No. _____

In the Supreme Court of the United States

LINDA DAVIS, fka Linda Beveridge,
Petitioner

V.

RICHARD JONES AND CAROLYN JONES,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Issue I: Did the Iosco (Michigan) circuit court exceed its jurisdiction and violate the Indian Child Welfare Act (25 USC §§1901 *et seq.*) by

A. failing to immediately restore full physical and legal custody of an Indian child to an Indian mother when, prior to and during trial the Indian mother expressed her desire to terminate a voluntarily-created limited guardianship and regain full physical and legal custody of the Indian child, as was the Indian mother's statutory right, 25 USC §1913(b);

B. acting without jurisdiction in violation of 25 USC §1920 by conducting a custody proceeding where the limited guardians retained custody of the Indian child after the Indian mother had expressed a desire to regain her custodial rights;

C. failing to require the limited guardians to notify the Indian child's Tribe of this foster care placement proceeding and of the Tribe's right to intervene under 25 USC §1912(a), which omission created a jurisdictional defect in all further proceedings;

D. failing to require the limited guardians to introduce qualified expert testimony to establish that active efforts had been made to avoid the breakup of an Indian family as required by 25 USC §1912(d);

where no finding was made that custody with the Indian mother would likely cause serious physical or emotional damage to the child and, to the contrary, the Michigan court granted the Indian mother liberal and unsupervised parenting time?

II. Did the Michigan courts err in failing to accord a natural mother's constitutional right to make reasonable decisions as to the care and custody of her child appropriate weight and importance, as required by *Troxel v Granville*, 530 US 57, 66; 120 S Ct 2054; 147 L Ed 2d 49 (2000)?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is Linda Davis. The parties to the state proceedings at issue were Timothy Beveridge, Linda Davis ex-husband (this case having begun as a divorce proceeding), Richard Jones (Mr. Beveridge's adoptive mother's ex-husband), and Carolyn Jones (Richard Jones current wife and former wife of Mr. Beveridge's adoptive father).

There are no corporations, limited liability companies, partnerships, limited partnerships, or juristic entities that are parties to this case. All natural persons party to this case are listed in the above paragraph.

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The Michigan Supreme Court's order denying rehearing is officially reported at 469 Mich ___; 671 NW2d 44 (2003), and is reproduced at Pet. Apx. 2a (Appendix B).

The Michigan Court of Appeals decision issued January 24, 2003 is unreported (but found at 2003 Westlaw 198011), and is reproduced at Pet. Apx. 3a (Appendix C).

The unreported Michigan Court of Appeals' order denying rehearing, issued March 4, 2003, is reproduced at Pet. Apx. __a (Appendix D).

The Iosco (Michigan) circuit court's order of June 7, 2002, granting custody of the Indian child to respondents, is unreported, and is reproduced at Pet. Apx. __a (Appendix E).

The Iosco (Michigan) circuit court's findings of fact were rendered from the bench on May 7, 2002, and are reproduced at Pet. Apx. __a (Appendix F).

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment entered by the Michigan Court of Appeals on January 24, 2003 in this case, as to which the Michigan Supreme Court has refused discretionary review.

JURISDICTION

The Michigan Supreme Court denied petitioner's timely application for leave to appeal raising the within federal

statutory and constitutional issues on July 24, 2003, and denied petitioner's timely motion for rehearing on October 31, 2003. The jurisdiction of this Court is based on 28 USC §1257(a) and Rule 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of 25 USC §1901 *et seq.*, and most especially §§1912(a), 1912(d), 1913(b), and 1920, Pet. Apx. 89a ff, (Appendix O) and §1 of the Fourteenth Amendment, Pet. Apx. 97a (Appendix Q).

STATEMENT

INTRODUCTION

Petitioner Linda Davis, an Indian mother and registered member of the Saginaw Chippewa Tribe of Indians, requests review by certiorari of a July 24, 2003 order of the Michigan Supreme Court (Pet. Apx. 1a), two justices dissenting, denying discretionary review (leave to appeal) of a January 24, 2003 decision of the Michigan Court of Appeals (Pet. Apx. 3a-19a), as to which a timely motion for rehearing was denied by order of March 4, 2003 (Pet. Apx. 20a), which affirmed an award of custody of plaintiff's natural Indian minor child, Jewel Beveridge, also a registered member of the Saginaw Chippewa tribe, to respondents, *non-Indian* paternal [adoptive and step-adoptive] grandparents. The Michigan Supreme Court denied Linda Davis' timely motion for rehearing on October 31, 2003 (Pet. Apx. 2a).

To achieve such a result, the Michigan Court of Appeals, hastened to excuse itself and the trial court—in violation of the Supremacy Clause of US Const, Art VI—from all obligation to comply with the Indian Child Welfare Act (ICWA), 25 USC §§1901 *et seq.* (Pet. Apx. 13a, footnote 6),

and to flatly ignore the Congressional purpose and intent underlying the ICWA.

The Michigan Court of Appeals' January 24, 2003 opinion stands these principles on their head by examining the case from the "wrong end of the telescope", blinded by the trial court's adverse findings based on state law principles. The ICWA is to be construed and applied in favor of Indians, *Bryan v Itasca Co, Minnesota,* 426 US 373, 392; 96 S Ct 2102; 48 L Ed 2d 710 (1976)[1], not, as the Michigan Court of Appeals has done, with a studied purpose to avoid the ICWA's mandates.

