

MEMORANDUM

To: Kate Fort & Neoshia Roemer
From: L. Clare Johnson
RE: Colorado ICWA Cases Annotated and Best Practices
Date: January 29, 2019

I. ICWA Annotated

25 U.S.C. § 1901: Congressional Findings

- *In re N.B.*, 199 P.3d 16 (Colo. App. 2007) (holding that failure of stepmother to show that active efforts were made to prevent breakup of Indian family precluded termination of mother's parental rights through stepparent adoption).
- *People In Interest of L.L.*, 2017 COA 38. (holding that (1) trial court was required to comply with notice requirements of Indian Child Welfare Act (ICWA) even though mother did not state that child was member of tribe or that mother was member of tribe).

25 U.S.C. § 1902: Congressional Declaration of Policy

- *People In Interest of M.V.*, 2018 COA 163 (§1902 establishes federal standards for child custody proceedings involving Indian children).

25 U.S.C. § 1903: Definitions

- *People ex rel. A.R.*, 2012 COA 195M (an “Indian child” as defined in 25 U.S.C. § 1903(4) is subject to ICWA in child-custody proceedings).
- *People ex rel. J.O.*, 170 P.3d 840 (Colo. App. 2007) (“parent” means “any biological parent ... of an Indian child.” 25 U.S.C. § 1903(9); An “Indian child” is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4)).
- *People In Interest of L.L.*, 2017 COA 38 ((1) ICWA establishes minimum federal standards for an “Indian child” involved in a “child custody proceeding.” 25 U.S.C. § 1903(1), (4) and (2) An “Indian child” means “any unmarried person who is under the age of eighteen and is either: (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]” 25 U.S.C. § 1903(4)).
- *In re N.B.*, 199 P.3d 16 (Colo. App. 2007) ((1)a “child custody proceeding encompasses “any action resulting in the termination of the parent-child relationship” and “any action resulting in a final decree of adoption.” 25 U.S.C. § 1903(1)(ii), (iv) (2001). Congress excepted only dissolution and delinquency proceedings from this broad definition of a “child custody proceeding” under the ICWA, (2) if a stepparent were to successfully adopt an Indian child, they would become an extended family member under the ICWA

definition. 25 U.S.C. § 1903(2), and (3) ICWA does not include any criteria for identifying what constitutes an Indian family).

- *B.H. v. People ex rel. X.H.*, 138 P.3d 299 (Colo. 2006) (Tribal membership is not defined by ICWA. Membership determinations are left up to the individual tribe. Tribes are the best sources of information regarding an individual's membership).
- *People ex rel. N.D.C.*, 210 P.3d 494 (Colo. App. 2009) (ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (2001); Each Indian tribe has the authority to decide who meets those criteria.).
- *People In Interest of K.G.*, 2017 COA 153 (ICWA applies to an action that may result in foster care placement, even if it ultimately does not.).
- *People In Interest of C.A.*, 2017 COA 135(Cites to definitions §§ 1903(1)(i)-(iv), 1903(4). Tribal membership is determined by the individual tribe.).
- *People ex rel. J.A.S.*, 160 P.3d 257 (Colo. App. 2007) (Cites to definition § 1903(4). Tribal membership is determined by the individual tribe. The Tribe's membership determination is conclusive and final).
- *People In Interest of R.L.*, 961 P.2d 606 (Colo. App. 1998) (Cites to definition 1903(4)).
- *People In Interest of I.B.-R.*, 2018 COA 75 (A proceeding to terminate parental rights is a separate child custody proceeding under ICWA).
- *People In Interest of A.D.*, 2017 COA 61 (Cites to definition § 1903(4), to show that minor is not an Indian child as defined under ICWA).
- *People In Interest of D.B.*, 2017 COA 139 (Child-custody proceedings under ICWA include any action that results in the termination of parental rights to an Indian child).
- *People In Interest of M.V.*, 2018 COA 163 ((1) ICWA also applies to an action that may result in foster care placement, even if it ultimately does not, (2) ICWA defines Indian child, but does not define tribal membership. Rather, membership is left to the province of each individual tribe).
- *In Interest of A.G.-G.*, 899 P.2d 319 (Colo. App. 1995) (Until the party asserting the applicability of the ICWA establishes, on the record, that the child meets one or both of these criteria of the definition of "Indian child," the ICWA is not applicable).
- *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994) (Enrolled members of the tribe satisfy the definition of "Indian child").
- *People In Interest of P.A.M.*, 961 P.2d 588 (Colo. App. 1998) (ICWA applies only to "eligible" tribes. The burden of proof is on the party asserting the ICWA is applicable).
- *People In Interest of L.M.*, 2018 COA 57M (Termination of parental rights is one type of child custody proceeding under ICWA . 25 U.S.C. § 1903(1)).
- *People ex rel. J.C.R.*, 259 P.3d 1279 (Colo. App. 2011) (The ICWA defines an "Indian child" as any unmarried person under the age of eighteen, who is either an Indian tribe member or eligible for membership and a member's biological child. 25 U.S.C. § 1903(4)).
- *In re People ex rel. A.R.Y.-M.*, 230 P.3d 1259 (Colo. App. 2010) (if the child is not eligible to enroll or is not enrolled, the ICWA does not empower the tribe to intervene. 25 U.S.C. § 1903(5)).

