SUMMARY
May 28, 2020

2020C0A86

No. 19CA1682, *People in Interest of KC* — Juvenile Court — Dependency and Neglect; American Indian Law — ICWA

A division of the court of appeals considers the responsibilities of the juvenile court and a county department in a dependency and neglect proceeding where a tribe indicates interest in and requests assistance with obtaining citizenship or membership of an enrollment-eligible child.

The division concludes that to meet its responsibilities under the Indian Child Welfare Act and the reasonable efforts requirements under sections 19-1-103(89) and 19-3-208, C.R.S. 2019, the Department must deposit with the juvenile court, at the earliest possible time upon receipt, any tribal response indicating the tribe's interest in obtaining citizenship or membership of an enrollment-eligible child. The division further concludes that once

the response from the tribe has been deposited with the juvenile court, it must set the matter for an enrollment hearing to determine whether it is in the child's best interests to be enrolled in the tribe.

Because the county department here failed to timely deposit with the juvenile court the Chickasaw Nation's response indicating its desire to enroll the children and the juvenile court had no opportunity to hear or determine whether enrollment in the Chickasaw Nation was in the children's best interests, the division vacates the judgment and remands for the court to conduct an enrollment hearing.

COLORADO COURT OF APPEALS **2020C0A86**

Court of Appeals No. 19CA1682
Logan County District Court No. 18JV21
Honorable Carl S. McGuire III, Judge

The People of the State of Colorado,

Appellee,

In the Interest of K.C. and L.C., Children,

and Concerning D.C.,

Appellants.

JUDGMENT VACATED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE DAVIDSON*
Bernard, C.J., and Román, J., concur

Announced May 28, 2020

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 This is an appeal from a judgment terminating the parent-child legal relationship between D.C. (mother) and her children, K.C. and L.C. (the children). The latter are not Indian children as defined by the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963 (2018), but are eligible for enrollment with the Chickasaw Nation (the Nation). We vacate the judgment and remand with directions.

I. ICWA-Related Background Facts and Procedures

¶ 2 In May 2018, the Logan County Department of Human Services (the Department) filed a petition in dependency and neglect regarding the then-one-month-old twin children. Mother reported that she did not have Indian heritage, but the children's father (who is not a party to this appeal) indicated that he had "Chickasaw" heritage.

¶ 3 The Department sent notice to the Nation, which responded in a letter dated October 22, 2018. In its letter, the Nation indicated that father and the children were "eligible for citizenship" through the lineage of the paternal grandfather who was an enrolled citizen. The Nation further stated that once "either the biological father or

the children are enrolled, the children will qualify as 'Indian Children.'"

¶ 4 Presumably aware that their current status did not make the children Indian children as defined by ICWA, *see* 25 U.S.C. § 1903(4) (2018), the Nation's letter went on to request the children's enrollment as members of the Nation, attached forms for enrollment and tribal citizenship, and demanded assistance in completing these forms from the children's parents or legal guardian, the latter of which, at all relevant times, was the Department.

¶ 5 Specifically, the Nation directed "the parent or legal custodian to complete the enclosed application for Certificate of Degree of Indian Blood (CDIB) and Chickasaw citizenship application for the children" and return the application to the Chickasaw Nation's Tribal Government Services Office. The Nation added that, "[a]though the ICWA does not yet apply in this case, we have a vested interest in the welfare of children who are eligible for citizenship with the Chickasaw Nation."

¶ 6 The Department did not notify the juvenile court of the Nation's request at that time nor did it enroll the children.

¶ 7 In April 2019, the Department moved to terminate the parents' rights. In its motion regarding ICWA, the Department asserted that mother had no Indian heritage, it had sent notice to the Nation based on its knowledge of father's Chickasaw heritage, and the Nation had responded that the children were not Indian children under ICWA until or unless father or the children enrolled. Attached to the motion, and for the first time brought to the attention of the juvenile court, was the Nation's letter and the uncompleted citizenship applications and enrollment forms.

¶ 8 Following a hearing, the juvenile court terminated mother's parental rights. As relevant here, the court found that father had not enrolled himself, neither father nor mother had enrolled the children, the children were not Indian children, and ICWA did not apply.