The Michigan Court of Appeals also ignored crucial documentary information that absolutely established Linda Davis' right to regain custody under 25 USC §1913(b). Petitioner first filed on December 11, 2000 a handwritten motion in the Iosco County (Michigan) family court—where limited guardianship of respondents over Jewel was initially created with petitioner's consent—*expressly demanding return of Jewel to her custody* (Pet. Apx. 53a-54a), and additionally invoked her federal rights under 25 USC §1913(b) in a May 11, 2001 circuit court motion for restoration of custody (Pet. Apx. 55a-57a). Given the Michigan Court of Appeals' focus on the timing of respondents' filing of their Motion for Custody on April 12, 2001 (Pet. Apx. 16a ff), and that court's Footnote 2 (Pet. Apx. 4a), which reflects that it overlooked or deliberately ignored this documentary record (despite the

[1] "[W] e must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 655 n. 7, 96 S.Ct. 1793, 1797, 48 L.Ed.2d 274 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918). See *Choate v. Trapp,* 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912); *Antoine v. Washington,* 420 U.S. 194, 199-200, 95 S.Ct. 944, 948-949, 43 L.Ed.2d 129 (1975)."

determination (Pet. Apx. 18a) that the probate court record is properly part of this appeal from *circuit* court[2]), it is inexplicable how the Michigan Court of Appeals could so completely overlook these controlling and repeatedly referenced exhibits, which established that *Linda Davis had repeatedly invoked her absolute federal right under 25 USC §1913(b) to withdraw her initial voluntary consent to the limited guardianship and require the return of Jewel to her custody.* 25 USC §1913(b) provides (emphasis added):

> (b) Foster care placement; withdrawal of consent
> **Any parent or Indian custodian may withdraw consent to a foster care placement under State law** ***at any time*** and, **upon such withdrawal, the child** ***shall be returned*** **to the parent or Indian custodian.**

In non-Michigan courts, the statute means exactly what it says. *In re Adoption of K.L.R.F.*, 356 Pa Super 555, 562-563; 515 A2d 33, 37 (1986), appeal granted 514 Pa 624; 522 A2d 50, appeal granted 514 Pa 625; 522 A2d 50, appeal dismissed 516 Pa 520; 533 A2d 708; *Matter of Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz 202, 207; 635 P2d 187, 192 (Ariz App, 1981). Yet 25 USC §1913(b) is entirely ignored in the Michigan Court of Appeals' opinion[3].

[2] Michigan has recently instituted a family division of circuit court, which possesses both the traditional jurisdiction of a circuit court and the jurisdiction formerly exercised by the juvenile division of probate court. Mich Comp Laws §§600.1001 *et seq.* In any event, the Probate Court *record* (as opposed to proceedings not transcribed and filed with the Clerk of the Probate Court) would be a proper subject for judicial notice, *People v Snow*, 386 Mich 586, 591; 194 NW2d 314 (1972), which is why, without objection, Pet. Apx. I was properly attached to Linda Davis' (Michigan) Brief on Appeal, and its relevance and verisimilitude were never challenged.

[3] Likewise, without explanation or citation of authority, the Michigan Court of Appeals' treated Linda Davis' motion in circuit court, filed May 11, 2001, as somehow inadequate to invoke Ms. Davis' rights under 25 USC §1913(b), although acknowledging that the ICWA imposes no formal requirements for the making of such a demand. Both the circuit and

From December 11, 2000 forward, the Joneses' continued custody of Jewel was therefore in violation of controlling federal law, and could not serve as the basis for bootstrapping them into asserting an existing valid custodial placement in avoidance of the requirements of 25 USC §1911(b). Pursuant to 25 USC §1913(b), respondents were legally bound to return Jewel from and after December 11, 2000; the Michigan judiciary should have recognized that petitioner's superior *federal* rights were first in time.

Petitioner had appealed to the Michigan Court of Appeals by right a June 7, 2002 order (Pet. Apx. 21a ff) of the Iosco Circuit Court, which granted respondents' ("the Joneses") request for custody of then 4-year old Jewel.

The same circuit court order also limits the custodial rights of Timothy Beveridge, Jewel's natural, non-Indian father, as well as Ms. Davis' ex-husband, and Carolyn Jones' adoptive stepson by a previous marriage. Mr. Beveridge appeared *inops consilii* and supported Linda Davis' request for termination of the limited guardianship and restoration of full custodial rights to Jewel. (Mr. Beveridge also attended oral argument in the Michigan Court of Appeals and supported Ms. Davis' appeal.)

In its findings of fact from the bench on May 6, 2002 (Pet. Apx. 30a ff), the circuit court found all the parental candidates more or less flawed. While there was evidence which would support a finding that Ms. Davis, in a vacuum, might be a less desirable custodial parent for Jewel than the Joneses, this case does not arise in a vacuum. Ms. Davis is Jewel's natural mother, has successfully raised one adult daughter, and is success-fully rearing three other minor children (Pet. Apx. 70a). The circuit court, although critical

probate court motions were independently sufficient under 25 USC §1913(b) to instantly terminate respondents' attempts to gain custody.

of Linda Davis in a number of respects, nonetheless granted her *extensive unsupervised* parenting time with Jewel—every Thursday from 6:00 p.m. until 6:00 p.m. Sunday, alternating weekends and holidays, and 2 full weeks in the summer (Pet. Apx. 22a). *Thus, that the circuit court manifestly does not deem Linda Davis an unfit parent, but merely a moderately less desirable custodial parent.* In its findings and ruling, the circuit court also totally ignored the fact that both Linda Davis and Jewel Beveridge are registered members of the Saginaw Chippewa Indian tribe.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit began as a simple divorce case with the filing of Linda Davis' complaint on September 17, 1998. Divorce was granted by order of May 10, 2000.

