
kathlynn@yourtexasfamilylawyer.com
Attorney for M[redacted] M[redacted] and UNKNOWN FATHER

JOHN T. ECK
State Bar No. 00792480
933 W. Weatherford Street
Fort Worth, Texas 76102
Tel: (817) 336-7577
john@stitesattorney.com
Guardian and Attorney Ad Litem

KELLYE HUGHES
State Bar No. 00792864
HUGHES LAW CENTER, PC
3615 W. Pioneer Parkway, Suite C
Pantego, Texas 76013
Tel: (817) 465-4664
Kellye.Hughes@yahoo.com
Attorney for C[redacted] B[redacted]
and J[redacted] B[redacted]

CHARLES K. ELDRED
State Bar No. 00793681
Assistant Attorney General
P.O. Box 12548, Mail Code 001
Austin, Texas 78711-2548
Tel: (512) 936-1706
charles.eldred@oag.texas.gov
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220 W. Pearl Street
Granbury, Texas 76048
Tel: (817) 573-6433
cindy@cindytisdalelaw.com
Attorney for the NAVAJO NATION

***APPROVED AS TO FORM ONLY:***

ASHLEY BASNETT
State Bar No. 24079190
Assistant Criminal District Attorney
2700 Ben Avenue
Fort Worth, Texas 76103
Tel: (817) 255-8733
anbasnett@tarrantcountytx.gov
Attorney for DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

JUSTIN MURRAY
State Bar No. 24075466
10901 County Road #528
Mansfield, Texas 76063
Tel: (817) 456-9045
justin@justinmurraylaw.com
Attorney for J[redacted] R[redacted] J[redacted]
AKA J[redacted] R[redacted] J[redacted]

KATHLYNN PACK
State Bar No. 24095828
6777 Camp Bowie Blvd., Suite 340
Fort Worth, Texas 76116
Tel: (817) 887-6433
kathlynn@yourtexasfamilylawyer.com
Attorney for M[redacted] M[redacted] and UNKNOWN FATHER

JOHN T. ECK
State Bar No. 00792480
933 W. Weatherford Street
Fort Worth, Texas 76102
Tel: (817) 336-7577
john@stitesattorney.com
Guardian and Attorney Ad Litem

KELLYE HUGHES
State Bar No. 00792864
HUGHES LAW CENTER, PC
3615 W. Pioneer Parkway, Suite C
Pantego, Texas 76013
Tel: (817) 465-4664
Kellye.Hughes@yahoo.com
Attorney for C[redacted] and J[redacted]

CHARLES K. ELDRED
State Bar No. 00793681
Assistant Attorney General
P.O. Box 12548, Mail Code 001
Austin, Texas 78711-2548
Tel: (512) 936-1706
charles.eldred@oag.texas.gov
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CINDY V. TISDALE
State Bar No. 00792700
220 W. Pearl Street
Granbury, Texas 76048
Tel: (817) 573-6433
cindy@cindytisdalelaw.com
Attorney for the NAVAJO NATION

# Tab B: Trial Court's First Amended Findings of Fact and Conclusions of Law

**Cause No. 323-107644-18**

| | | |
|---|---|---|
| IN THE INTEREST OF | § | IN THE DISTRICT COURT OF |
| Y[redacted] R[redacted] J[redacted] | § | |
| | § | |
| | § | TARRANT COUNTY, TEXAS |
| A CHILD | § | |
| | § | |
| | § | 323rd JUDICIAL DISTRICT |

## FIRST AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 3, 2019, the Court heard this case. In response to the first amended request of the Navajo Nation on July 8, 2019, the Court makes and files the following as original Findings of Fact and Conclusions of Law in accordance with rules 296 and 297 of the Texas Rules of Civil Procedure.

### FINDINGS OF FACT

**A. The Parties**

1. Petitioner, TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES ("the Department"), appeared through its representative, KAREN SOTO, and through its attorney of record, ASHLEY BASNETT, Assistant District Attorney, Tarrant County, Texas.

2. Respondent J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] executed an affidavit of relinquishment of parental rights which included a waiver of appearance. However, J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] attorney, JUSTIN MURRAY, appeared in person and announced ready. JUSTIN MURRAY was then excused by the court because J[redacted] R[redacted] J[redacted] A[redacted] J[redacted] R[redacted] J[redacted] executed the affidavit of relinquishment of parental rights.

3. Respondent M[redacted] M[redacted] who was cited by publication, did not appear. Respondent M[redacted] M[redacted] was represented by the "Diligent Search" attorney, KATHLYNN PACK.

4. Respondent UNKNOWN FATHER did not appear. The UNKNOWN FATHER was represented by the "Diligent Search" attorney, KATHLYNN PACK.

5. Intervenor NAVAJO NATION appeared in person through its representative, CELESTE SMITH, and its attorney of record, CINDY TISDALE.

6. Intervenors C[redacted] B[redacted] and J[redacted] B[redacted] (hereinafter, the "[redacted]") appeared in person and through their attorney of record, KELLYE HUGHES.

7. The Attorney Ad Litem for the child, JOHN T. ECK, appeared.

8. A[redacted] J[redacted], the child's maternal great-aunt, who was not a party to this proceeding, appeared in person.

9. The OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS, who appeared as *amici* on January 28, 2019 and who intervened on June 24, 2019, appeared through David J. Hacker, Special Counsel for Civil Litigation, and Charles K. Eldred, Assistant Attorney General.

**B. Jurisdiction**

10. The Court, having examined the record and heard the evidence and argument of counsel, finds the following:

a. A request for identification of a court of continuing, exclusive jurisdiction has been made as required by Section 155.101 of the Texas Family Code.

b. This Court has jurisdiction of this case and of all the parties, and no other court has continuing, exclusive jurisdiction of this case.

11. The Court, having examined the record and heard the evidence and argument of counsel, finds that the State of Texas has jurisdiction to render final orders regarding the child the subject of this suit pursuant to Subchapter C, Chapter 152, Texas Family Code, by virtue of the fact that Texas is the home state of the child.

12. The Court finds that all persons entitled to citation were properly cited.

13. The Court finds that the Department served Notice of Pending Custody Proceeding Involving Indian Child on each parent or Indian custodian, each tribe identified, the Bureau of

Indian Affairs (BIA), and the Secretary of the Interior pursuant to 25 U.S.C. Section 1912(a) on the following:

a. J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted], [redacted]

b. NAVAJO NATION, C/O Celeste Smith, P.O. Box 769, St. Michael, Arizona 86511.

c. M[redacted] M[redacted], [redacted].

14. The Court further finds that the Department has properly served Notice to Bureau of Indian Affairs (BIA): Parent, Custodian or Tribe of Child Cannot Be Located or Determined on the Bureau of Indian Affairs, as necessary pursuant to 25 U.S.C. Section 1912(a).

**C. Child**

15. The Court finds that the following child is the subject of this suit:

a. Name: Y[redacted] R[redacted] J[redacted]

b. Sex: [redacted]

c. Birth date: [redacted]

d. Home state: [redacted]

**D. Termination of Mother's Parental Rights**

16. The Court finds by evidence beyond a reasonable doubt that J[redacted] R[redacted] J[redacted] A[redacted] J[redacted] R[redacted] J[redacted] ("Mother") has –

a. Executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided for by chapter 161 of the Texas Family Code, pursuant to Section 161.001(b)(1)(K); and

b. Constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months and: 1) the Department has made reasonable efforts to return the child to the mother; 2) the mother has not regularly visited or maintained significant contact with the child; and 3) the mother has demonstrated an inability

to provide the child with a safe environment, pursuant to Section 161.001(b)(1)(N) of the Texas Family Code.

17. The Court also finds beyond a reasonable doubt that termination of the parent-child relationship between J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] and the child the subject of this suit is in the best interest of the child.

18. The Court further finds by evidence beyond a reasonable doubt that:

a. The Department made active efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that these efforts proved unsuccessful; and

b. The evidence, including testimony of a qualified expert witness, demonstrates that the continued custody of the child by J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted], parent or Indian Custodian, is likely to result in serious emotional or physical injury to this child.

19. In accordance with Section 161.001(c) of the Texas Family Code, the Court finds that the order of termination of the parent-child relationship as to J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] is not based on evidence that J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted]:

a. Homeschooled the child;

b. Is economically disadvantaged;

c. Has been charged with a nonviolent misdemeanor other than:

i. An offense under Title 5 of the Texas Penal Code;

ii. An offense under Title 6 of the Texas Penal Code; or

iii. An offense that involves family violence, as defined by Section 71.004 of the Texas Family Code;

d. Provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169 of the Texas Occupations Code; or

e. Declined immunization for the child for reasons of conscience, including a religious belief.

**E. Termination of Father's Parental Rights – M[redacted] M[redacted]**

20. The Court finds by clear and convincing evidence that M[redacted] M[redacted] has not registered with the paternity registry under Chapter 160 of the Texas Family Code. The Court finds by clear and convincing evidence that Petitioner has filed in this case a certificate of paternity registry search that indicates that no man has registered as the father of this child.

21. The Court also finds by clear and convincing evidence that termination of the parent-child relationship, if any exists or could exist, between any alleged father and the child the subject of this suit is in the best interest of the child.

**F. Termination of Alleged Father's Parental Rights – Unknown Father**

22. The Court finds by clear and convincing evidence that no man has registered with the paternity registry under chapter 160 of the Texas Family Code. The Court finds by clear and convincing evidence that Petitioner has filed in this case a certificate of paternity registry search that indicates that no man has registered as the father of this child.

23. The Court also finds by clear and convincing evidence that termination of the parent-child relationship, if any exists or could exist, between any UNKNOWN FATHER or alleged father and the child the subject of this suit is in the best interest of the child.

**G. Findings Regarding Potential Placements**

24. The Court finds that the [redacted] are the adoptive parents to the child's sibling, L[redacted] B[redacted]. L[redacted] B[redacted], born [redacted], has lived with the [redacted] since June 22, 2016. L[redacted] has integrated fully into the [redacted] family and has bonded with each family member. The [redacted] have two biological children, H.B. (10 years old) and B.B. (7 years old). The [redacted] have provided all three children a stable and nurturing home. Dr. J[redacted] B[redacted] is an anesthesiologist who works 7:00 AM to 2:00 PM at a day-surgery center. C[redacted] E[redacted] B[redacted] [redacted] is a full-time stay-at-home parent, and a professional portrait photographer. The [redacted]

live in a 4,000-square-foot, 4-bedroom household that is a licensed foster home in [redacted] of [redacted]. The [redacted] are willing to cultivate the child's Navajo culture.

25. This Court finds that the [redacted] petitioned the Court to terminate the parent-child relationships, to be appointed managing conservators of the Child, to adopt the Child, and for temporary orders placing the child in the [redacted] home as foster placement and appointing them temporary possessory conservators.

26. The Court finds that non-party A[redacted] J[redacted] is the child's maternal great-aunt. A[redacted] J[redacted] lives in a two-bedroom house on the Navajo reservation in a remote part of Arizona. A[redacted] J[redacted] is 55 years of age and divorced. She is not employed outside the home. A[redacted] J[redacted] has five adult children. One of her adult sons lives with her and helps her pay bills through his occupation as a weaver and officiant at Navajo ceremonies. A[redacted] J[redacted] also receives food stamps.