- *People in Interest of A.E.*, 749 P.2d 450 (Colo. App. 1987) (Until it is established on the record that the child meets one or both of these criteria, the ICWA is not applicable. The ICWA does not set forth requisite criteria for membership in an Indian tribe; instead, each Indian tribe has the authority to determine its membership criteria and to decide who meets those criteria. Although enrollment in an Indian tribe is probative of membership, it is not the sole means of establishing tribal membership, nor is it determinative).
- *People, Dept. of Social Services in Interest of A.E.V.*, 782 P.2d 858 (Colo. App. 1989) (a “child custody proceeding” includes “foster care placement,” “termination of parental right,” “preadoptive placement,” and “adoptive placement.” “Adoptive placements” are defined as “the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.” 25 U.S.C. 1903(1)(iv)).

25 U.S.C. § 1911: Indian tribe jurisdiction over Indian child custody proceedings

- *People ex rel. C.Z.*, 262 P.3d 895 (Colo. App. 2010) (“Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child” and requiring compliance with the ICWA in cases filed under the Colorado Children's Code when “filing party knows or has reason to believe that the child who is the subject of the proceeding is an Indian child”).
- *People In Interest of T.E.R.*, 2013 COA 73 (The tribal court, is the preferred jurisdiction, and in the absence of good cause, upon request of “[e]ither parent, the Indian custodian, or the Indian child's tribe” the state court must transfer jurisdiction to the tribe. Determining whether good cause exists is within the juvenile court's discretion. This determination must be made on a case-by-case basis after consideration of all of the circumstances. Review is limited to examining the record to determine whether substantial evidence supports the juvenile court's findings.).
- *People ex rel. N.D.C.*, 210 P.3d 494 (Colo. App. 2009) (Indian parents, Indian custodians, and the child's tribe have the right to petition the court to transfer the proceeding to the child's tribal court absent objection by either parent)
- *People ex rel. A.N.W.*, 976 P.2d 365 (Colo. App. 1999) (upon petition of a parent, the trial court is required “in the absence of good cause to the contrary” to transfer such proceeding to the jurisdiction of the tribe. The transfer is also subject to declination by the tribal court).
- *People In Interest of M.V.*, 2018 COA 163 (ICWA is a jurisdictional statute. Its provisions establish jurisdiction over child-custody proceedings involving Indian children).
- *Catholic Charities and Community Services of the Archdiocese of Denver, Inc., Matter*, 942 P.2d 1380 (Colo. App. 1997) (Although implicit in the order granting intervention is a determination that the child is an “Indian child,” the order does not reveal the basis of the court's decision not to apply the ICWA.).
- *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994) (even for an Indian child who lives off reservation, the tribal court is still the preferred jurisdiction under the Act absent a showing of “good cause” to the contrary.).
- *People in Interest of A.T.W.S.*, 899 P.2d 223 (Colo. App. 1994) (because the Indian child resides off the reservation, the state courts and the tribal courts share jurisdiction).