II. Merits

¶ 9 On appeal, mother does not challenge the statutory grounds for termination but instead asserts that the judgment must be vacated and remanded because the Department failed to take steps to enroll the children at the Nation's request. Specifically, she contends that, under the circumstances here, the reasonable efforts

standard set forth in sections 19-1-103(89) and 19-3-208, C.R.S. 2019, must be read to impose on the Department the responsibility to assist with the children's enrollment.

¶ 10 On different reasoning, we agree with mother that the judgment must be vacated and remanded. We conclude that in dependency and neglect proceedings, when the notified tribe communicates to the county department the desire to obtain tribal citizenship or membership for enrollment-eligible children, the department must, at the earliest time possible, deposit the tribe's response with the juvenile court. The court, in turn, must then hold an enrollment hearing, as described below, and determine whether it is in the children's best interests to be enrolled in the requesting tribe.

¶ 11 We further conclude that, once it has timely notified the juvenile court of the tribe's interest, the department has satisfied any ICWA notice responsibilities it has under sections 19-1-103(89) and 19-3-208, subject, of course, to compliance with enrollment-related orders directed to it by the juvenile court after a best interests hearing.

A. Public Policy: ICWA and its Guidelines

¶ 12 Congress enacted ICWA because of concerns over the involuntary separation of Indian children from their families for placement in non-Indian homes. *B.H. v. People in Interest of X.H.*, 138 P.3d 299, 301 (Colo. 2006). ICWA dictates that tribal preservation is paramount. 25 U.S.C. § 1901(3) (2018) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.").

¶ 13 ICWA's primary goal is to protect and preserve Indian tribes and their resources and to protect Indian children who are members of or eligible for membership in an Indian tribe. 25 U.S.C. § 1901(2), (3); *People in Interest of Z.C.*, 2019 COA 71M, ¶ 44. Importantly, under ICWA, it is up to each tribe to determine whether a child is eligible for membership. *People in Interest of T.M.W.*, 208 P.3d 272, 274 (Colo. App. 2009). And we note that, according to the Nation here, because the children's paternal grandfather is an enrolled member, they are eligible for citizenship regardless of the enrollment status of their father.

¶ 14 ICWA also "recognizes that Indian tribes have a separate interest in Indian children that is equivalent to, but distinct from, parental interests," *People in Interest of I.B-R.*, 2018 COA 75, ¶ 4, and requires that tribal interests in Indian children and children eligible for tribal membership must be heard and considered in dependency and neglect proceedings. Thus, in a proceeding in which ICWA may apply, tribes must have a meaningful opportunity to participate in determining whether the child is an Indian child and to be heard on the issue of ICWA's applicability. *B.H.*, 138 P.3d at 303.

¶ 15 In conformity with ICWA's directive that tribes have an opportunity to be heard, Colorado's ICWA-implementing legislation provides that, in dependency and neglect proceedings the juvenile court shall confirm "by way of a report, declaration, or testimony included in the record" that the petitioning party (usually the county department) "used due diligence to identify and work with all of the tribes of which there is a reason to know that the child may be a member, or eligible for membership." § 19-1-126(2)(a), C.R.S. 2019 (requiring the court and each party to the proceeding to comply with federal implementing regulations of ICWA).

¶ 16 In 2016, the Bureau of Indian Affairs issued regulations and new guidelines clarifying ICWA's notice requirements. *See* 25 C.F.R. §§ 23.107-.109, .111 (2019); Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act 11, 30-38 (Dec. 2016), https://perma.cc/3TCH-8HQM (2016 Guidelines). The 2016 Guidelines are not binding, but they provide useful guidance in interpreting the statute and "examples of best practices for the implementation of the statute." 2016 Guidelines at 4. In particular, and as pertinent here, the 2016 Guidelines indicate that it is "a recommended practice for the social worker . . . to facilitate a child becoming a member, such as by assisting with the filing of a Tribal membership application or otherwise." *Id.* at 22.

B. ICWA Notice and Inquiry: Role of the Department

¶ 17 In *People in Interest of L.L.*, 2017 COA 38, ¶¶ 40-41, a division of this court clarified and detailed the ICWA inquiry and notice responsibilities of the county department in dependency and neglect cases involving children who are members of or eligible for membership in a tribe.