27. This Court finds that A[redacted] J[redacted] cares for her ailing brother and mother, as well as numerous animals. Four of J[redacted] J[redacted]' other children, the youngest of which is at least 10 years older than the child, live 40 minutes away from A[redacted] J[redacted]. A[redacted] J[redacted] follows Navajo traditions and desires to raise the child in the Navajo culture.

28. This Court finds that A[redacted] J[redacted], who was not a party, did not file a petition with this Court seeking relief. A[redacted] J[redacted] did not file a motion for placement of the child with her. A[redacted] J[redacted] did not file a petition seeking to be appointed conservator of the child. No party filed a petition seeking to appoint A[redacted] J[redacted] a managing conservator.

29. This Court finds that on January 24, 2019, the Navajo Nation filed a motion for placement of the child with A[redacted] J[redacted]. The basis of its motion was that A[redacted] J[redacted] is the maternal great-aunt of the child. The Navajo Nation argues that she is therefore a preferred placement option compared to the [redacted] under the ICWA. The Court finds that on March 1, 2019, it denied the Navajo Nation's motion for placement.

**H. Joint Managing Conservatorship**

30. Consistent with the specific rights described in this Court's June 28, 2019 Order, the Court finds that it is in the best interest of the child to appoint the [redacted]s, who sought appointment as managing conservators, and A[redacted] J[redacted], who did not ask the court to be appointed as a managing conservator, as Joint Non-Parent Managing Conservators of Y[redacted]R[redacted] J[redacted].

31. The Court finds that it is in the best interest of the child to treat the [redacted]s and non-party A[redacted] J[redacted] as if they were divorced parents living more than 100 miles apart. The Court finds that it is in the child's best interest to enter into this joint managing conservatorship arrangement to place her in a loving home with her sibling who is closest to her in age by several years, while still ensuring the child's continued connection to Navajo culture and family.

32. The Court finds that it is in the best interest of the child to require each conservator, during that conservator's period of possession, to ensure the child's attendance in school.

**I. Primary Residence and Geographical Restriction**

33. The Court finds that it is in the best interest of the child to give the [redacted]s the exclusive right to designate the child's primary residence. The [redacted]s must designate a primary residence that is either within the State of Arizona, within a state that is contiguous to the State of Arizona, or within a state that is contiguous to a state that is contiguous to the State of Arizona (including the State of Texas).

34. The Court finds that in the residence of the [redacted]s, the child will be well-cared for, have her needs met, and bond with the [redacted]s. *See In the Interest of M.D.M.*, No. 01-18-01142-CV, 2019 WL 2459058, at *17 (Tex. App. June 13, 2019). The Court further finds that the [redacted]s can and will provide the child with a stable and loving home environment that gives her the care, nurturance, guidance, and supervision necessary for the child's safety and development. *See* Tex. Fam. Code Ann. § 263.307.

35. The court finds that it is in the best interest of the child for the child to have her primary residence in the same home with her sibling, L[redacted], who lives with the [redacted]s as their adopted son.

**J. Possession and Access**

36. The Court finds that it is in the best interest of the child to give the [redacted]a right of possession of the child at all times not specifically designated in the June 28, 2019 Possession Order for A[redacted] J[redacted]s. The Court finds that it is in the best interest of the child to give A[redacted] J[redacted]s, a non-party, the right of possession of the child for designated summer, weekend, and holiday periods, as prescribed in the June 28, 2019 Possession Order.

**K. Language Program for Child**

37. The Court finds that it is in the best interest of the child to require the continuous enrollment of the child in a Navajo Language Program from as soon as a Navajo Language Program will accept the child for enrollment until the child's fourteenth birthday. If a Navajo Language Program is not available within 30 miles of the residence of the [redacted]s, the [redacted]s shall enroll the child in an equivalent on-line program.

## CONCLUSIONS OF LAW

**A. Termination of Parental Rights**

38. The Court may order termination of the parent-child relationship if the Court finds by clear and convincing evidence that the parent has executed an unrevoked or irrevocable affidavit of relinquishment of parental rights. Tex. Family Code § 161.001(b)(1)(K).

39. The Court may order termination of the parent-child relationship if the Court finds by clear and convincing evidence that the parent has constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and (i) the department has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment. Tex. Family Code § 161.001(b)(1)(N).

40. The Court may not order termination of the parent-child relationship based on evidence that the parent (1) homeschooled the child; (2) is economically disadvantaged; (3) has been charged with a nonviolent misdemeanor offense other than: (A) an offense under title 5, Penal Code; (B) an offense under Title 6, Penal Code; or (C) an offense that involves family violence, as defined by Section 71.004 of this code; (4) provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169, Occupations Code; or (5) declined immunization for the child for reasons of conscience, including a religious belief. Tex. Family Code § 161.001(c).

41. The Court concludes, beyond a reasonable doubt, that the conditions set forth in Tex. Family Code § 161.001(b)(1)(K) and (b)(1)(N) are met as to the child's mother. The Court further concludes, beyond a reasonable doubt, that termination of the child's mother's parental rights is in the best interest of the child. Accordingly, the Court concludes that the child's mother's parental rights should be and are terminated. The Court does not base this conclusion in any part on the prohibited considerations recited in Tex. Family Code § 161.001(c).

42. The Court may order termination of the parental rights of a man alleged to be the father of a child without notice if the man did not timely register with the vital statistics unit and is not entitled to notice under Texas. Family Code § 160.402 or § 161.002. Tex. Family Code § 160.404.

43. The Court concludes, beyond a reasonable doubt, that the conditions set forth in Texas Family Code § 160.404 are met as to M[redacted] M[redacted]. The Court further concludes, beyond a reasonable doubt, that termination of M[redacted] M[redacted]'s parental rights is in the best interest of the child. Accordingly, the Court concludes that M[redacted] M[redacted]'s parental rights should be and are terminated.

44. The Court concludes, beyond a reasonable doubt, that the conditions set forth in Texas Family Code § 160.404 are met as to Unknown Father. The Court further concludes, beyond a reasonable doubt, that termination of Unknown Father's parental rights is in the best interest of

the child. Accordingly, the Court concludes that Unknown Father's parental rights should be and are terminated.

**B. The Brackeens Have Standing To Intervene.**

45. On January 22, 2019, the Navajo Nation filed a motion to dismiss the [redacted]' intervention on the basis that the [redacted] did not have standing to intervene. On January 28, 2019, the Parties appeared before this Court and were heard on this motion and the [redacted]' opposition thereto. After considering the Navajo Nation's motion, as well as evidence and argument of counsel, and for the reasons given in the Court's previous orders and statements, the Court concludes that the [redacted] have standing to proceed in this cause number and that the [redacted]' original petition in Cause No. 323-108748-19 should be consolidated into the above cause number.

46. Where a party has standing to file an original suit, it may petition to intervene. *See Whitworth v. Whitworth*, 222 S.W.3d 616, 621 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In keeping with that general rule, courts have permitted parties to intervene in a suit affecting the parent-child relationship on the basis that they could have filed an original suit pursuant to Section 102.005. *See In re A.C.*, No. 10-15-00192-CV, 2015 WL 6437843, at *9 (Tex. App.—Waco Oct. 22, 2015, no pet. h.).

47. Texas Family Code § 102.005 permits an original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption to be filed by, *inter alia*, an adult who has adopted, or is the foster parent of and has petition to adopt, a sibling of the child.

48. The Court has found that L[redacted] B[redacted] is the sibling of the child and is the adoptive child of the[redacted]. Accordingly, the Court concludes that the [redacted] have standing to file an original petition under Section 102.005(4).

49. Because the [redacted] have standing to file an original petition, which they properly invoked in their petition in intervention, the Court concludes that the [redacted] properly petitioned to intervene. *See* First Amended Petition in Intervention (Jan. 15, 2019).

50. Moreover, standing to intervene in an existing proceeding is subject to a more relaxed standard than is standing to file an original suit. *See In re N.L.G.*, 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.) (per curiam) ("Sound policy supports the relaxed [intervention] standing requirements.") (citing *In re K.T.*, 21 S.W.3d 925, 927 (Tex. App.—Beaumont 2000, no pet.)).

51. The [redacted], as prospective adoptive parents, have standing to intervene in this proceeding because it advances the Court's efforts to determine the placement most in keeping with the best interests of the child. *See In re N.L.G.*, 238 S.W.3d at 830; *In re A.L.W.*, No. 02-11-00480-CV, 2012 WL 5439008, at *5 (Tex. App.—Fort Worth Nov. 8, 2012, *rev. denied* (Mar. 22, 2013), *reh'g of pet. rev. denied* (Apr. 19, 2013)) ("allowing the intervention of parties who wish to adopt the child may enhance the trial court's ability to adjudicate that issue.").

**C. Texas Law Applying the Indian Child Welfare Act to Texas Placement Proceedings Violates the Texas Constitution.**

52. On January 18, 2019, the [redacted] filed a motion to declare the Indian Child Welfare Act inapplicable to these proceedings on the basis that the ICWA violates the United States Constitution. Specifically, the [redacted] argued that (a) the ICWA placement preferences discriminate on the basis of race in violation of the Constitution's guarantee of equal protection, (b) the ICWA and the Final Rule unconstitutionally commandeer state courts and agencies; and (c) the ICWA and the Final Rule violate the United States Constitution because the adoption of "Indian Children" is not a permissible subject of federal regulation. The Navajo Nation opposed the [redacted]' motion to declare the ICWA inapplicable as unconstitutional.

53. On January 28, 2019, the Parties appeared before this Court. All Parties were heard on the merits of the [redacted]' motion to declare the ICWA inapplicable as unconstitutional. The Court concluded that the United States Court of Appeals for the Fifth Circuit in No. 18-11479 stayed the order of the Northern District of Texas in *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018). The Court concluded that the Fifth Circuit stay prevented the Court from ruling on the constitutionality of the ICWA under the United States Constitution.

54. The [redacted] filed a supplemental brief on February 1, 2019, arguing that the Court had an independent obligation to decide the issue before it and that state courts are bound only by decisions of the United States Supreme Court and higher state courts, not federal courts of appeals. The Court concludes that stay in *Brackeen v. Zinke* prevents the Court from ruling on the constitutionality of ICWA. Accordingly, the Court does not here decide that issue.

55. The Court concludes that the ICWA does not apply to Texas state-court custody proceedings of its own force because it is not a valid form of preemption. Federal law preempts state law only if the federal law is "best read as one that regulates private actors." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018). Because ICWA regulates state courts and agencies rather than individuals, the Court concludes that ICWA does not validly preempt state law.

56. Texas Family Code § 152.104(a) provides that "[a] child custody proceeding that pertains to an Indian child as defined in [ICWA] is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act."

57. Since ICWA does not apply in Texas state-court proceedings of its own preemptive force, it could be applied only by means of Texas Family Code § 152.104(a).

58. On March 1, 2019 the Court concluded that Texas Family Code § 152.104 is unconstitutional under the Texas Constitution, specifically Tex. Const. art. I, §§ 1, 3, 3a, 19, and 29.