- *In re People ex rel. A.R.Y.-M.*, 230 P.3d 1259 (Colo. App. 2010) (if the child is not eligible to enroll or is not enrolled, the ICWA does not empower the tribe to intervene).
- *People, Dept. of Social Services in Interest of A.E.V.*, 782 P.2d 858 (Colo. App. 1989) (§ 1911(c) does not authorize the Tribe to intervene in adoption proceedings. The Court held that the Tribe lacks an interest by virtue of the ICWA which is sufficient to support a right of mandatory intervention under C.R.C.P. 24(a)(2).).
- *In re S.M.J.C.*, 262 P.3d 955 (Colo. App. 2011) (the common law concept of abandonment may be employed in this case to determine whether the child has been abandoned so as to change his domicile for the purpose of determining jurisdiction under the ICWA.).
- *In re J.C.T.*, P.3d 726 (Colo. App. 2007) (The probate court was within its power to instruct a GAL to seek permanent placement for the minor child. These actions did not constitute a de facto adoption proceeding within the exclusive jurisdiction of the juvenile court.).
- *People ex rel. S.R.M.*, 153 P.3d 438 (Colo. App. 2006) (The ICWA applies when the state seeks to place an Indian child in foster care and when the state seeks to terminate parental rights).

25 U.S.C. §1912: Pending court proceedings

- *People ex rel. A.R.*, 2012 COA 195M (A court may not terminate parental rights unless evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, establishes that the parent's continued custody of the child is likely to result in serious emotional or physical damage to the child.).
- *People ex rel. J.O.*, 170 P.3d 840 (Colo. App. 2007) (“the best source of information on whether a particular child is Indian is the tribe itself” and “tribal verification is preferred.” Though not binding, the Guidelines are considered persuasive.).
- *People In Interest of L.L.*, 2017 COA 38 (the federal ICWA statute is silent as to the particular standard of proof required for an adjudicatory hearing. The court rejects the argument that ICWA creates a heightened evidentiary standard.)
- *In re N.B.*, 199 P.3d 16 (Colo. App. 2007) (the active efforts requirement is not excused even if requiring such efforts may not further the best interests of an Indian child in a particular case. The burden of proving fulfillment of the active efforts requirement applies to private petitioners such as stepmother. We express no opinion whether a private petitioner must make those efforts directly.).
- *B.H. v. People ex rel. X.H.*, 138 P.3d 299 (Colo. 2006) (A state is required by ICWA to provide notice to the child's or its parent's tribe, or the Bureau of Indian Affairs if the tribe cannot be identified or located, whenever the court knows or has reason to know that an Indian child is involved. Under the “reason to know” or “reason to believe” standards, the state's obligation to notify potentially concerned tribes or the BIA necessarily arises preliminary to an ultimate determination of the child's Indian status.).
- *People ex rel. K.D.*, 155 P.3d 634 (Colo. App. 2007) (“Active efforts” are equivalent to reasonable efforts to provide or offer a treatment plan in a non-ICWA case and must be tailored to the circumstances of the case. A denial of services is not inconsistent with the “active efforts” requirement of the ICWA “if it is clear that past efforts have met with no

success.” Although the state must make “active efforts” under the ICWA, it need not “persist with futile efforts.”).