While the divorce action was pending, Linda Davis was arrested on a charge of felonious assault against then-husband Timothy Beveridge. While in custody, Linda Davis voluntarily consented to the appointment of her then-in laws, Richard and Carolyn Jones, as limited guardians of Jewel (Order Appointing Limited Guardian dated November 29, 1999, Pet. Apx. 46a, and supporting petition, Pet. Apx. 48a, 51a). Other relatives or friends took charge of Ms. Davis' other children.

At preliminary examination, the prosecutor's motion to dismiss the assault charge against Linda Davis was granted by the Michigan district court (TR II, pp. 31-34). Linda Davis then sought to regain custody of Jewel (Pet. Apx. 53a-54a) on Dec. 11, 2000 and May 11, 2001, but respondents' petitioned for custody on April 12, 2001. After a trial focusing on state law issues (summarized in Pet. Apx. 73a-88a), the circuit court entered its findings from the bench (Pet. Apx. 30a-44a) and granted respondents' petition, (Pet. Apx. 21a-29a) focusing exclusively on state law grounds (the "best interests

of the child" under Mich Comp Laws §722.23), correlatively ignoring the ICWA and giving no shrift whatever to Linda Davis' constitutional status as natural parent.

REASONS FOR GRANTING THE PETITION

The Indian Child Welfare Act is an important federal statute designed to protect the cultural integrity of American Indian families and tribes. This Court has given plenary review to questions arising under the ICWA in only two cases, *Bryan v Itasca Co, Minnesota*, 426 US 373; 96 S Ct. 2102; 48 L Ed 2d 710 (1976) and *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30; 109 S Ct 1597; 104 L Ed 2d 29 (1989), and thus has not addressed the ICWA for over fourteen years. Lower federal courts are fairly excluded from involvement in custody issues, because most domestic relations and child custody litigation occurs in the state courts and, being civil rather than criminal, is not subject to collateral federal review. The decision in this case by the Michigan judiciary is also at odds with application of the ICWA in other states.

As this case demonstrates, when this Court remains aloof from regularly upholding the important federal policies reflected in 25 USC §1901(3) (Pet. Apx. 89a), state judiciaries tend to elevate their own state's policies concerning child welfare above Congress' pronouncement on the subject. Then Indians like petitioner, who have a historical special relationship to the federal government, 25 USC §1901(2) (Pet. Apx. 89a), must turn to this Court for redress.

Likewise, although this Court held in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000) that natural parents' custodial rights can only be divested in favor of third parties if due consideration is given to their constitutional discretion to make reasonable child-rearing choices, here the Michigan judiciary has rendered that ruling

a dead letter. Again, review by this Court is the only avenue to protect petitioner's important federal constitutional rights.

Issue I: The Iosco (Michigan) circuit court exceeded its jurisdiction and violated the Indian Child Welfare Act (25 USC §§1901 *et seq.*)[4] by
A. failing to immediately restore full physical and legal custody to Linda Davis as required by 25 USC §1913(b) when, prior to and during trial (TR II, p.46), Linda Davis, an Indian mother, expressed her desire to terminate the voluntarily-created limited guardianship and regain full physical and legal custody of Jewel Davis, an Indian child;
B. acting without jurisdiction in violation of 25 USC §1920 by conducting a custody proceeding, where the limited guardians retained custody of the Indian child after the Indian mother had expressed a desire to regain her custodial rights;
C. failing to require the limited guardians to notify the Saginaw Chippewa Indian Tribe of this foster care placement proceeding and of the Tribe's right to intervene under 25 USC §1912(a), which omission created a jurisdictional defect in all further proceedings;
D. failing to require, pursuant to 25 USC §1912(d), the limited guardians to introduce qualified expert testimony to establish that active efforts had been made to avoid the breakup of an Indian family;
where no finding was made that custody with the Indian mother would likely cause serious physical or emotional damage to the child (to the contrary, the circuit court granted the Indian mother liberal and unsupervised parenting time three days per week, two weeks during the summer, and alternate holidays).

ISSUE PRESERVATION

[4] Relevant provisions of the Indian Child Welfare Act are reproduced in Appendix O per Supreme Court Rule 14.1(f).

The record reflects that the ICWA was raised and addressed on the record at trial (TR III, pp. 31-36), which both sufficiently presented the issue and preserved the issue for appeal under state law. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). The circuit court acknowledged that the child is receiving "Indian benefits" (TR 5/6/02, p. 59) and that Linda Davis tribal court dealings established her status as an Indian (TR 4/26/02, p. 60). In any event, a Michigan court is empowered to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and resolved. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999).

The Michigan Court of Appeals opined that because, at a pretrial hearing, the circuit judge instructed Ms. Davis' trial counsel to submit a brief on the issue of the impact of the ICWA, the failure to submit a brief waived such issues. That was a clear mischaracterization of the trial judge's directive; the trial judge instructed petitioner's counsel to brief the matter only "[i]if you're contesting it in advance" of trial. (TR 2/15/04, p. 4, Pet. Apx. 67a). Ms. Davis was satisfied to obtain a ruling at the close of trial rather than in advance of trial, and no brief was thus required. Thus, there is no need to address whether the Michigan Court of Appeals' procedural assertion might constitute an "independent and adequate state procedural ground" for sustaining the decision below. *Cf. Sullivan v Little Hunting Park, Inc*, 396 US 229, 233-234; 90 S Ct 400; 24 L Ed 2d 386 (1969)[5].