59. The Court concludes that Texas Family Code § 152.104(a) violates the Texas Constitution's guarantee of equal protection. ICWA's definition of "Indian child" is explicitly based on lineal descent. It sweeps in not only children who are enrolled members of an Indian tribe, but any "biological child of a member of an Indian tribe" who is eligible for tribal membership. 25 U.S.C. § 1903(4)(b). The Texas Constitution "guarantees that all persons similarly situated should be treated alike." *Sanders v. Palunsky*, 36 S.W.3d 222, 224–25 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The ICWA treats individuals differently based on their ancestry, and discrimination on the basis of "ancestry [is] equivalent to racial discrimination." *Richards v. League of United*

*Latin Am. Citizens (LULAC)*, 868 S.W.2d 306, 312 n.6 (Tex. 1993); *see also, e.g.*, *Rice v. Cayetano*, 528 U.S. 495, 514 (2000). For these reasons, Texas Family Code § 152.104(a) violates the Texas Constitution.

60. The Court concludes that Texas Family Code § 152.104(a) violates the Texas guarantee of the "right of local self-government." Tex. Const. art. I, § 1. "[T]he Constitution divides authority between federal and state governments for the protection of individuals." *Murphy*, 138 S. Ct. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). But ICWA requires state agencies and courts to carry out its federal policy of placing Indian children with Indian families. Indeed, ICWA repeatedly dictates what state agencies and courts "shall" do. *See, e.g.*, 25 U.S.C. § 1915 ("shall be given"; "shall be placed"; "shall follow"; "shall be maintained"). ICWA thus commands state actors to implement federal policy in contravention of "local self-government, unimpaired to all the States." Tex. Const. art. I, § 1. Applying ICWA, as Texas Family Code § 152.104(a) mandates, accordingly violates Tex. Const. art. I, § 1.

61. The Court concludes that because statutorily applying ICWA both deprives Texas citizens of equal protection and commandeers state courts and agencies, the state legislature did not have the power to enact Texas Family Code § 152.104(a) under Tex. Const. art. I, § 29, and Texas Family Code § 152.104(a) could not be considered the "law of the land" for due process under Tex. Const. art. I, § 19.

62. The Court concludes that the Navajo Nation's motion for placement should be denied because the Indian Child Welfare Act is inapplicable because Texas Family Code § 152.104(a) violates the Texas Constitution and because denial of the Navajo Nation's motion for placement is in the best interest of the child.

**D. The Best Interest of the Child Requires Placement with the Brackeens**

63. The Court concludes that it is in the best interest of the child to appoint the [redacted] and A[redacted] J[redacted], a non-party, as joint managing conservators as if they were divorced parents living more than 100 miles apart. Trial courts have wide latitude in determining a child's best interest. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). Section 153 of the Texas Family

Code gives this Court the authority to appoint nonparents as joint managing conservators where it is in the best interest of the child. *See* Tex. Fam. Code §§ 153.002; 153.005; 153.372. The Court applied the *Holley* factors to analyze what is in the child's best interest. *Holley v. Adams,* 544 S.W.2d 367, 371–72 (Tex. 1976); *see* Tex. Fam. Code §§ 153.002. These factors include: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.; In re C.H.,* 89 S.W.3d 17, 27 (Tex. 2002).

64. Applying these factors, the Court concludes that it is in the child's best interest to enter into this joint managing conservatorship arrangement to place her in a loving home with her sibling who is closest to her in age by several years, while still ensuring the child's continued connection to Navajo culture and family. Placing a child with her sibling is routinely considered to be in the child's best interest. *See, e.g., In Interest of M.R.J.M.*, 280 S.W.3d 494, 511 (Tex. App.—Fort Worth 2009, no pet. h.); *In Interest of B.H.R.*, 535 S.W.3d 114, 125 (Tex. App.—Texarkana 2017, no pet. h.). Further, cultural heritage is also considered important in advancing the child's best interest. *In re W.D.H.*, 43 S.W.3d 30, 36 (Tex. App.—Houston [14th Dist.] 2001).

65. The Court concludes the joint managing conservatorship arrangement is best way to advance the child's best interest.

66. The Court concludes that it is in the best interest of the child to give the [redacted] a right of possession of the child at all times not specifically designated in the June 28, 2019 Possession Order for A[redacted] J[redacted]

67. The Court concludes that in the residence of the [redacted], the child will be well-cared for, have her needs met, and bond with the [redacted]. *See In the Interest of M.D.M.*, No. 01-18-01142-CV, 2019 WL 2459058, at *17 (Tex. App.—Houston [1st Dist.] June 13, 2019, no

pet. h.). The Court further concludes that the [redacted] can and will provide the child with a stable and loving home environment that gives her the care, nurturance, guidance, and supervision necessary for the child's safety and development. *See* Tex. Fam. Code Ann. § 263.307.

**E. Miscellaneous Conclusions**

68. The Court concludes that that the Navajo Nation had standing to intervene in these proceedings.

69. The Court concludes that A[redacted] J[redacted] was allowed to participate as a non-party.

70. The Court concludes that it is in the best interest of the child and it is within its discretion to appoint A[redacted] J[redacted] as a joint non-parent managing conservator, though she has not petitioned the Court to do so.

71. The Court concludes that it is in the best interest of the child and it is within its discretion to treat the [redacted] and A[redacted] J[redacted] as if they are divorced parents who will be given joint managing conservatorship and live more than 100 miles apart, though the [redacted] are the only parties who sought to be appointed managing conservators.

72. The Court concludes that the State of Texas had standing to intervene in these proceedings on June 25, 2019.

**F. Application of ICWA (in the Alternative)**

73. "Any party seeking . . . termination of parental rights to[] an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d).

74. "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).

75. For the reasons set forth in paragraphs 52-62, the Court concludes that ICWA does not validly preempt Texas law in this case.

76. Nonetheless, and in the alternative to its conclusions of law set forth above, the Court concludes based on evidence beyond a reasonable doubt that the conditions of Section 1912(d) and (f) are met with respect to the termination of parental rights of Mother, M[redacted] M[redacted], and Unknown Father.

77. Moreover, and in the alternative to its conclusions of law set forth above, the Court concludes that the best interest of the child provides good cause to place the child with the[redacted] pursuant to 25 U.S.C. § 1915(b).

Signed August 16, 2019

JUDGE PRESIDING

# Tab C: Court of Appeals' Opinion

2019 WL 6904728
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Fort Worth.

In the INTEREST OF Y.J., a Child

No. 02-19-00235-CV
|
Delivered: December 19, 2019

On Appeal from the 323rd District Court, Tarrant County, Texas, Trial Court No. 323-107644-18

**Attorneys and Law Firms**

ANNA MCKIM, FIELD, MANNING, STONE, HAWTHORNE & AYCOCK, P.C., LUBBOCK, TEXAS, C. ALFRED MACKENZIE WACO, TEXAS, CINDY V. TISDALE, THE LAW OFFICE OF CINDY V. TISDALE, GRANBURY, TEXAS, FOR APPELLANT/CROSS-APPELLEE NAVAJO NATION.

KELLYE HUGHES, HUGHES LAW CENTER, PC, PANTEGO, TEXAS, MATHEW D. MCGILL, GIBSON, DUNN & CRUTCHER, LLP, WASHINGTON, D.C., ASHLEY E. JOHNSON, SCOTT K. HVIDT, GIBSON, DUNN & CRUTCHER LLP, DALLAS, TEXAS, FOR APPELLEES/CROSS-APPELLANTS C.B. AND J.B.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS; JEFFREY C. MATEER, FIRST ASSISTANT ATTORNEY GENERAL; KYLE D. HAWKINS, SOLICITOR GENERAL; BETH KLUSMANN, ASSISTANT SOLICITOR GENERAL; DAVID J. HACKER, SPECIAL COUNSEL TO THE FIRST ASSISTANT ATTORNEY GENERAL OFFICE OF THE ATTORNEY GENERAL AUSTIN, TEXAS, FOR APPELLEE/CROSS-APPELLANT THE OFFICE OF THE ATTORNEY GENERAL.

Before Sudderth, C.J.; Gabriel and Birdwell, JJ.

**MEMORANDUM OPINION**

Memorandum Opinion by Justice Birdwell

***1** This unusual appeal is from an order terminating parental rights, but neither parent has appealed, the Department of Family and Protective Services (Department) was dismissed and has not appealed, and no appealing party challenges the termination. Instead, three intervenors—the Navajo Nation, the Office of the Attorney General of the State of Texas (AG), and two of the nonparents the trial court named as joint managing conservators for the child, C.B. and J.B. (the Bs)—appeal the part of the trial court's order naming the Bs and the child's Navajo maternal great-aunt A.J. the child's joint managing conservators.

At trial and on appeal, the majority of the parties' arguments have centered on the constitutionality of the federal Indian Child Welfare Act (ICWA) and its applicability to this case. If constitutional, ICWA applies to certain aspects of this case because the child at issue is Navajo through her biological mother (Mother). *See* 25 U.S.C.A. §§ 1901–63. At the heart of the dispute is whether ICWA's post-termination placement preferences—which favor placement of an Indian child with Indian families—control, or whether the trial court should apply solely Texas law regarding the child's best interest. *Id.* § 1915 (mandating that Indian child be placed in a preadoptive or adoptive placement with Indian relatives, the child's tribe, or any other Indian family absent good cause not to do so); Tex. Fam. Code Ann. § 153.002 ("The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.").

The Navajo Nation contends that ICWA is constitutional and mandates placing the child solely with A.J.[1] The AG and the Bs claim that ICWA is unconstitutional under both the United States and Texas Constitutions, that it does not pre-empt Texas law and therefore cannot be applied to these proceedings, and that the trial court abused its discretion under Texas law by naming A.J. as one of the child's joint managing conservators along with the Bs.

1 Alternatively, the Navajo Nation argues that if ICWA does not apply, the trial court did not abuse its discretion by naming A.J. a joint managing conservator along with the Bs.

The trial judge purported not to determine ICWA's constitutionality under the United States Constitution. Instead, he held that even if ICWA does not violate the United States Constitution, it nevertheless does not apply to this proceeding because (1) ICWA violates the

  

anticommandeering doctrine and therefore cannot validly pre-empt Texas law and (2) Family Code Section 152.104, which the judge concluded attempts to engraft ICWA into Texas law, violates the Texas constitution.

After considering the record and procedural posture of this case—taking into account the ultra-accelerated nature of this appeal—we conclude we need not decide at this time whether ICWA is constitutional; regardless of ICWA's application, the trial court committed reversible error requiring a new trial on conservatorship. We therefore reverse only the part of the trial court's order naming the Bs and A.J. joint managing conservators for the child, and we remand the case for a new trial on that issue.