¶ 18 As pertinent here, the division read ICWA and its 2016 Guidelines to require the department to confirm to the juvenile

court that it used due diligence to identify and work with any tribes of which there was reason to know that a child may be a member or eligible for membership. *Id.* at ¶ 40; *see* 25 C.F.R. § 23.107(b)(1); *see also* 2016 Guidelines at 9. To do so, the division specified, the department is to timely file with the court an original or copy of each notice sent to the tribe together with any return receipts or other proof of service, document its verbal and written requests to a tribe to obtain information or verification of a child or parent's tribal membership or eligibility for membership, and provide this information to the court. *L.L.*, ¶ 41; *see* 25 C.F.R. § 23.111(a)(2); *see also* § 19-1-126(1)(c); 2016 Guidelines at 22. Furthermore, under *L.L.*, the department must continue to timely update its tribe-related information to the juvenile court "so that the proceeding can move forward in compliance with the requirements of ICWA." 2016 Guidelines at 11; *see L.L.*, ¶ 45 ("Lack of timely information may generate unnecessary delays, create instability in placements for the Indian child, and deny ICWA protections to Indian children and their families."); 25 C.F.R. § 23.107.

¶ 19 Following *L.L.*, with which we agree, we have little trouble deciding that a department's ICWA-mandated due diligence

necessarily includes the requirement that it timely inform the juvenile court of tribal interest in obtaining citizenship or membership for an enrollment-eligible child. Accordingly, we conclude that to meet its responsibilities, the department in a dependency and neglect proceeding must deposit with the juvenile court, at the earliest possible time upon receipt, any tribal response indicating the tribe's interest in obtaining citizenship or membership of an enrollment-eligible child.

¶ 20 Furthermore, as detailed more specifically *infra* Part II.C, it is for the juvenile court, not the county department, to decide whether tribal enrollment is in the children's best interests. Thus, we further conclude that the timely deposit of the tribe's enrollment-related request with the juvenile court is sufficient, as a matter of law, to satisfy any notice-related reasonable efforts requirements of the department implied under sections 19-1-103(89) and 19-3-208.

C. The Enrollment Hearing: Role of the Juvenile Court

¶ 21 As referenced *supra* Part II.B, it is ultimately the responsibility of the juvenile court to decide whether it is in the best interests of enrollment-eligible children to become members of the requesting tribe. *See K.D. v. People*, 139 P.3d 695, 698 (Colo. 2006) (Courts

conducting dependency and neglect proceedings must "strive[] to preserve the family while simultaneously ensuring the child's best interest and welfare."); *C.S. v. People*, 83 P.3d 627, 640 (Colo. 2004) (In all dependency and neglect cases, "the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child." (quoting § 19-3-604(3), C.R.S. 2003)).

¶ 22 Thus, once the response from the tribe has been deposited with the juvenile court as set forth in Part II.B, we conclude that the court must set the matter for a hearing to determine whether it is in the best interests of the children to enroll them in the tribe. *See People in Interest of L.B.*, 254 P.3d 1203, 1208 (Colo. App. 2004) (A juvenile court "must conduct a hearing to determine the proper disposition best serving the interests of the child.").

¶ 23 Of course, at an enrollment hearing, as at any other hearing in a dependency and neglect proceeding, the court must give primary consideration to the children's best interests. *See K.D.*, 139 P.3d at 698; *C.S.*, 83 P.3d at 640.

¶ 24 And, in determining the children's best interests, the juvenile court must hear and consider the positions of the parents, as well as the department and the guardian ad litem (GAL), all of whom

have standing, as relevant here, to speak to the merits of the tribe's enrollment request. *See, e.g.*, *People in Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982) (parents of dependent and neglected children, prior to termination of their rights, have a liberty interest in the care, custody, and management of their children); *People in Interest of M.M.*, 184 Colo. 298, 302, 520 P.2d 128, 131 (1974) ("[I]t is clear that the public policy of the state is to provide for a neglected and dependent child in a manner that will best serve his welfare and the interests of society."); *L.L.*, ¶ 44 ("[T]he GAL plays an important role in ensuring ICWA's application to an Indian child subject to a child-custody proceeding by supporting the relationship between a child and his or her parents, extended family, and Tribe.").