Moreover, the ICWA is controlling federal law; its application is not dependent on the filing of a written brief

[5] Moreover, no order requiring a brief under any circumstances was ever entered, and since under Michigan law courts speak only through their written orders, *Tiedman v Tiedman*, 400 Mich 571, 577 n. 4; 235 NW2d 652 (1977), this request by the trial judge was merely precatory and not mandatory, and certainly could not limit Linda Davis' right to present this clearly preserved federal issue on appeal.

in advance of any particular stage of trial. As the Michigan Court of Appeals itself has repeatedly held, "the trial court was bound to follow the law, notwithstanding the fact that it was not called to the court's attention." *People v Glover*, 47 Mich App 454, 458; 209 NW2d 533 (1973); *White v North Oakland Med Ctr* (Mich App No. 199443, March 4, 1998), slip op p 2. Here, of course, the ICWA was called to the trial court's attention during trial, (Pet. Apx. 59a-63a) as well as before trial; nothing further was required to preserve these issues for appeal even under state law. *Adam v Sylvan Glynn Golf Course, supra*, 197 Mich App at 98.

Moreover, given the mandate of 25 USC §1914[6], petitioner could properly raise any such issue for the first time on appeal; Congress has expressly dispensed with such procedural demands as preservation of issues in cases governed by the ICWA. Indeed, 25 USC §1914 provides grounds for attacking even final adjudications, where, as here, the notice requirements of §1912(a) have not been fulfilled. *Mississippi Band of Choctaw Indians v Holyfield, supra*, 490 US at 39 ff.

ANALYSIS

This issue presents a question as to the application of federal statutory law. Pursuant to US Const, art 1, §8, cl. 3, Congress has plenary power to regulate relationships with the Indian tribes. Pursuant to that constitutional delegation

[6] 25 USC §1914 provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

of authority, Congress has enacted the Indian Child Welfare Act (ICWA), 25 USC §§1901 *et seq.*

The ICWA includes a Congressional statement of purpose and intent, which declare as follows:

> 25 USC §1901
> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds–
> (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have

often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 USC §1902
The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

The federal law is thus by its explicitly designed and intended to prevent statute judiciaries from breaking up Indian families except in compelling and egregious cases.

It is undisputed that Linda Davis is an Indian, and her minor daughter, Jewel Davis, is an Indian child. 25 USC §1903(3) and (4)[8]. Both are registered members of the Saginaw Chippewa Indian Tribe. Carolyn Jones[9]

[8] 25 USC §1903(3) and (4) provide:
For the purposes of this chapter, except as may be specifically provided otherwise, the term–
(3) "Indian" means any person who is a member of an Indian tribe . . .;
(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]

[9] While Carolyn Jones claimed to be a fifth generation descendant of Sacagawea (making her at best $1/64^{th}$ Indian), she did not claim to be a registered member of an Indian tribe or eligible to become one. Moreover, Sacagawea was a Shoshone, not a Chippewa, and thus Mrs. Jones cannot

acknowledged that Jewel is eligible for health insurance through the Tribe, and even the Joneses' trial counsel acknowledged that Linda Davis is of Indian heritage (TR 4/22/02, p. 158). The Saginaw Chippewa Tribe's recognition of both Linda Davis and Jewel Beveridge as tribal members, 25 USC §1903(3) and (4)—is *conclusive* of their Indian status; Indian tribes are arbitrators of their own membership for purposes of the Indian Child Welfare Act. *In Interest of JW*, 498 NW2d 417, 422 (Iowa App,.1993)[9].

It follows that Linda Davis, as to Jewel Beveridge, is an "Indian custodian" as defined by 25 USC §1903(6):

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child[.]

It is undisputed that, as a result of the divorce judgment, Linda Davis had sole physical and legal custody of Jewel as between herself and Timothy Beveridge. Respondents, on the other hand, cannot satisfy the statutory definition, because neither is an "Indian person."

Linda Davis and Mr. Beveridge are similarly the only persons involved in this case who meet the Congressional definition of "parent" set forth in 25 USC §1903(9):

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has

qualify as an alternative (Indian) custodian, inasmuch as the ICWA looks to tribal affiliation, not mere Indian blood. 25 USC §1903(5). Nor does Mrs. Jones claim any knowledge or ability to raise Jewel in accordance with the unique values of Indian culture. 25 USC §1902.

[9] Tribal enrollment is a common way to establish Indian status, but not exclusive; *enrollment is a sufficient but not a necessary condition for Indian status. Nelson v Hunter*, 132 Or App 361; 888 P2d 124, 125-126 (1995).

lawfully adopted an Indian child, including adoptions under tribal law or custom.

However Michigan law characterizes the proceedings below, Congress, which has plenary power over Indian matters under the commerce clause, US Const, Art I, §8, cl. 3, and whose enactment is the "supreme law of the land," US Const, Art VI, defines this custody dispute between an Indian mother and non-Indian third parties over an Indian child as a "child custody proceeding" involving "foster care placement". 25 USC §1903(1)(i) provides (emphasis added):

> For the purposes of this chapter, except as may be specifically provided otherwise, the term—
> (1) "child custody proceeding" shall mean and include—
> (i) **"foster care placement"** which **shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in** a foster home or institution or **the home of a guardian** or conservator **where the parent or Indian custodian cannot have the child returned upon demand**, but where parental rights have not been terminated[.]