## Pretrial Factual and Procedural Background

### Removal and initial placement efforts

***2** On June 13, 2018, the Department filed a petition seeking conservatorship of Y.J. or termination of her parents' rights because Y.J. had tested positive for marijuana, amphetamines, and methamphetamines at birth. In the attached affidavit, a Department caseworker averred that Mother had told Texas Child Protective Services (CPS) workers that she is a member of the Navajo tribe and that the workers had contacted the tribe to seek Navajo tribal members for foster placement. Mother named more than one man as a possible father; at least one of those men requested DNA testing and was excluded as Y.J.'s biological father. The Department alleged that it had attempted to contact some of Mother's suggested placements, but none were suitable. It also alleged that Mother had an extensive history with New Mexico CPS, that seven of her other children had been removed from her care, and that "the Tribal Council" had placed four of those children with relatives. The caseworker stated further in the affidavit that one of Mother's other children had been removed in Texas when the maternal grandmother—who allegedly had a New Mexico CPS history and with whom Mother had left the child—had tested positive for methamphetamine use. The affidavit also stated that the Navajo Nation was "working to locate a potential Navajo foster home for placement."

An associate judge signed an order naming the Department Y.J.'s temporary sole managing conservator.

Mother waived service of citation. After the statutory temporary adversary hearing, *see* Tex. Fam. Code Ann. § 262.201, the trial court ordered Mother and the child's alleged fathers to submit the Section 261.307[2] Child Placement Resources Form and specifically found, "the Department ... does not have the option of placing the child with a relative [or] other designated caregiver." The order also noted that the "inquiry regarding the child or family's possible Indian ancestry [was] not complete due to ex parte proceedings or similar circumstances." The Department placed Y.J. in a non-Indian foster home.

2 *See* Tex. Fam. Code Ann. § 261.307(a)(2) (describing form's contents, including instruction that parent list at least three persons who could be relative caregivers or designated caregivers), § 264.751 (defining types of caregivers).

Four days after the adversary hearing, the Navajo Nation sent a letter stating that Y.J. was eligible for "ICWA[ ] service" and that the Navajo Nation would assign an ICWA social worker to the case to coordinate services with the Department.

### Identification of first ICWA-compliant home

Although a caseworker noted in the child's June 2018 service plan, "Worker will engage with the Navajo Nation to discuss possible placements," she also stated that the Navajo Nation had not contacted the Department about what it could do to preserve the child's heritage. In a July 2018 status report, a CPS specialist told the trial court that the Navajo Nation had identified an ICWA-compliant home as a possible placement.

Around the same time, the Department filed a Motion for Expedited Placement Under the Interstate Compact for the Placement of Children (ICPC),[3] in which it sought an expedited placement of the child with a Colorado family identified by the Navajo Nation. The Navajo Nation had also sent the Department a "favorable Navajo Adoption Home Study" on the family. The nine-page, detailed report discusses the suitability of the couple and the man's Navajo heritage and family ties. It further notes that although the man had a "finding" on an Arizona background check, the offense was over twenty years old (i.e., when he was twenty-one or younger) and his lifestyle had changed for the better.

3 *See id.* §§ 162.101–.107 (adopting the ICPC, by which states cooperate to place children across state lines with the goal of placing children "in a suitable environment and with persons or institutions having appropriate qualifications and facilities" while giving authorities in the state

  

where the child resides and the state where the child is to be placed an adequate opportunity and the necessary information to evaluate the placement's suitability).

The trial court approved the placement in late July 2018 and ordered the Department to expedite its compliance with the ICPC to effectuate the placement. But the Department's attempts to comply with the ICPC for this placement were repeatedly rejected for administrative reasons, such as missing records and lack of a social security number for Y.J. After a second failed attempt in October 2018, the Department stopped trying to comply with the trial court's order because, by that time, a Texas federal judge had held ICWA unconstitutional in a case in which the State of Texas is a party. *See Brackeen v. Zinke*, 338 F. Supp. 3d 514, 536–46 (N.D. Tex. 2018), *rev'd*, 937 F.3d 406 (5th Cir. 2019), *reh'g en banc granted*, 942 F.3d 287 (5th Cir. 2019). The Department never placed Y.J. with the Colorado family, [4] and she stayed with her Texas, non-ICWA-compliant foster placement.

[4] The Department began reconsidering this family in January 2019, and they were approved in February 2019, but by that time the Navajo Nation had notified the Department about A.J., who as a family member is a preferred placement under ICWA.

**Interventions related to Y.J.'s placement**

***3** In late November 2018, the Navajo Nation intervened in the Department's suit and immediately sought removal of the case to a tribal court under ICWA. The Bs, who by that time had adopted Y.J.'s three-year-old half sibling Alan, [5] also intervened seeking termination of Y.J.'s parents' rights, adoption of Y.J., and appointment as Y.J.'s permanent managing conservators. The Bs, along with Mother, [6] opposed removal of the case to a tribal court. The Navajo Nation opposed placement of Y.J. with the Bs.

[5] Alan is a pseudonym. *See* Tex. Fam. Code Ann. § 109.002(d). Mother has seven other children, but Alan is the closest in age to Y.J. Because Y.J.'s father is unknown, we refer to all of Mother's other children as half siblings.

[6] The Department had lost track of Mother, but the Bs found her in the Tarrant County Jail. Mother's appointed counsel filed the objection to removal to tribal court.

After the Bs intervened, Mother signed an affidavit that was filed in the clerk's record; the affidavit contains a certificate of service from Mother's appointed counsel. In the affidavit, Mother asked the trial court to place Y.J. with the Bs "as soon as possible ... [to] allow her to be placed with her sibling (who is also a Navajo member)." Mother averred that placement with the Bs allowed Y.J. "reasonable proximity to [Mother], her home, [and] extended family and siblings." Mother also signed a Section 261.307 form naming the Bs as "relatives or close family friends" who could take care of Y.J.

On December 3, 2018, the Fifth Circuit Court of Appeals stayed enforcement of the Northern District trial judge's order determining that ICWA is unconstitutional.

Later that month, the Navajo Nation filed a Motion for Placement of the Child, urging the trial court to place Y.J. with the Colorado family that the Navajo Nation had originally identified and complaining that the Department had not complied with the July 2018 order requiring it to do so. The Bs responded by moving to have Y.J. placed with them. They also opposed the Navajo Nation's motion, arguing that if ICWA does not apply, Texas law favors placement with them because they had adopted Alan. *Cf.* 40 Tex. Admin. Code § 700.1309(3) (setting forth factors Department considers in placing children in substitute care and including as a factor that "[s]iblings removed from their home should be placed together unless such placement would be contrary to the safety or well-being of any of the siblings"). They argued alternatively that good cause existed to depart from ICWA's placement preferences.

Thus began a course of briefing in the trial court on ICWA's constitutionality, with the Bs challenging its constitutionality and the Navajo Nation advocating its constitutionality. The AG filed an amicus curiae brief in support of the Bs, challenging the constitutionality of ICWA on the same grounds and also urging placement of Y.J. with the Bs.

In January 2019, the Navajo Nation amended its placement request and instead moved to have Y.J. placed with Mother's great-aunt A.J.—a Navajo who lives on the reservation in Arizona near Y.J.'s four oldest half siblings, [7] who live with another great-aunt—and, alternatively, with the Colorado couple. The Navajo Nation also moved to dismiss the Bs' intervention for lack of standing. The trial court denied that motion.

[7] Although Mother's rights to these half siblings have not been terminated, she does not see them.

In March 2019, the trial court issued a ruling on ICWA's applicability, making the following findings:

> ***4** The Court acknowledges multiple claims under the United States Constitution, but is providing deference to the United States Court of Appeals for the Fifth Circuit Stay Pending Appeal dated December 3, 2018, and conscientiously refraining from ruling on those matters in this order of the court.
>
> The Court finds ... Texas Family Code § 152.104(a) to be in violation of Article I, Section 1 of the Texas Constitution and inapplicable to the proceedings in this matter.
>
> The Court finds ... Texas Family Code § 152.104(a) to be in violation of Article I, Section 3 of the Texas Constitution and inapplicable to the proceedings in this matter.
>
> The Court finds ... Texas Family Code § 152.104(a) to be in violation of Article I, Section 3a of the Texas Constitution and inapplicable to the proceedings in this matter.
>
> The Court finds ... Texas Family Code § 152.104(a) to be in violation of Article I, Section 19 of the Texas Constitution and inapplicable to the proceedings in this matter.
>
> The Court finds ... Texas Family Code § 152.104(a) to be in violation of Article I, Section 29 of the Texas Constitution and inapplicable to the proceedings in this matter.

The court also held,

> The Court, having reviewed the Motion to Declare ICWA Inapplicable as Unconstitutional, any responses and reply thereto, the evidence presented, the pleadings on file, the arguments of the parties, and the applicable law, is of the opinion that the Motion to Declare ICWA Inapplicable as Unconstitutional should be **GRANTED**.
>
> **IT IS HEREBY ORDERED** that Texas Family Code 152.104, is unconstitutional and inapplicable to these proceedings.

Despite this ruling, neither the Bs nor the Department moved to strike the Navajo Nation's intervention.

Final trial was set for May 3, 2019. Although A.J. intervened before final trial, the trial court dismissed her intervention petition for lack of standing. [8]

[8] A.J.'s petition in intervention stated "that placement with her would provide the child access to the four siblings and *the child's maternal grandmother*." [Emphasis added.] Because the evidence showed that in Navajo society older maternal relatives are referred to as grandmothers, it is unclear whether she was referring to herself or to Y.J.'s actual maternal grandmother.

A little less than a month before trial, Mother signed a voluntary affidavit of relinquishment of her parental rights; in it, she designated the Department as Y.J.'s managing conservator and stated that she preferred that Y.J. be placed with the Bs for adoption.

At trial, the Department, the Navajo Nation, and the Bs all supported termination of Y.J.'s parents' rights and appointment of the Department as Y.J.'s permanent managing conservator. The Department and the Navajo Nation recommended that Y.J. be placed with A.J., [9] but the Bs advocated placing Y.J. with them and asked to be named possessory conservators so that the Department would not place Y.J. with A.J. after being named permanent managing conservator. The trial court ordered on the record that Mother's and all alleged fathers' rights be terminated, but instead of naming the Department Y.J.'s permanent managing conservator, the trial court named the Bs and A.J. joint managing conservators and designated the Bs as the primary persons to designate Y.J.'s residence, so long as Y.J. was living within two states of Arizona (including Texas). The trial court stated its intention to treat the Bs and A.J. as if they were divorced parents residing more than 100 miles apart, but with a stair-step schedule for A.J.'s possession, beginning with one week in summer 2019, two weeks in summer 2020, and so on until Y.J. turned five, when A.J. would have extended summer possession. The trial court dismissed the Department from the suit. [10]

[9] The Department's recommendation was different than the AG's amicus recommendation. The record does not indicate why these two State agencies disagreed on the proper placement for Y.J., but the record does show that the Department had dealt with the Bs in connection with Alan's adoption and that Department workers were aware of the Bs when Y.J. came into care because of the federal court litigation. Y.J.'s caseworker could not explain why the Department never considered

the Bs even for a temporary placement because other Department workers made that decision; she admitted the Department did not follow its own policy about placing removed children in care with siblings. Additionally, C.B. testified that he had asked Y.J.'s caseworker—also Alan's caseworker—on the date the Department removed Y.J. from Mother's care whether she knew anything about Y.J.'s being in care, and she told them she did not know and said, "[I]f there was a baby in care, I think I would know about it." The caseworker at first did not admit that she had talked to C.B., but when given the date of the phone call, she explained, "I believe at that time I didn't feel comfortable with giving him any information of that case" because she could not disclose a child's personal information to a nonparty.