- *People ex rel. T.M.W.*, 208 P.3d 272 (Colo. App. 2009) ((1)A tribe does not waive its right to intervene or corresponding right to receive notice, unless it explicitly states that it will not intervene. (2)The court may not rely on notice that was given to a tribe concerning a sibling to determine another child's membership in, or eligibility to enroll in, the tribe.).
- *People In Interest of L.H.*, 2018 COA 27 (Requires notification to be sent to tribes that have been historically affiliated with the Indian Tribe alleged to be the “Indian child’s tribe.”).
- *People ex rel. C.Z.*, 262 P.3d 895 (Colo. App. 2010) (neither 25 U.S.C. § 1912(d) nor case law interpreting it requires that the court apply the beyond a reasonable doubt burden of proof when deciding whether the state made active efforts to prevent the breakup of the family. Court applies the clear and convincing evidence standard to the active efforts requirement that they apply to the reasonable efforts requirement in non-ICWA cases.).
- *People ex rel. N.D.C.*, 210 P.3d 494 (Colo. App. 2009) (the court need not delay the termination hearing until the tribe responds; it need only wait ten days post receipt, as required by the ICWA.).
- *People ex rel. S.R.M.*, 153 P.3d 43 (Colo. App. 2006) (Concluding that because the tribe had not specifically indicated it was not going to intervene, the department was required under 25 U.S.C. § 1912(a) to send notice of the termination hearing. Its failure to do so requires invalidating the judgment of termination).
- *People ex rel. A.N.W.*, 976 P.2d 365 (Colo. App. 1999) (Court concluded that since the expert's opinion in this case was based upon culturally neutral considerations and she had substantial education and experience in her specialty, the expert did not need to have special knowledge of Indian life in order to be qualified to testify under 25 U.S.C. § 1912(f)). If termination is based on parental unfitness unrelated to Indian culture or society, it is sufficient if such witness has substantial education and experience in his or her area of specialty.).
- *People ex rel. A.V.*, 2012 COA 210 (ICWA does not require expert testimony to support a trial court's finding that active efforts were made to prevent breakup of an Indian family under section 1912(d).).
- *People In Interest of R.L.*, 961 P.2d 606 (Colo. App. 1998) (Because findings pursuant to 25 U.S.C. §§1912(d) and 1912(f) are predicates to termination under the ICWA, we conclude that logic compels application of the same “beyond a reasonable doubt” standard of proof as to both statutory provisions.).
- *People In Interest of I.B.-R.*, 2018 COA 75 (If the identity or location of the tribe cannot be determined, notice must be given to the BIA. Also, the trial court must afford the tribes or the BIA a reasonable amount of time to respond to notices and must proceed in accordance with 25 U.S.C. § 1912(a)).
- *People In Interest of J.L.*, 2018 COA 11 (What constitutes “reason to believe” in any particular set of circumstances is not precisely defined. But the threshold for notice was not intended to be high. Because ICWA intends for tribes themselves to decide whether children are tribal members, sufficiently reliable information of virtually any criteria is sufficient to trigger ICWA's notice requirements.).

- *People In Interest of D.B.*, 2017 COA 139 (the statute does not mandate that an expert witness specifically opine that the child is likely to suffer emotional or physical damage in the parent's custody. Nor does 25 U.S.C. § 1912(f) require that the expert testimony provide the sole basis for the trial court's conclusion.).
- *People In Interest of M.V.*, 2018 COA 163 ((1) (holding that that the juvenile court's asserted lack of compliance with ICWA's notice provisions under 25 U.S.C. § 1912(a) did not divest it of subject matter jurisdiction to enter the adjudicatory and dispositional orders (2) holding that if at the time of the dispositional hearing, the court has been unable to determine that the children are not Indian children, it must comply with 25 U.S.C. § 1912(d) and (e) for any of the children that remain out of a parent's care and determine whether (1)the Department has made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and these efforts have proved unsuccessful; and (2) and convincing evidence, including testimony of qualified expert witnesses, demonstrates that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child).
- *People ex rel. L.A.N.*, 296 P.3d 126 (Colo. App. 2011) (“sufficiently reliable information of virtually any criteria upon which membership might be based must be considered adequate to trigger the notice provisions of the Act.”).
- *People ex rel. L.O.L.*, 197 P.3d 291 (Colo. App. 2008) (If the ICWA, applies, the statutory criteria for termination of the parent-child legal relationship must be established by proof beyond a reasonable doubt. 25 U.S.C. § 1912(f). However, if it does not apply, the statutory criteria for termination of the parent-child legal relationship must be established by clear and convincing evidence.).
- *People In Interest of P.A.M.*, 961 P.2d 588 (Colo. App. 1998) (In a state court proceeding for termination of parental rights, notice must be sent to the tribe of any child the court has reason to know is an “Indian child.” 25 U.S.C. § 1912(a) (1978)).
- *People ex rel. E.C.*, 28, 259 P.3d 1272 (Colo. App. 2010) ((1) if the state knows, or has reason to believe, that an Indian child is involved in a dependency and neglect action, it must provide notice to the Indian child's tribe by registered mail, with return receipt requested, of the pending proceedings and the tribe's right to intervene; (2) The party asserting that the ICWA applies has the burden to produce the evidence necessary for the court to determine whether the child is an Indian child.).
- *People ex rel. J.C.R.*, 259 P.3d 1279 (Colo. App. 2011) (The Guidelines for State Courts indicate that a court may have “reason to believe” the child is an Indian child if (1) any party to the case, Indian tribe, Indian organization, or public or private agency informs the court that the child is an Indian; (2) any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child; or (3) an officer of the court involved in the proceeding has knowledge that the child may be an Indian child. Guidelines are non-binding.).
- *People In Interest of E.R.*, 2018 COA 58 (The court must afford any identified tribes a reasonable time to respond to notices sent and must proceed in accordance with 25 U.S.C. § 1912(a). Section 1912(a) provides that no foster care placement hearing shall be held until at least ten days after receipt of notice by the tribe. This section further provides that a tribe shall be granted twenty additional days to prepare for such proceeding if the tribe so requests).