Here, respondents being non-Indians, continued placement with them over Linda Davis' protest is a "foster care placement". *In re Custody of A.K.H.*, 502 NW2d 790, 793 (Minn App, 1993); *Matter of Guardianship of Ashley Elizabeth R.*, 116 NM 416; 863 P2d 451 (NM App, 1993), notwithstanding, to some extent (counting adoptive step-grandparents as part of an "extended family") the dispute is an intra-family one. *A.B.M. v. M.H.*, 651 P2d 1170, 1173-1176 (Alaska 1982), *cert denied*, 461 US 914; 103 S Ct 1893; 77 L Ed 2d 283 (1983); *In re Q.G.M.*, 808 P2d 684, 688 (Okla.1991); *In re Custody of A.K.H.*, 502 NW2d 790, 794-795 (Minn App 1993).

The Michigan Court of Appeals attempted to circumvent this federal statute by opining that, because there was already a limited guardianship in place, and because the placement with the Joneses is not temporary, this case does not involve a "foster care placement." The ICWA is to be construed and applied in favor of Indians, *Bryan v Itasca Co, Minnesota, supra,* 426 US at 392[10], not, as the Michigan Court of Appeals has done, with a studied purpose to avoid the ICWA's mandates.

As the Pennsylvania appellate court, addressing the interplay between the definitional provision in 25 USC §1903(1)(i) and §1913(b) observed in *In re Adoption of K.L.R.F, supra,* 356 Pa Super at 562-563:

> We cannot help but notice that these two provisions are contradictory; one provides that consent can be withdrawn at any time with regard to a foster care placement; and the other just as explicitly states that in a foster care placement, the parent or Indian custodian cannot have the child returned upon demand. We need not resolve this inconsistency in the case before us. However, we note that if §1903 is in fact what the legislature intended the definition of "foster care placement" to be, then § 1913(b) can be given no effect because a foster care placement by definition precludes the

[10] "[W] e must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n. 7, 96 S.Ct. 1793, 1797, 48 L.Ed.2d 274 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be **liberally construed, doubtful expressions being resolved in favor of the Indians.**' *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918). See *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912); *Antoine v. Washington*, 420 U.S. 194, 199-200, 95 S.Ct. 944, 948-949, 43 L.Ed.2d 129 (1975)." (Emphasis supplied.)

possibility of a parent being entitled to the return of the child upon demand. * * *

> We construe § 1913(b) as applying to situations such as the instant case, wherein a *consensual* foster care placement was made in the first place and there is no inherent bar to a withdrawal of the consent. In so doing, we are guided by the presumption that the drafters of the statute did not intend a result that is absurd or impossible of execution, *McKinney v. Board of Commissioners of Allegheny County,* 488 Pa. 86, 410 A.2d 1238 (1980); and the presumption that the drafters did intend the entire statute to be effective and certain. *In re Borough of Lemoyne,* 176 Pa.Super. 38, 107 A.2d 149 (1954). Further, statutes enacted to benefit American Indians must be liberally construed with all doubts resolved in favor of the Indian seeking its benefits or protections. *Preston v. Heckler,* 734 F.2d 1359 (9th Cir.1984); *Bryan v. Itasca Co., Minnesota,* 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). With these principles in mind, we cannot conclude that the drafters of the Act intended § 1903(1)(i) and § 1913(b) to interact in such a way as to nullify the withdrawal of consent provision in § 1913(b). Therefore, we hold that the definitional language in § 1903(1)(i) has no effect upon an Indian parent's ability to demand a return of the child pursuant to § 1913(b).

In the present case, likewise, respondents were understood from the outset to have only temporary custody, so there is no tension between the statutory sections.

The Michigan Court of Appeals thus baldly but erroneously asserted in Part I, Footnote 6 of its opinion (Pet. Apx. 13a) that because Jewel was already in the temporary custody of the Joneses, this was not a "foster care

placement" proceeding as defined in §1903(1)(i) and thus that the ICWA simply has no application. Again, citing no authority to support its creation of an enormous loophole in the coverage of the ICWA[11], the Michigan Court of Appeals has gone out of its way to deny Linda Davis and her daughter Jewel, enrolled members of the Chippewa Tribe, the Congressionally-mandated protective benefits of the ICWA, which is the antithesis of the Michigan judiciary's duty toward an Indian parent. Since this dispute concerns the continued placement of Jewel with her limited guardians, **it also comes within the mandate of 25 USC §§1911(b) and 1912(a)** that preclude adjudication of a custody petition without either ceding jurisdiction to the Tribe or at least notifying the tribe of the proceedings. *In re Custody of AKH, supra,* 502 NW2d at 792-793[12]. In other cases

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[11] Following the Michigan Court of Appeals' opinion, to circumvent the ICWA one need only induce an Indian parent, by whatever means, to initially consent to a limited guardianship; then, whatever happens thereafter (including, as here, the Indian parent futilely demanding return of the child per §1913(b)), the ICWA is deemed inapposite. It is just such a narrow construction of the protective ambit of the ICWA that this Court refused to entertain as conceivably consistent with Congressional intent in *Mississippi Bank of Choctaw Indians v Holyfield, supra,* 490 US at 46 n. 20:

> FN20. Nor is it inconceivable that a State might apply its law of domicile in such a manner as to render inapplicable § 1911(a) even to a child who had lived several years on the reservation but was removed from it for the purpose of adoption. Even in the less extreme case, a state- law definition of domicile would likely spur the development of an adoption brokerage business. Indian children, whose parents consented (with or without financial inducement) to give them up, could be transported for adoption to States like Mississippi where the law of domicile permitted the proceedings to take place in state court.