10 The Department did not file a notice of appeal from the trial court's ruling.

***5** After trial, the AG also intervened in the suit and filed a motion for new trial. The AG continued to support placement of Y.J. with the Bs.

The trial judge did not sign an order of termination until almost two months after trial. The order is consistent with the trial judge's ruling on the record and provides a detailed possession schedule, which until 2023 gives A.J. exclusive possession of Y.J. only during the stair-stepped weeks in the summer. Beginning in 2023, when Y.J. turns five, the order provides for possession by A.J. one weekend each month, one week every spring, and extended summer possession. The order provides that the Bs have the right of possession of Y.J. "at all other times not specifically designated" for A.J.

The only parties that appealed the trial court's judgment are the Bs, the AG, and the Navajo Nation. Because the Department did not file a notice of appeal, and no party has argued that just cause exists for rendering a judgment that the Department be named managing conservator, we do not consider that as a choice for our disposition. *See* Tex. R. App. P. 25.1(c); *see also* Tex. Fam. Code Ann. § 161.207(a) (requiring trial court to appoint "suitable, competent adult" as managing conservator after termination if not appointing the Department). Thus, the only dispute before this court is whether the trial court's awarding joint managing conservatorship to the Bs and A.J. should stand. The Navajo Nation asks us to reverse and render a judgment that Y.J. be placed in accordance with ICWA preferences (or in the alternative, to remand for ICWA-compliant proceedings); the Bs and the AG ask us to hold ICWA unconstitutional, reverse the trial court's order, and render judgment that the Bs be named Y.J.'s sole managing conservators so that they may adopt her. Because we determine that the trial court abused its discretion in making its joint-managing-conservatorship ruling, necessitating a remand for a new trial, regardless of whether ICWA applies, we do not reach the constitutionality of ICWA. But we do not foreclose the trial court's reconsidering the issue and ruling on it in the remanded proceedings.

**The Bs Have Standing In This Suit**

In its fifth issue,[11] the Navajo Nation argues that the Bs lacked standing to seek placement of Y.J. with them or appointment as managing conservators. According to the Navajo Nation, Family Code Section 102.005(4), on which the Bs relied to intervene in the suit, allows a party to seek only adoption or termination and adoption, not placement or appointment as a managing conservator. The Navajo Nation also argues that Section 102.005 allows a party to file only an original suit, not an intervention, because the statute does not specifically say that it allows intervention.

11 We address the issues out of order for ease of discussion.

Section 102.005 provides that "[a]n original suit requesting only an adoption or for termination of the parent–child relationship joined with a petition for adoption may be filed by ... an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child." Tex. Fam. Code Ann. § 102.005(4). The Navajo Nation does not dispute that the Bs have adopted Alan.

***6** As a general rule, an individual's standing to intervene is commensurate with that individual's standing to file an original lawsuit. *In re A.C.*, Nos. 10-15-00192-CV, 10-15-00193-CV, 2015 WL 6437843, at *9 (Tex. App.—Waco Oct. 22, 2015, no pet.) (mem. op.); *Whitworth v. Whitworth*, 222 S.W.3d 616, 621 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (op. on reh'g) ("Generally, an intervenor must show standing to maintain an original suit in order to intervene."). A party's standing to file an original suit affecting the parent–child relationship is typically governed by Family Code Sections 102.003, 102.004, and 102.005. Tex. Fam. Code Ann. §§ 102.003–.005; *A.C.*, 2015 WL

6437843, at *9; *see In re Smith*, 262 S.W.3d 463, 467 (Tex. App.—Beaumont 2008, orig. proceeding [mand. denied] ). A party who has standing to file an original suit under Section 102.005 may also file an intervention under that same statute. *A.C.*, 2015 WL 6437843, at *8–9.

The Navajo Nation acknowledges the holdings of *A.C.* and *Whitworth* but argues that by not specifically mentioning intervention, the plain language of Section 102.005 allows only the filing of an original suit, not an intervention. The Navajo Nation cites no authority supporting this proposition, and we have not found any. It discusses the holding in *Whitworth*—in which the court discussed Family Code Section 102.004(b), which specifies which parties can intervene in a suit affecting the parent– child relationship—but *Whitworth* does not support the Navajo Nation's argument. 222 S.W.3d at 621–22. Section 102.004(b) provides standing to intervene to certain parties who do not have standing under another Family Code provision to file an original suit. *See* Tex. Fam. Code Ann. § 102.004(b); *In re N.L.G.*, 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.); *In re A.M.*, 60 S.W.3d 166, 169 (Tex. App. — Houston [1st Dist.] 2001, no pet.). But the Bs do have standing to file an original suit under Section 102.005(4), and that section does not expressly prohibit a party with original standing from intervening in a suit. Nor does any other Family Code provision. *But cf.* Tex. Fam. Code Ann. § 102.006 (limiting standing of certain parties who would otherwise have standing to file an original suit affecting the parent–child relationship). Therefore, we conclude that the plain language of Section 102.005(4) permits the Bs to intervene rather than bars them from intervening.

The Navajo Nation argues, alternatively, that the Bs' standing was limited to seeking adoption only, or termination and adoption, and that the Bs have no standing to seek placement of Y.J. or managing conservatorship because Section 102.005 limits the relief they can ask for. The Bs' focus in their pleadings and at trial was for the parents' rights to be terminated so that the Bs could adopt Y.J., which is what Section 102.005 gives them standing to seek. *See Turner v. Robinson*, 534 S.W.3d 115, 123 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Standing is determined at the time suit is filed in the trial court."). Their requests for conservatorship were in response to the Department's apparent unwillingness to consider them as a placement and potential adoption choice. Additionally, because Y.J. had not been placed with them, she had not lived with them for at least six months—a prerequisite to adoption unless the trial court waives that requirement when it is in the child's best interest. *See* Tex. Fam. Code Ann. § 162.009. Absent the trial court's waiver, the only way the Bs could fulfill the residency prerequisite was by obtaining conservatorship and possession of Y.J.

***7** Here, the trial court ordered termination but not adoption in a suit in which the Bs had standing to seek them jointly. Nothing in Section 102.005 limits their standing to seek post-termination conservatorship as against the Department or any other nonparent in this instance. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (noting that because standing—in terms of a party's right to initiate a lawsuit and the trial court's power to hear it—is determined when suit is filed, subsequent events do not deprive the court of subject matter jurisdiction).

We therefore overrule the Navajo Nation's fifth issue.

## Constitutionality of ICWA and Family Code Section 152.104(a)

In its first and second issues, the Navajo Nation contends that the trial judge erred by not holding ICWA constitutional and by holding that Section 152.104(a) of the Family Code violates the Texas constitution. The AG's first and second issues, and the Bs' first through third issues, urge the opposite contention: they argue that ICWA is unconstitutional, that Family Code Section 152.104(a) engrafts all of ICWA into Texas law, and that Section 152.104(a) violates the Texas constitution. Although we hold that the trial court made two errors in its legal reasoning, we do not sustain any of the parties' issues related to the constitutionality question because we need not decide their merits.

First, although the trial judge stated that he declined to decide ICWA's constitutionality under the United States Constitution, he determined that ICWA could not validly pre-empt Texas law because it violates the anticommandeering doctrine, as explained in *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018): "The anticommandeering doctrine ... is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." In describing the doctrine, the Supreme Court explained that a statute that violates the anticommandeering doctrine *is unconstitutional* because no provision in the Constitution gives Congress the power to pass such a

law. *Id.* at 1479. Although *Murphy* discussed whether a statute that violates the anticommandeering doctrine could validly pre-empt state law, the Court determined that such a statute could not because pre-emption flows from the Supremacy Clause, which is not an independent grant of congressional power. *Id.* In other words, pre-emption under the Supremacy Clause will not save a statute that violates the anticommandeering doctrine because such a law still exceeds Congress's power under the United States Constitution, and otherwise unconstitutional statutes cannot pre-empt state law. *See id.* Thus, by determining that ICWA violates the anticommandeering doctrine under *Murphy* and cannot pre-empt Texas state law, the trial court actually determined that ICWA is unconstitutional under the United States Constitution, even though it purported not to do so.

Second, the trial court then held that Texas Family Code Section 152.104(a) purports to independently apply all provisions of ICWA to all aspects of a Texas child custody proceeding involving an Indian child. *See* 25 U.S.C.A. § 1903(4) (defining "Indian child"). Section 152.104(a) provides that "[a] child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act of 1978 (25 U.S.C. Section 1901 et seq.) is not subject *to this chapter* to the extent that it is governed by the Indian Child Welfare Act." Tex. Fam. Code Ann. § 152.104(a) (emphasis added). "[T]his chapter" is Chapter 152, which adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *Id.* § 152.101. Chapter 152 deals generally with the proper court in which custody disputes regarding a child are to be heard and the authority to be given to child custody determinations of other courts. *See id.* §§ 152.001–.317.

***8** By its plain language, Section 152.104(a) does not purport to apply all ICWA provisions to all facets of Texas child custody proceedings. By limiting its scope to "this chapter," it defers to ICWA only in jurisdictional issues arising under the UCCJEA.[12] No such issues occurred in this proceeding. Except for the Navajo Nation's attempt to remove the case to a tribal court—the denial of which the Navajo Nation has not appealed[13]—all parties have agreed that the trial court is the court of continuing, exclusive jurisdiction for this case. *See id.* § 152.202. Thus, the trial court erred by holding that Section 152.104(a) of the Family Code purported to make all of ICWA applicable to all facets of Texas child custody proceedings, independent of federal law. The placement preferences of ICWA at the heart of this case are not affected by whether Section 152.104(a) violates the Texas constitution; thus, that ruling of law was unnecessary to the disposition of this case.[14]

12 By comparison, other states have specifically incorporated ICWA into state proceedings. *See, e.g.*, Cal. Welf. & Inst. §§ 224–224.6 (incorporating specific provisions of ICWA into California law); Okla. Stat. tit. 10, § 40.1 (stating that the Oklahoma Indian Child Welfare Act was intended to clarify "state policies and procedures regarding the implementation by the State of Oklahoma of the federal Indian Child Welfare Act"), § 40.6 ("The placement preferences specified in 25 U.S.C. Section 1915, shall apply to all ... preadoptive, adoptive and foster care placements.").

13 ICWA allows such a removal only if no parent objects. 25 U.S.C.A. § 1911(b).

14 We therefore agree with the Navajo Nation that Section 152.104(a)'s constitutionality has no bearing on this case. Accordingly, we also decline to address whether Section 152.104(a) violates the Texas constitution. *See In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003).

To summarize, the trial court purported not to decide whether ICWA violates the federal Constitution, but its ruling that ICWA violates the anticommandeering doctrine is actually a determination that ICWA is unconstitutional. Although the trial court purported not to apply ICWA to the proceedings, it allowed the Navajo Nation to participate in the trial[15] and made A.J.—a nonparty whose interest is being represented only by the Navajo Nation—a joint managing conservator. And, as an alternative ruling, the trial court found that even if ICWA is constitutional and applied to the proceedings, good cause existed to deviate from its preferred placement scheme. *See* 25 U.S.C.A. § 1915(a)–(b) (providing placement preferences "in the absence of good cause to the contrary"). Thus, the trial court applied ICWA while purporting not to apply ICWA.