¶ 25 That said, we acknowledge that there may be reasons why a parent may choose not to be enrolled or to not enroll the children in a tribe. Bureau of Indian Affairs, Frequently Asked Questions 5 (June 2016), https://perma.cc/5H3P-S6UY ("Parents may choose to not apply for Tribal citizenship for themselves or their child, or may renounce their Tribal citizenship.").

¶ 26 Nonetheless, we highlight that, in considering a request from an interested tribe, ICWA and the 2016 Guidelines explicitly

encourage enrollment. *See People in Interest of S.R.M.*, 153 P.3d 438, 440 (Colo. App. 2006) (under ICWA, there is a presumption that the protection of an Indian child's relationship with the tribe serves the child's best interests); 2016 Guidelines at 22. This is because "Tribal citizenship would make more services and programs available to the child" and "[e]ven where it is not clear that Tribal services and programs would assist the child, there are both immediate and long-term benefits to being a Tribal citizen." 2016 Guidelines at 22.

¶ 27 We note further that in a dependency and neglect proceeding, if a child is enrolled with a tribe, and therefore considered an Indian child under ICWA, the heightened protections under ICWA kick in. *See* 25 U.S.C. § 1903(4) (An "Indian child" is an "unmarried person who is under age eighteen and is" a "member of an Indian tribe."); *see also* 25 U.S.C. § 1912(d)-(e) (2018) (discussing active efforts, a higher burden of proof, and additional testimony from a qualified expert witness required under ICWA). For example, a department must make "active efforts," rather than reasonable efforts, "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d); *see*

People in Interest of A.R., 2012 COA 195M, ¶ 29 ("ICWA's 'active efforts' standard requires more than the 'reasonable efforts' standard in non-ICWA cases."). This additional heightened protection, which is available to an Indian child and his or her parents, is aligned with the goal of the Children's Code "to preserve the parent-child relationship whenever possible." *People in Interest of C.A.K.*, 652 P.2d 603, 610 (Colo. 1982); *see* § 19-1-102(1), C.R.S. 2019 (describing the purpose of the Children's Code).

¶ 28 Thus, at an enrollment hearing, the juvenile court should not treat an objection, even from a parent, as a veto. On the contrary, any reason for objection must be compelling considering ICWA's intent to maintain or foster the children's connection with their tribal culture. *See L.L.*, ¶ 43 (ICWA is consistent with what is in the "best interests of Indian children" by "supporting reunification" and "enabling a Tribe to fully participate in the proceeding.").

III. Remand Instructions

¶ 29 By failing to timely deposit with the juvenile court the Nation's response indicating its desire to enroll the children, the Department did not comply with its notice responsibilities under ICWA. And, in turn, the juvenile court has had no opportunity to hear or

determine whether enrollment in the Nation is in the children's best interests.

¶ 30 Thus, we remand the case to the juvenile court to set the matter for hearing and direct the Department to procure the appearance of mother and father, if possible, so that the court may inquire of them on the record whether they want the children enrolled with the Nation.

¶ 31 After considering the positions of the parents, the Department, and the GAL concerning the Nation's request, the juvenile court must decide whether it is in the children's best interests to complete the citizenship application.

¶ 32 If, on the one hand, the juvenile court determines that, based on the children's best interests, the citizenship application should be completed, the court shall direct the Department to diligently work with the Nation and assist with the submission of any application materials necessary for the children's enrollment. After the application is submitted and the children are enrolled with the Nation, the court shall enter a legal determination that the children meet the definition of Indian children under 25 U.S.C. § 1903(4) and proceed in accordance with ICWA.

¶ 33 If, on the other hand, the juvenile court determines that, based on the children's best interests, the citizenship application should not be completed and the children are not enrolled with the Nation, then the court must again determine whether the children meet the definition of Indian children under 25 U.S.C. § 1903(4).

¶ 34 If the children meet the definition of Indian children, the juvenile court shall proceed in accordance with ICWA.

¶ 35 If the children do not meet the definition of Indian children, the juvenile court may allow the parties to present additional evidence and shall then resolve the motion to terminate mother's parental rights. Of course, mother may appeal any aspect of the juvenile court's judgment entered on remand.

IV. Conclusion

¶ 36 Based on our disposition, we do not address any of mother's remaining contentions. We vacate the termination judgment and remand for further proceedings consistent with this opinion.

CHIEF JUDGE BERNARD and JUDGE ROMÁN concur.