- *In re People ex rel. A.R.Y.-M.*, 230 P.3d 1259 (Colo. App. 2010) (whenever the court knows or has reason to know that an Indian child is involved, the party seeking placement or termination must provide notice to the child's tribe or his or her parent's tribe, or to the Bureau of Indians Affairs).
- *People in Interest of A.E.*, 749 P.2d 450 (Colo. App. 1987) (Cites to the criterion established 25 U.S.C. § 1912 of the ICWA.).

25 U.S.C. §1913: Parental Rights; Voluntary Termination

- *In re N.B.*, 199 P.3d 16 (Colo. App. 2007) (holding that the distinction between voluntary and involuntary proceedings depends on whether the parent whose parental rights are at issue concedes the termination, not on whether the state initiates the proceeding).

25 U.S.C. §1914: Petition to court of competent jurisdiction to invalidate an action upon showing of certain violations

- *People ex rel. J.O.*, 170 P.3d 840 (Colo. App. 2007) (holding that § 1914 refers to a parent's legal, rather than physical, relationship with a child).
- *B.H. v. People ex rel. X.H.*, 138 P.3d 299 (Colo. 2006) (“An Indian tribe, like an Indian parent from whom custody was removed, is therefore permitted by the Act to petition any court of competent jurisdiction to invalidate an order terminating parental rights upon a showing that notice was not provided as required by the Act and that the threshold for notice was not intended to be high).
- *People ex rel. S.R.M.*, 153 P.3d 438 (Colo. App. 2006) (If notice is not given in compliance with the provisions of 25 U.S.C. § 1912, the tribe may petition in any court of competent jurisdiction to invalidate the order terminating parental rights).
- *People in Interest of D.B.*, 2017 COA 139 (holding that a court of competent jurisdiction includes an appeals court).
- *People in the Interest of M.V.*, 2018 COA 163 (the remedy that Congress has provided for a failure to comply with ICWA's provisions, including its notice provisions, is to allow an Indian child, parent, or tribe to petition to invalidate the termination judgment).
- *Catholic Charities and Community Services of the Archdiocese of Denver, Inc., Matter of*, 942 P.2d 1380 (Colo. App. 2007) (Because 25 U.S.C. § 1914 (1978) allows a tribe to petition a court of competent jurisdiction to invalidate an action which violates certain procedural requirements of the ICWA, the court assumed that the tribe had standing).
- *People In Interest of M.R.M.*, 2018 COA 10 (“in some circumstances a proceeding to allocate parental responsibilities is a child custody proceeding covered by ICWA.” This however, does not vest the court with jurisdiction to hear a collateral attack on the APR order to address the ICWA issue).

25 U.S.C. §1915: Placement of Indian children

- *People ex rel. A.R.*, 2012 COA 195M (ICWA applies after the termination of parental rights, to pre-adoptive and adoptive placements and that this statute expresses a presumption that the child's best interests are served by placement with an extended family member who also has Indian heritage).
- *In re N.B.*, 199 P.3d 16 (Colo. App. 2007) (Court rejects the existing Indian family exception and that the standards to be applied in meeting the placement preference requirements 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”).

- *People ex rel. A.N.W.*, 976 P.2d 365 (Colo. App. 1999) (ICWA includes a presumption that preferential adoptive placement is with a family member of Indian heritage. To overcome this presumption, a party must establish the existence of “good cause to the contrary.”).
- *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994) (Children were not placed in foster care that would culminate in adoption in compliance with ICWA).
- *People, Dept. of Social Services in Interest of A.E.V.*, 782 P.2d 858 (Colo. App. 1989) (“The preferences are to be applied in accordance with the prevailing social and cultural standards of the tribal community and their order may be altered by Tribal resolution. In adoptive placements, absent good cause to the contrary, a preference is to be given to (1) a member of the child's extended family, (2) other members of the Indian child's tribe, or (3) other Indian families.”).