15 *See* 25 U.S.C.A. § 1911(c) (giving Indian child's tribe the right to intervene at any point in a state proceeding for the foster care placement of, or termination of parental rights to, an Indian child).

The trial judge understandably attempted to avoid squarely addressing whether ICWA violates the United States Constitution. A federal district judge has held that it does,

  

a Fifth Circuit panel—with one judge dissenting—has held that it does not, and the Fifth Circuit court has vacated the panel opinion and judgment and will be rehearing the case en banc. Therefore, this exact issue has been—and will be— extensively briefed and argued in the federal system in a case in which both the State of Texas and the Bs are parties. But in his attempt to fashion a remedy that incorporates the important concerns of ICWA [16] and Texas law regarding the best interest of the child, [17] the trial judge made conflicting rulings in this case that are difficult to harmonize. In attempting to address the interests of all parties and provide alternative relief in the event the Fifth Circuit (or perhaps ultimately the United States Supreme Court) decides ICWA is constitutional, [18] the trial judge reversibly erred. Because, as we explain below, the trial judge's sua sponte conservatorship ruling necessitates a new trial regardless of the federal system's conclusion regarding ICWA's constitutionality, we need not reach the federal constitutional issue [19] and therefore do not grant any of the parties relief under their related issues.

16 *See id.* § 1901–02.

17 The Navajo Nation contends "that ICWA does not abandon—nor compel trial courts to abandon—the best interests of children. Instead, ICWA supplements the traditional best interest standards with a modified best interest standard and stated placement preferences, which are not absolute."

18 Practically speaking, we do not quarrel with this approach. Failing to comply with certain provisions of ICWA can result in a challengeable, infirm judgment well after the trial court has made a ruling and the child has bonded with a caregiver, *see id.* § 1913(d) (allowing an Indian child's parent who voluntarily consented to adoption to petition to vacate it on duress or fraud grounds), § 1914 (allowing Indian child's parent or tribe to petition to invalidate foster care placement or termination for violation of Sections 1911, 1912, 1913), a result which goes against bedrock principles underpinning Texas family law that are focused on promoting stability and permanence for children. Following the procedural requirements of ICWA for the termination—while recognizing the tension that can seemingly result in some cases between its stated goals and a child's best interest—is an understandable approach until the federal constitutional question is settled.

19 Likewise, we need not address the Navajo Nation's subargument that the AG and the Bs are bound by issue preclusion, an argument which the Navajo Nation concedes has been rendered moot by the Fifth Circuit's subsequent actions in the case pending in that court, except to the extent that the complaint must be raised for preservation purposes.

## Evidence Does Not Support Ruling Under Either Texas Law or ICWA

***9** The Navajo Nation's fourth issue, and the Bs' fourth and fifth issues, [20] advocate that the trial court's joint managing conservatorship decision should be reversed: the Navajo Nation because it contends ICWA requires placement with A.J. only, in that the evidence is legally and factually insufficient to show that good cause exists to deviate from ICWA's Indian-centered placement preferences; and the Bs because (1) they contend that the trial court's decision is not in Y.J.'s best interest under Texas law [21] and (2) even if ICWA applies, the evidence shows that good cause exists to deviate from ICWA's placement preferences. Because both sides' complaints require an examination of the trial evidence, we review their issues together.

20 We do not reach the Navajo Nation's third issue, which argues about alleged error in pre-termination placement of Y.J. Because both parents' rights have been terminated and no party challenges the termination, even if error occurred in the pre-termination placements, the Navajo Nation would not be entitled to relief. *See In re A.M.*, 570 S.W.3d 860, 866–67 (Tex. App.—El Paso 2018, no pet.) (citing, and agreeing with reasoning of, Montana and Iowa cases holding similarly); *see also* Tex. R. App. P. 47.1.

21 *See generally Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (setting forth nonexhaustive factors courts generally use in analyzing child's best interest).

### Standard of review

The parties agree that we review the trial court's conservatorship decision for an abuse of discretion. *See In re*

*J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *In re A.K.M.*, No. 02-12-00469-CV, 2013 WL 6564267, at *2 (Tex. App.—Fort Worth Dec. 12, 2013, no pet.) (mem. op.). A trial court abuses its discretion if it makes an erroneous legal ruling even in an unsettled area of law. *See In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding); *In re United Scaffolding, Inc.*, 301 S.W.3d 661, 663 (Tex. 2010) (orig. proceeding). Thus, whether the evidence supporting the decision is legally and factually sufficient is relevant in deciding whether the trial court abused its discretion. *See In re T.D.C.*, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied) (op. on reh'g).

**Evidentiary review**

Termination of parental rights was not the focus of the trial because Mother relinquished her rights and a father could not be found; instead, the primary consideration before the trial court was where to place Y.J. after termination. The Bs' primary focus was on adoption, whether by immediate placement with them and eventual adoption after a conservatorship or by waiver of the six-month requirement and immediate adoption.

**The Department's caseworker**

As stated before, the Department advocated placement of Y.J. solely with A.J. The caseworker testified that although delays in the Department's IT system had prevented the completion of an ICPC home study for A.J., [22] she had no concerns about placement with A.J. after speaking with her on the phone. According to a representative from the Navajo Nation, the ICPC home study for A.J. would have been fully completed less than a week after trial. A.J. lives close to Y.J.'s four oldest half siblings and sees them at least once a week. A.J. had not visited Y.J. while the case was pending. When asked why, the caseworker responded, "Just financially and she's out of state. It's hard to come to Texas."

22 The Department had sent the request to Arizona, who then had to send the request to the Navajo Nation. Once the Navajo Nation had completed its home study and other requirements, it would send the materials back to Arizona, which would then send the final approval to Texas. At the time of trial, Texas had sent the original request to Arizona, but Arizona had not yet forwarded it to the Navajo Nation.

***10** Y.J. was very bonded to the foster family she was living with at the time of trial, and the Department had no concerns about that home. The Department planned for Y.J. to stay there pending completion of A.J.'s home study. According to the caseworker, the Department would have recommended A.J. for placement even if ICWA did not apply because A.J. is a family member. According to the caseworker, Y.J.'s best interest was to be placed with A.J. instead of the Bs because of "family ties," which includes extended family. A.J. and Y.J.'s oldest half sibling had visited with Y.J. the day before trial.

The caseworker stated that the Bs had offered Mother an open adoption, [23] in which Mother would continue to have contact with Y.J. The Department did not think an open adoption was in Y.J.'s best interest. But the caseworker testified that it was in Y.J.'s best interest to stay in her then-current foster placement "for up to ... two weeks" until the ICPC approval was finished, "knowing it can be finished with[in] less than a week." The Department intended to place Y.J. with A.J. upon Arizona's ICPC approval.

23 The caseworker was never asked to explain how she knew the Bs had offered an open adoption, but she said that she had become concerned because she had heard about a "possible" open adoption.

According to the caseworker, from September 2018 to the time of trial, the Bs had possession of and access to Y.J. for at least one visit per month, anywhere from overnight to a full day. Y.J.'s foster mother set up these visits. When asked whether the sibling contact between Y.J. and Alan would be maintained if Y.J. were to be placed with A.J., the caseworker responded, "I believe [Y.J.] will know where to contact her brother and how that initial -- initial bond that she created when she met him here."

Although the foster parent was adoption motivated, the foster family was not ICWA compliant.

**CASA representative**

Stacey Main, the CASA representative for Y.J., had also been Alan's advocate. Main recommended placing Y.J. with the Bs because of the relationship they already had with her and to minimize "trauma." [24] She also acknowledged that naming the Department as Y.J.'s managing conservator would facilitate financial subsidies for Y.J.

[24] Main said that CASA had trained her in trauma, utilizing a continuing series of two-hour lectures from a doctor who specializes in childhood trauma.

According to Main, Y.J. already had an attachment to her foster mother and to the Bs. But Main agreed it was important for Y.J. to bond with her oldest half siblings and extended family in Arizona. As to placement with A.J., Main opined, "I look at it as a win-win either way. If she goes with the [Bs], she wins. If she goes with [A.J.], she wins. If she stays with the foster home, she wins. I like them all." According to Main, keeping Y.J. "with family" was the main goal, and Y.J. would have contact with her family with any of those placements.

Y.J. had normal, sibling-type interactions with the Bs' children. Her then-current foster parents "adore[d]" her and were bonded to her.

**Navajo Nation expert**

Celeste Smith, a senior social worker with Navajo Children and Family Services Indian Child Welfare Act, testified as an expert on the Navajo Nation. Smith is an enrolled member of the tribe who lives on the reservation. Although Smith agreed that termination of the parents' rights was in Y.J.'s best interest, she recommended placement of Y.J. with A.J.

Smith had initiated a home study for A.J., but she had not received it by the time of trial because the ICPC request with Arizona had not been completed. Nevertheless, she had no concerns about A.J. based on background checks. [25] Smith estimated that when she received the ICPC request from Arizona, she could finish the home study within a week. The only remaining items were for A.J. to obtain a Navajo Nation foster care license and for Smith to check two additional references. A.J. had already completed the foster care "trainings," and Y.J. could be fully placed with A.J. before A.J. was officially licensed as a foster parent.

[25] State and federal background checks, and Navajo Department of Family Services background checks, for A.J. and her adult son living with her showed "no findings."

***11** Additionally, according to Smith, A.J.'s home was clean, safe, and appropriate for Y.J. A.J. lived with her adult son in a two-bedroom home with an addition in back for which a doorway needed to be cut. Y.J. would sleep in A.J.'s bedroom with her, which is not uncommon for Navajo. A.J. is a homemaker, which is a traditional Navajo role, and her children help support her and take care of her bills, which is also Navajo custom. A.J. receives food stamps and her monthly income varies. Her thirty-three-year-old son and other family members would provide Y.J.'s care when she could not, such as when she was helping care for her chronically ill mother and brother. According to A.J., Y.J. will take the bus to school when she gets older.

Smith testified that the references she contacted for A.J. acknowledge that she is a good candidate for placement. A.J.'s family, including the family living on the reservation, are "very close" and were supportive of A.J.'s decision to seek placement of Y.J. with her. Y.J.'s maternal grandmother, A.J.'s sister-in-law, communicates with A.J. and has contact with Mother. According to Smith, Y.J.'s maternal grandmother returns to the reservation "on and off." [26]

[26] This evidence renders somewhat curious the Department caseworker's concern that the Bs would seek an open adoption. Although the trial court could not have judicially noticed for its truth the Department's statement in the affidavit attached to its removal petition that Y.J.'s maternal grandmother had a CPS history in New Mexico, *see In re R.A.*, No. 02-18-00185-CV, 2018 WL 5832148, at *8 (Tex. App.—Fort Worth Nov. 8, 2018, no pet.) (mem. op.), it could have judicially noticed that the Department had made such an allegation. Nevertheless, it is undisputed that A.J. does not have contact with Mother.