[12] There, the Indian child had been in her *Indian* grandmother's custody when the grandmother sought sole legal and physical custody; the Minnesota Court of Appeals concluded that the definition of "foster care placement" in 25 USC §1903(1)(i) was intended to apply even to an intra-*Indian* family dispute (here, respondents are not Indians, while Linda

even the Michigan Court of Appeals has recognized the compulsion of the ICWA that no infringement of parental custodial rights *vis à vis* an Indian child is valid unless the tribe has first been properly notified. *Matter of Claybron* (Mich App No. 247223, Nov. 20, 2003).

The ICWA must be complied with in any Indian child custody proceedings. *Matter of K.A.B.E.*, 325 NW2d 840, 842 (SD, 1982). The sole exception is where applicable state law provides *greater* protection to the Indian family unit. 25 USC §1921[13]. The ICWA is to be strictly construed and applied **in favor of Indians.** *Mississippi Choctaw Indians v Holyfield, supra,* 490 US at 50-51. *Bryan v Itasca Co, Minnesota, supra,* 426 US at 392.

A. The Michigan judiciary erred in failing to immediately restore full physical and legal custody to Linda Davis when, prior to and during trial, petitioner Linda Davis, an Indian mother, expressed her desire to terminate the limited guardianship and regain full physical and legal custody of Jewel Beveridge, her Indian child.

Initially, Linda Davis voluntarily agreed to allow Carolyn and Richard Jones to become limited guardians of Jewel[14]. Even if it was somehow not clear from petitioner's

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Davis and Jewel Beveridge *are* Indians), and thus, on remand, with the tribe participating, the trial court was to accord the Indian parents and the tribe the protective benefit of the ICWA in defending the proceeding.

[13] 25 USC §1921 provides:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

[14] Nonetheless, there is no judicial certification that the terms and consequences of that consent were fully explained to Linda Davis in detail and fully understood by her, **thus rendering even the apparently**

Dec. 11, 2000 and May 11, 2001 motions to regain custody (Pet. Apx. 53a and 55a),[15] petitioner's trial testimony that she wished to have her full custody rights restored (Pet. Apx. 99a) should have immediately ended the proceedings pursuant to 25 USC §1913(b) (emphasis added):

> (b) Foster care placement; withdrawal of consent
> **Any parent or Indian custodian may withdraw consent to a foster care placement under State law *at any time* and, upon such withdrawal, the child *shall be returned* to the parent or Indian custodian.**

This federal statute is unambiguous, and means exactly what it says. *In re Adoption of K.L.R.F., supra,* 356 Pa Super at 563; *Matter of Appeal in Pima County Juvenile Action No. S-903, supra,* 130 Ariz at 207; 635 P2d at 192.

Appeal to the Michigan Court of Appeals and Michigan Supreme Court was one way for Linda Davis to insist that her rights under the ICWA be honored per 25 USC §1914 :

> Any Indian child who is the subject of any action for foster care placement * * * under State law, **any parent or Indian custodian from whose custody**

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consensual initial establishment of the limited guardianship invalid under 25 USC §1913(a), which provides (emphasis supplied):

> a) Consent; record; certification matters; invalid consents
> **Where any parent or Indian custodian voluntarily consents to a foster care placement * * *, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. * * *.**

[15] Thus, the Michigan court's assertion that petitioner made no effort to terminate the limited guardianship prior to the filing of her circuit court motion simply willfully ignores the unimpeachable documentary record (Pet. Apx. 53a-54a).

such child was removed, and the Indian child's tribe **may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated** <u>any provision</u> **of sections 1911, 1912, and 1913 of this title.**

The Michigan appellate courts, as part of the state's "one court of justice", Mich Const 1963, art 6, §1, are courts of competent jurisdiction for this purpose, Const 1963, art 6, §§1 and 4; Mich Comp Laws §§600.217, 600.219; Mich Court Rules 7.301(A)(6) and (7) and 7.316(A)(7), and Linda Davis had proper standing to invoke the ICWA on appeal to enforce her rights thereunder. *In re Kreft*, 148 Mich App 682, 687-689; 384 NW2d 843 (1986).

From and after December 11, 2000, when petitioner first invoked her rights under 25 USC §1913(b), respondents had unclean hands, which should have closed the circuit court's doors to their petition. *Precision Instrument Mfg Co v Automotive Maintenance Machinery Co*, 324 US 806, 814; 65 S Ct 993, 89 L Ed 1381 (1945). Equity respects the principle that the party that is first in time is first in right, *Judson v. Corcoran*, 17 How (58 US) 612, 614; 15 L Ed 231 (1854); *Salem Trust Co v Manufacturers' Finance Co*, 264 US 182, 192-193; 44 S Ct 266; 68 L Ed 628, 31 ALR 867 (1924). Here, the Joneses, pursuant to 25 USC §1913(b), were legally bound to return Jewel from and after December 11, 2000; the Michigan judiciary should have dismissed respondent's custody request and also have recognized that this established Linda Davis' superior equitable rights as first in time.

Note that even if the requirements for state interference with custody of this Indian child had been otherwise fulfilled, it would still violate the ICWA to grant custody to respondents, who are non-Indians, where qualified Indians, *e.g.* Rebecca Davis (petitioner's adult daughter), are available to accept that responsibility. 25 USC §1915(b). To that end,

the circuit court would also have had to investigate the prevailing social and cultural standards of the Saginaw Chippewa Indian Tribe. 25 USC §1915(d) and (e)[16].

B. The circuit court acted without jurisdiction in violation of 25 USC §1920 by conducting a custody proceeding where the limited guardians retained custody of the Indian child after the Indian mother had expressed a desire to regain her custodial rights.