Smith further testified about the importance of the Navajo culture to Y.J.: "[I]t's her whole identity. It's going to help ... to know where she comes from, what her clans are, what ... Navajo culture traditions there are for her. From ... birth ... to [her] elderly age, she could have the ceremonies, the teachings, in order to ... [have] a balance[d] life for her." Smith explained that children are sacred to the Navajo and that the tribe is always looking to its children's future. Smith explained that contact with Y.J.'s oldest half siblings, especially the oldest who understands the Navajo language and traditional Navajo foods and customs, would help Y.J.'s cultural understanding of what it means to be a Navajo girl and woman. It is especially important to hand down the Navajo language. The Navajo Nation's concerns about non-Navajo placement were the loss of cultural and institutional knowledge of the Navajo Nation and the difficulty for

  

children living outside the reservation to participate in Navajo ceremonies because they generally are not open to the public. But Navajo children who do not live on the reservation may participate in traditional ceremonies with their family. Smith acknowledged that Y.J. would not receive benefits for being a tribal member but would receive free medical care.

According to Smith, in January 2019, when Mother found out that A.J. was also interested in placement, Mother told her that she would be satisfied with placement of Y.J. with either the Bs or A.J. But Smith did not find out about Mother's affidavit of relinquishment, in which she again expressed a preference for the Bs, until the day before trial.

**C.B.**

C.B. testified that the Bs had found out about Y.J.'s birth through Alan's biological paternal grandmother, who is a Cherokee. The Bs keep in touch with her and the adoptive mother of Mother's fifth and sixth children, who also have a Cherokee birth father.

C.B. testified that the Bs had not promised Mother an open adoption but had not closed the door to possible supervised visitation between Y.J. and Mother if Mother were to stay sober and was consistent with her promises. In other words, they were "open to being open." But C.B. also said that the Bs would comply with any court order that Mother have no contact with Y.J. Additionally, Mother had never requested visitation nor had any contact with Alan.

***12** According to C.B., Alan "understands that [Y.J.'s] his sister" and is excited to see her. She "lights up" around him. All of the Bs' children are "very playful" with Y.J., and she likes the attention and interaction. The Bs "feel very strongly that [Y.J. and Alan] should grow up together and support and love each other" because of their important sibling bond. The Bs were concerned that if Y.J. were placed with A.J., she might never see Alan again. Their plan was for Y.J. to sleep in a room with Alan until "it was age appropriate necessary" for her to have her own room.

Although the Bs met with Mother after they found her in the county jail, they did not ask her to request them for placement, nor did they discuss an open adoption. C.B. was not present when Mother signed the affidavit of relinquishment, and he did not ask her to sign it. He did not know where it was signed or created because "[a]ll of that was handled through her attorney."

The Bs were trying to learn Navajo culture. They had used age-appropriate books for that purpose, but because Alan was only three and a half at the time of trial, the books were more "lifestyle" books. To involve Alan in the Cherokee culture, they maintained a relationship with his biological family, particularly his biological paternal grandmother. They had "sought recommendations from her ... [and] directions [they] could point him in." They had attended two public powwows in the Dallas/Fort Worth area and were educating themselves, as C.B. put it, to "better educate our child and our children, ... as a family, what it means to be native, the history, the culture.... [A]s an outsider looking in, as best as we can, that is difficult[,] and we have always welcomed any resources that are there to help us in that process." C.B. acknowledged that because the Cherokee tribe has been more involved in Alan's life, he has a stronger connection to that tribe, but the Bs do not prefer one tribe over another. Alan's Navajo family had not attempted to contact him, but C.B. said the Bs "would welcome any contact from [that] family to help" raise him. C.B. did not think that Alan's Navajo family's lack of contact with him would change, though.

When asked, "You understand the conundrum here, that we have more than just one sibling in this picture?" C.B. answered, "Yes." He acknowledged that "the problem of trying to prioritize which sibling is most important to have a relationship with moving forward" was "very complicated."

**J.B.**

J.B. acknowledged that the Bs did not know much about Navajo culture. J.B. had tried to contact Y.J.'s maternal grandmother and had texted her pictures of Alan at Mother's request. J.B. testified that Y.J. had visited with the B family one day each month between September 2018 and January 2019 and once each month for a forty-eight-hour period between January 2019 and trial.

**Summary of the Bs' adoption report for Alan**

The trial court admitted into evidence a favorable 2017 adoption report for the Bs that CK Family Services had completed for Alan's foster placement and adoption. The Department placed Alan with the Bs the day he was removed

from Mother's care. At the time of the report, the Bs were in their late thirties; they have two biological children, who were both under the age of ten. C.B. was a college-educated stay-at-home father, and J.B. was an employed in the medical field with a substantial monthly income. The interviewer described their marriage as "stable and loving," their family as "loving and affectionate," and their characters as "compassionate." The home environment was safe; they lived in a four-bedroom, three-bath home with their children and a dog. Both Bs had passed criminal and child abuse background checks.

***13** Regarding Alan's biological family, the report stated that the Bs had maintained phone contact with his paternal grandmother and that they were "open to ... have contact, as long as it is appropriate," with biological family members to ensure he has a "familial and cultural connection." Additionally, it stated the Bs "want[ed] to ensure they learn and implement [Alan's] culture into their home and lives due to [his] being Navajo and Cherokee Indian." At the time, Alan had never met any of his oldest half siblings.

CK Family Services updated the report in October 2018 after the Bs became interested in adopting Y.J. The addendum was not as detailed as the original report but showed no significant changes.

**A.J.**

A.J. testified that she lives on the Navajo reservation close to many family members. Y.J.'s four oldest half siblings live with A.J.'s older sister about twenty-seven miles from her. A.J. sees Y.J.'s oldest half siblings twice a week, but Y.J. would see them probably every other day. A.J. has a lot of extended family members who would help with Y.J.'s care and take care of anything she could not.

A.J. said she would follow any order that Y.J. have no contact with Mother; A.J. had not heard from Mother for many years.

A.J. supplements her income by making and selling crafts, and her four sons and her daughter help her financially, which is normal for Navajo families on the reservation. A.J. testified that she would be able to support Y.J. financially.

A.J. did not know much about Alan, but Y.J.'s maternal grandmother had told her "a little bit." She did not know about Y.J.'s other children in the DFW area. When asked, "When you were asked about coming out here to visit [Y.J.], has cost been a consideration -- has cost been a problem for you to be able to come out here to visit *up until now*?," she answered "No." [Emphasis added.]

**Findings**

The trial judge made extensive findings on the record and in written findings of fact and conclusions of law.

On the record, the trial judge stated that he had applied the *Holley* factors in deciding who should be Y.J.'s managing conservator. He ordered that Y.J. be enrolled in a Navajo language class, which the Navajo Nation had a duty to identify, beginning as soon as possible and continuing until she turned fourteen. The judge acknowledged that "[w]hen a person leaves a [n]ation, there is an expectation that you will lose some of your culture.... [A]nd there's expectation your [descendants] will also slowly lose some of their culture but that's part of the decision that we make to immigrate to other cultures and other countries." He recognized that Y.J.'s Navajo culture is part of her identity and that preserving culture and heritage can be a struggle. He stated that "[t]he goals of ICWA are noble and most often what is best for the children." As for the dual joint managing conservatorship, he explained, "I'm trying to find that mix to ensure that we give this child every chance possible to maintain ties with ... her rich Navajo history and culture, in the meantime, doing what I feel like is best for the child at this point." The judge indicated that "a large factor in this [ruling] was the relationship that she would have with her biological brother who is the closest sibling in age to her."

Acknowledging the evidence about the importance of tribal rituals that occur when a child reaches certain milestones, the trial court said that there is no way to plan those and he "certainly wish[ed] there was a way for the Court to plan other things out to make sure she's in touch with her heritage and not lose sight of that." But the judge went on to say that—without regard to any of the parties' financial resources—he thought it was in Y.J.'s best interest to live with her half sibling who was closest to her in age while maintaining her cultural ties to the Navajo Nation. He stated, "[T]here was no bad situation for [Y.J].

***14** The trial court signed findings of fact and conclusions of law consistent with its verbal findings. Specifically, the trial court found and concluded that "it is in the child's best interest to enter into this joint managing conservatorship arrangement to place her in a loving home with her half sibling who is closest to her in age by several years, while still

  

ensuring the child's continued connection to Navajo culture and family." The trial court also found and concluded that the Bs would provide Y.J. "with a stable and loving home environment that gives her the care, nurturance, guidance, and supervision necessary for [her] safety and development" and that it was in Y.J.'s best interest "to have her primary residence in the same home with her sibling, [Alan], who lives with [them] as their adopted son." The trial court further found that it was in Y.J.'s best interest for A.J. to have "the right of possession ... for designated summer, weekend, and holiday periods." Finally, the trial court concluded that "the best interest of [Y.J.] provides good cause to place [her] with the [Bs] pursuant to 25 U.S.C. § 1915(b)."

**Best-interest determination without consideration of ICWA**

The Bs contend that the trial court abused its discretion under Texas law, without regard to ICWA's placement preferences, by naming A.J. a joint managing conservator and mandating a possession and access schedule akin to parents living more than one hundred miles apart. Their argument discusses the *Holley* factors and places great emphasis on Y.J.'s sibling relationship with Alan.

The nonexhaustive *Holley* factors include

> (A) the [child's] desires ... ;
>
> (B) the [child's] emotional and physical needs[,] ... now and in the future;
>
> (C) the emotional and physical danger to the child now and in the future;
>
> (D) the parental abilities of the individuals seeking custody;
>
> (E) the programs available to assist these individuals to promote the [child's] best interest ... ;
>
> (F) the plans for the child by these individuals or[, if applicable,] by the agency seeking custody;
>
> (G) the stability of the home or proposed placement;
>
> (H) the [parent's] acts or omissions ... indicat[ing] that the existing parent–child relationship is not a proper one; and
>
> (I) any excuse for the [parent's] acts or omissions ....

544 S.W.2d at 371–72 (citations omitted).[27] We need not consider (H) and (I) because whether Y.J. should be returned to her parents is not an issue.

27 We employ the *Holley* factors in reviewing conservatorship orders, in addition to termination orders. *See In re R.M.*, No. 02-18-00004-CV, 2018 WL 2293285, at *5 (Tex. App.—Fort Worth May 21, 2018, no pet.) (mem. op.).

Y.J. was too young to articulate her desires, and the evidence showed that she had a normal, healthy infant's response to caregivers and other children. We need not compare the degree of bonding with Y.J.[28] as between the Bs and A.J. because the evidence showed that Y.J.'s primary bond at the time of trial was with her foster mother, who had the primary care of and access to Y.J. by virtue of the foster care placement. There was no evidence that she had any special emotional or physical needs that could not be met by either the Bs or A.J. separately, nor was there any evidence of a particular emotional or physical danger to her other than theoretical contact with Mother. Both the Bs and A.J. expressed a willingness to protect Y.J. from harmful contact with Mother.

28 If ICWA applies, federal rules implementing it provide that "[a] placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 25 C.F.R. § 23.132(e) (2016).

The evidence showed that both the Bs were excellent parents. There was not much evidence specific to A.J.'s parenting abilities, but the evidence showed that she had her own adult children who helped support her and that she maintained close ties to her family and extended family. There was not much evidence about any programs available to assist the Bs and A.J. other than that Y.J. would be entitled to health care on the reservation and would have access to Arizona Medicaid. She would also have access to an early intervention program and Head Start. The evidence showed that Navajo culture includes assisting older tribal members with their needs, and A.J.'s family would help her with child care. There was also evidence that naming the Department as managing conservator would have facilitated "financial subsidies" for Y.J.

  

***15** The Bs wanted to adopt Y.J. She would be raised in a home with continual daily access to the half sibling that is closest to her in age, in a loving home with two other children. The Bs intended to facilitate contact with her two half siblings in the DFW area and expressed a willingness to provide contact with her other half siblings and family on the reservation and to educate her in Navajo culture. The Navajo Nation asked only for placement of Y.J. with A.J.; there was no evidence that A.J. had any plans to adopt Y.J. if the child were to be placed with her. But Y.J. would be immersed in her Navajo culture and heritage, have weekly visits with four of her oldest half siblings, and have close contact with her extended Navajo family.

The evidence showed that both homes, individually, would be stable choices for Y.J., and each would fulfill a different primary need: with the Bs, a home with daily contact with her half sibling closest in age, the opportunity to see other half siblings living close by (and possibly her half siblings living on the reservation), and occasional interaction with the Navajo tribe directed by non-Indian parents; and with A.J., a home without daily sibling interaction but with frequent contact with her four oldest siblings and extended family and with immersion in Y.J.'s Navajo culture and heritage (but with possibly little to no contact with her half siblings in Texas).

Considering the *Holley* factors separately, then, without considering the sibling-attachment and contact evidence, the evidence is favorable for either the Bs or A.J. to provide a home for Y.J. But we are reviewing the trial court's decision to name all three nonparent joint managing conservators. No evidence supports the trial court's decision that Y.J.'s stability and permanence would be best served by the arrangement ordered. As the Bs note, the standard possession and access provisions generally exist for when parents—with whom the child already has an existing relationship—divorce or are not married and the trial court must order custody in a way that maintains an already existing bond between the child and those two parents. That is not the case here. And the arrangement seriously undermines the possibility that Y.J. could ever be adopted. *See* Tex. Fam. Code Ann. § 162.009 (six-month residency requirement),[29] § 162.010 (requiring written consent to adoption by "a managing conservator" unless "the managing conservator" is a petitioner, but not specifically addressing consent required when a child has more than one—nonaligned—joint managing conservator), § 263.3026 (including as only permanency goal after termination by Department, "adoption of the child by a relative or other suitable individual"). Thus, here, the joint managing conservator arrangement does little to promote a stable and permanent solution for Y.J.

29 A.J. could not meet this requirement under the current order.

Based on the trial judge's comments, it is clear that he was trying to place Y.J. where she would develop and enjoy a daily sibling attachment, have the most access to all of her half siblings, and still maintain her relationship with and access to her Navajo culture and extended family.[30] But in doing so, the trial judge fashioned a remedy that seriously undermines Y.J.'s stability and permanence, particularly in her younger years.[31] Not only is establishing a stable, permanent home for a child a compelling state interest, the need for permanence is a paramount consideration for a child's present and future physical and emotional needs. *In re J.W.*, No. 10-18-00344-CV, 2019 WL 5078678, at *8 (Tex. App.—Waco Oct. 9, 2019, no pet. h.) (mem. op. on reh'g); *see* Tex. Fam. Code Ann. § 153.001(a)(2); *In re A.B.*, 412 S.W.3d 588, 609 n.15 (Tex. App.—Fort Worth 2013) (en banc op. on reh'g), *aff'd*, 437 S.W.3d 498 (Tex. 2014). Accordingly, we hold—without reference to ICWA—that the trial court abused its discretion by naming the Bs and A.J. the child's joint managing conservators with a possession and access schedule akin to parents living more than 100 miles apart.

30 We also have no quarrel with the trial judge's suggestion that this could be a proper best-interest consideration under Texas law, regardless of ICWA's application, especially considering that the record includes expert testimony about the benefit to Y.J. of being a part of her heritage and culture.

31 For example, without stating why it would be in her best interest, the order provides that when Y.J. turns five, she may fly alone between the airport nearest the Bs' residence and the airport nearest A.J.'s residence.

***16** We sustain the Bs' fifth issue.

**Good cause under ICWA**

The trial court likewise abused its discretion in making its alternative good cause finding under ICWA because the evidence is factually insufficient to support it.

A party seeking to establish good cause for not following ICWA's placement preferences for adoptive or preadoptive placement—here, with a member of the Indian child's extended family—must bring forth clear and convincing evidence of good cause. *See* 25 C.F.R. § 23.132(b) (2016). [32] That good cause must be based on at least one of several considerations; here, the two possible considerations are "[t]he request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference" and "[t]he presence of a sibling attachment that can be maintained only through a particular placement." *Id.* § 23.132(c)(1), (3).

32 This standard is set forth in the Bureau of Indian Affairs' Final Rule, which clarifies the "minimum Federal standards governing implementation of ... ICWA to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." *Id.* § 23.101 (2016). The Bs do not raise independent constitutional challenges to ICWA and the current version of the Final Rule. Thus, in assuming ICWA's application for purposes of this part of our analysis, we also presume—without deciding—the constitutionality of the Final Rule.

To determine if evidence is legally sufficient under the clear-and-convincing standard, we look at all the evidence in the light most favorable to the challenged finding to determine whether a reasonable factfinder could form a firm belief or conviction that the finding is true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). Evidence is factually insufficient under the clear-and-convincing standard if, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction that the finding is true. *Id.*

**Mother's placement preference**

In Mother's first affidavit stating her preference that Y.J. be placed with the Bs, she averred that she had reviewed the potential placement with the Colorado couple and preferred the Bs so that Y.J. would be "placed with[ ] her brother and his adoptive family rather than with strangers who live several hundred miles away." A.J. had not been identified as a potential placement at that time. Although this evidence is legally sufficient to meet the clear-and-convincing standard, Mother's affidavit of voluntary relinquishment—which also stated her preference for Y.J.'s placement with the Bs but which she signed after A.J. had been identified as a potential placement—did not state that Mother had reviewed A.J. as a potential placement. And Smith testified that Mother had indicated at one time that she preferred placement with either the Bs or A.J. Thus, the evidence is factually insufficient under the clear-and-convincing standard to support the trial court's finding of good cause based on a parent's preference.

**Sibling attachment maintainable only with a particular placement**

***17** Y.J. has seven half siblings: Alan who lives with the Bs, the four oldest who live in Arizona on the reservation, and two who live close to the Bs in the DFW area. The trial court was clearly concerned with how best to foster all of those sibling attachments and was faced with an incredibly difficult decision as to how to prioritize the importance of each of those attachments to Y.J.

The evidence showed that Y.J. was the closest in age to Alan, that she had visited with him, and that Alan had formed an attachment to her. Although Y.J. was by all accounts a happy infant with no discernable attachment problems—and therefore could be expected to "light[ ] up" when around other small children such as Alan—the evidence of Alan's attachment to her shows a benefit of that relationship *to Y.J.* [33] as she ages. She would also be living in a home with, and have daily interaction with, two nonbiological older siblings. The evidence also shows that the Bs have cultivated contact with Y.J.'s other two half siblings that do not live in Arizona and desire to continue that contact. C.B. testified that the Navajo family had not attempted to contact Alan and that he did not think Y.J. would have much contact with Alan if she were to be placed with A.J. Although A.J. testified that it had been no problem to come to Texas up until the time of trial, she had only attended trial and visited with Y.J. once. There was no evidence she or the family could afford to maintain cross-country visits with Alan or her other two DFW-area siblings. And Y.J. would not be living in a home with any of her half siblings in Arizona.

33 The Navajo Nation attempts to minimize this evidence, arguing that preservation of sibling attachments should be a guiding concern only when two siblings had been living together before being

  

> removed from a home. We do not agree that the trial court's consideration of the importance of sibling relationships to a child when making a best-interest determination is so limited.

But the evidence also showed that A.J. and Y.J.'s oldest half sibling had visited with her once before trial and that her close Navajo family was excited at the prospect of having Y.J. live with A.J. Although the trial court found that the Bs could best maintain the sibling relationships, it ordered A.J. to pay the cost of Y.J.'s travel to Arizona after the age of five and to accompany her on all flights during summer 2022. [34] The evidence also showed that even though the oldest half siblings lived about half an hour from A.J., she saw them frequently and anticipated that Y.J. would see them every other day. This is in keeping with Smith's testimony about the importance of family in Navajo culture. Finally, the evidence showed that the Bs wanted to maintain a relationship between Alan and Y.J. and likely have the financial means to travel to facilitate visits. Thus, there is conflicting evidence of a sibling attachment that could be maintained only through a particular placement.

34 This provision appears to conflict with another provision in the order requiring the Bs to deliver Y.J. to A.J.'s residence, and for A.J. to surrender Y.J. at her residence, for the "four continuous week[ ]" summer 2022 possession.

We hold that the evidence regarding sibling attachment conflicts such that the trial court's finding that good cause existed to deviate from Section 1915's placement preferences is factually insufficient. [35] Because the evidence is factually insufficient to support the trial court's good cause finding under either of the possible considerations set forth in the Final Rule, we conclude that the trial court abused its discretion in making that finding. We thus sustain the Navajo Nation's fourth issue and overrule the Bs' fourth issue.

35 Because we determined that the evidence supporting parental consent is legally sufficient, we need not address the legal sufficiency of the sibling-attachment factor.

## Conclusion

***18** Having sustained the Navajo Nation's fourth issue and the Bs' fifth issue, we reverse only the part of the trial court's June 28, 2019 order appointing the Bs and A.J. joint managing conservators of Y.J., and we remand the case for a new decision on conservatorship, or adoption, as the case may be. Although we limit remand to the conservatorship/adoption decision, we do not limit the trial court's reconsideration of previously raised legal issues that we have not ruled on, such as ICWA's constitutionality, or the trial court's consideration of new issues or evidence raised regarding conservatorship.

Chief Justice Sudderth and Justice Gabriel concur without opinion.

**All Citations**

Not Reported in S.W. Rptr., 2019 WL 6904728

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# Tab D: Court of Appeals' Judgment

# In the
# Court of Appeals
# Second Appellate District of Texas
# at Fort Worth

No. 02-19-00235-CV

| | | |
|---|---|---|
| IN THE INTEREST OF Y.J., A CHILD | § | On Appeal from the 323rd District Court |
| | § | of Tarrant County (323-107644-18) |
| | § | December 19, 2019 |
| | § | Opinion by Justice Birdwell |

## JUDGMENT

This court has considered the record on appeal in this case and holds that the trial court reversibly erred in the part of its order awarding joint managing conservatorship. We reverse the part of the trial court's order appointing joint managing conservators, and we remand the case to the trial court for a new trial on the conservatorship and adoption issues, as set forth in this court's memorandum opinion. The trial court must commence a new trial no later than 180 days after the date this court issues the mandate in this appeal. *See* Tex. Fam. Code Ann. § 263.401(b-1).

It is further ordered that each party shall bear their own costs of this appeal, for which let execution issue.

SECOND DISTRICT COURT OF APPEALS

By /s/ Wade Birdwell
Justice Wade Birdwell