In what may be denominated the ICWA's "clean hands" provision, Congress has decreed that no person in the position of respondents may even be heard to argue for custody where they have refused to restore an Indian child to its Indian parent upon request. 25 USC §1920 provides (emphasis added):

> **Where any petitioner in an Indian child custody proceeding before a State court** has improperly removed the child from custody of the parent or Indian custodian or **has improperly retained custody after a** visit or other **temporary relinquishment of custody, the court** ***shall decline jurisdiction*** **over**

[16] Those subsections of 25 USC §1915 provide:

> (d) Social and cultural standards applicable
> The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

> (e) Record of placement; availability
> A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

such petition and *shall forthwith return the child to his* parent or *Indian custodian* unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

Again, the Michigan judiciary simply ignored this federal statutory directive, obviously having no satisfactory answer to the federal mandate, but being determined to act according to the dictates of what they regarded as their unfettered discretion, as though this case involved a non-Indian child and non-Indian parent.

Note that the circuit court did not purport to find that returning Jewel to the custody of Linda Davis would "subject the child to a substantial and immediate danger or threat of such danger." To the contrary, the circuit court allowed Linda Davis unsupervised parenting time every Thursday through Sunday, alternate holidays, and two weeks in the summer (Pet. Apx. 22a); that is wholly inconsistent with any intimation that restoring full physical and legal custody to Linda Davis would expose Jewel to "substantial and immediate danger" per 25 USC §1920.

The circuit court found only that, using the state-law "best interest" factors of Mich Comp Laws §722.23(a)-(*l*), the Joneses are the better choice to have custody of Jewel. But that is irrelevant; Congress has determined that such relativistic comparisons, while perhaps suitable in ordinary custody disputes, are not allowed because they threaten Indian culture and the continued existence and integrity of Indian tribes. 25 USC §1901(3)-(5)[17]. Congress accordingly

[17] 25 USC §1901 provides (emphasis supplied):

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

established a federal standard requiring proof surmounting the statutory threshold and satisfying the "beyond a reasonable doubt" standard, 25 USC §1912(f) – a standard to which the circuit court never adverted[18].

C. The circuit court erred in failing to require the limited guardians to notify the Saginaw Chippewa Indian Tribe of this foster care placement proceeding and of the Tribe's right to intervene, and that omission created a jurisdictional defect in all further proceedings.

25 USC §1912(a) provides (emphasis supplied):

> (a) Notice; time for commencement of proceedings; additional time for preparation
> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian

> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
> (3) that there is **no resource that is more vital to the continued existence and integrity of Indian tribes than their children** and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
> (4) that **an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public** and private **agencies and** that an **alarmingly high percentage of such children are placed in non-Indian foster** and adoptive **homes** and institutions; and
> (5) that **the States**, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, **have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.**

[18] Even if 25 USC §1912(f) does not apply, 25 USC §1912(e) requires proof by clear and convincing evidence to bring into play any of the federal exceptions.

> child is involved, the party seeking the foster care placement of * * * an Indian child **shall notify the** parent or Indian custodian and the **Indian child's tribe,** by registered mail with return receipt requested, **of the pending proceedings** and of their right of intervention. * * * **No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice** by the parent or Indian custodian **and the tribe or the Secretary** * * *.

In this respect the Indian Child Welfare Act is jurisdictional and failure to give adequate notice to tribes divests state courts of jurisdiction to terminate parental rights. *In Interest of J.W., supra,* 498 NW2d at 419; *Interest of HD,* 11 Kan App 2d 531, 538-539; 729 P2d 1234, 1241 (1986); *Matter of N.A.H.,* 418 NW2d 310, 311 (SD, 1988); *In re Junious M,* 193 Cal Rptr 40; 144 Cal App 3d 786, 792 ff (1983). *See also* 25 USC §1914.

One reason for this rigid application of the notice requirement is that, without tribal participation, a court considering a custody dispute tends to get its most important information from state agencies. The deficiency of the resulting adjudication then follows for the reasons identified in *In re Custody of A.K.H., supra,* 502 NW2d at 795:

> While a home study could be done by the county social services department, many social workers are ignorant of Indian cultural values and social norms in judging the fitness of a particular family, and therefore make decisions wholly inappropriate in the context of Indian family life. H.R.Rep. No. 95-1386, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532. Contributing to this problem has been the failure of state agencies to take into account the special problems and circumstances of Indian families. *Id.* at 7541. Non-Indian social workers

> cannot reasonably be expected to evaluate a proposed custodian from Indian cultural perspectives, and therefore input from the Indian tribe is desirable when a state court makes a custody decision involving Indian children.

The ICWA requires notice whenever a state court has reason to believe that a child is an Indian child. *In re Kahlen W,* 285 Cal Rptr 507; 233 Cal App 3d 1414, 1422 (1991).

The Federal Bureau of Indian Affairs has issued "Guidelines for State Courts; Indian Child Custody Proceedings," covering the notice obligation, among other ICWA issues. 44 Fed Reg 67,584 *et seq.* (Nov. 26, 1979). The Guidelines set forth five circumstances where the Bureau of Indian Affairs concludes that a state court "has reason to believe a child involved in a child custody proceeding is an Indian": (1) where the court is directly informed the child is an Indian child; (2) where a public or licensed private agency has information which suggests that the child is an Indian; (3) where the child states that he or she is an Indian; (4) where the residence or domicile of the child, his or her biological parents or an Indian custodian is known or shown to be a "predominantly Indian community"; and (5) where an officer of the court has knowledge that the child may be an Indian child. Guideline B.1.(c)(i)-(v), 44 Fed Reg 67586 (Nov. 26, 1979). The list is intended to be non-inclusive. The commentary to the Guidelines states that "the best source of information on whether a particular child is Indian is the tribe itself." Commentary to Guideline B.1. It further notes that list of circumstances "is not intended to be complete, but it does list the most common circumstances." *Id.*

Here, the Tribe recognizes the mother and child as Indians, asserting criminal jurisdiction over the mother for off-reservation conduct, and providing stipends to both mother and child, as well as making health care coverage

available to them. Additionally, counsel for the Joneses acknowledged the Indian status of mother and child at trial (TR 4/22/02, p. 158). It was therefore jurisdictional error to fail to issue the required notice the requisite period in advance of any hearing. *Matter of Claybron* and §1914, *supra*.

D. The Michigan courts erred in failing to require respondents to introduce qualified expert testimony to establish that active efforts had been made to avoid the breakup of an Indian family pursuant to 25 USC §1912(d).

The Michigan courts further erred in failing to require the limited guardians to introduce evidence that active efforts had been made to avoid a breakup of an Indian family. 25 USC §1912(d) provides:

> (d) Remedial services and rehabilitative programs; preventive measures
> Any party seeking to effect a foster care placement of * * * 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.

No evidence of such *prerequisite* active efforts was adduced by the respondents. To the contrary, petitioner produced the Protective Services worker, Mr. Philburn, who testified that Linda fulfilled all the requirements of the parenting plan to which she agreed (TR 4/22/03, p. 235); **there was no contrary testimony.** Without such proofs, the circuit court erred in going forward with the hearings. *State ex rel Juvenile Dept of Multnomah County v Charles*, 70 Or App 10, 14-15; 688 P2d 1354, 1359 (1984), review allowed 298 Or 427; 693 P2d 48, review dismissed 299 Or 341; 701 P2d 1052.

Indeed, respondents would have had to produce experts possessing the special qualifications and specialized

knowledge of social or cultural aspects of Indian life to begin to meet their burden under this statute. 25 USC §1912(e); *In re Morgan*, 180 Mich App 594, 603 n. 3; 364 NW2d 754 (1985); *State ex rel Juvenile Dept of Multnomah County v Charles, supra*, 70 Or App at 17; 688 P2d at 1359-1360; *Matter of N.L.*, 754 P2d 863, 868 (Okla, 1988). A qualified expert must not merely testify as a witness, but must offer qualified expert testimony suggesting that custody with the Indian parent would be likely to result in serious emotional or physical damage to the child. *In re Interest of C.W.*, 239 Neb 817, 823-824; 479 NW2d 105, 111 (1992).

The guidelines for state courts promulgated by the Federal Bureau of Indian Affairs assist in defining a qualified expert witness. 44 Fed Reg 67,584, at 67,593 (1979).

> D.4 Qualified Expert Witnesses
> (a) Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.
> (b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings.
> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
> * * *

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

25 USC §1912(e) provides (emphasis added):

(e) Foster care placement orders; evidence; determination of damage to child
No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, 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.

Expert testimony is an absolute prerequisite to such a petition. *Matter of N.L., supra.*

II. The Michigan court erred in failing to accord Linda Davis' constitutional right as natural parent to make reasonable decisions as to the care and custody of her child appropriate weight and importance.

ISSUE PRESERVATION

This 14th Amendment (Pet. Apx. 97a) issue was raised by Linda Davis' at trial (Pet. Apx.. 63a-65a) and on appeal.

ANALYSIS

The Constitution reposes ordinary childrearing decisions to custodial natural parent(s); judicial intervention requires proof the parent's choices are harmful to the child. *Troxel v Granville,* 530 US 57, 66; 120 S Ct 2054; 147 L Ed 2d 49 (2000)

Such judicial intermeddling in the custody of a natural parent constitutes an unconstitutional interference with the fundamental liberty interest in childrearing, *Troxel v Granville, supra.* The mere fact that respondents, on a point by point comparison using state-law standards, might slightly outshine petitioner is simply inadequate to the task at hand. Respondents are interlopers; awarding third parties custody on a mere colorable showing they might do better parenting stands the constitutional order on its head. The circuit court never mentioned the applicable constitutional principle in its findings, and thus did not give it due weight.

As this Court recognized in *Troxel* (emphasis added):

Accordingly, **so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family** to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. **The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters' best interests. . . . * * * In effect, the judge placed on [the mother], the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. . . . The decisional framework** employed by the Superior Court directly **contravened the traditional presumption that a fit parent will act in the best interest of his or her child.** In that respect, **the court's presumption failed to provide any protection for [the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters.** * * * Needless to say, however, our world is far from perfect, and in it **the decision** whether such an

intergenerational relationship would be **beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.**

Here, the trial court made no finding that Linda Davis is an unfit parent; it merely concluded that respondents might be somewhat better parents. And, as already noted in another context, the fact that the circuit court thought it appropriate to grant Linda Davis unsupervised custody of Jewel every Thursday through Sunday, alternate holidays, and two weeks in the summer, belies any possibility that Linda Davis could be deemed "unfit." The findings made are constitutionally insufficient to justify awarding custody to third parties over the natural parent's objections, and require restoration of petitioners' full custodial rights.

CONCLUSION

For the foregoing reasons, Linda Davis respectfully prays that her petition for certiorari be granted, or alternatively that pursuant to Supreme Court Rule 16.1 that the Court summarily reverse the lower court orders in this cause and direct that full *and unfettered* legal and physical custody of Jewel Beveridge be restored to Linda Davis **forthwith** as mandated by 25 USC §1913(b) *inter alia.*

Respectfully submitted

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