SUMMARY
December 16, 2021

2021COA152

No. 21CA0381, *People in Interest of E.M.*— American Indian Law — ICWA — Notice; Juvenile Court — Dependency and Neglect — Termination of the Parent-Child Legal Relationship — Compliance with the Federal "Indian Child Welfare Act"

A division of the court of appeals considers the notice of requirement of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963, in the context of the termination of parental rights. The division concludes that recently revised section 19-1-126(3), C.R.S. 2021, does not alter the applicability of ICWA's notice requirements. More specifically, the division holds that section 19-1-126(3) does not change the test for assessing whether a court has reason to know that the child at issue is an Indian child. Applying the well-established understanding of the "reason to know" standard, the division concludes that the juvenile court here had such reason to know and, thus, was required to comply with

ICWA's notice requirements. Because the record does not reflect such compliance, the division vacates the judgment and remands with directions.

COLORADO COURT OF APPEALS **2021COA152**

Court of Appeals No. 21CA0381
City and County of Denver Juvenile Court No. 19JV1351
Honorable Pax L. Moultrie, Judge

The People of the State of Colorado,

Appellee,

In the Interest of E.M., a Child,

and Concerning D.R.M.,

Appellant.

JUDGMENT VACATED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE NAVARRO
Grove and Pawar, JJ., concur

Announced December 16, 2021

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¶ 1 In this dependency and neglect proceeding, D.R.M. (mother) appeals the juvenile court's judgment terminating her parent-child legal relationship with E.M. (the child). Mother contends that the record does not show compliance with the notice requirements of the Indian Child Welfare Act of 1978 (ICWA). 25 U.S.C. §§ 1901-1963; *see also* § 19-1-126, C.R.S. 2021. We agree with mother. In doing so, we reject the notion that recently revised section 19-1-126(3) alters the applicability of ICWA's notice requirements. Therefore, we vacate the judgment and remand the case to the juvenile court with directions to ensure that ICWA's notice requirements are satisfied.

I. Background

¶ 2 In August 2019, the Denver Department of Human Services filed a dependency and neglect petition concerning the child. Mother indicated that she has Apache and Sioux heritage. The juvenile court decided it did not have reason to know the child is an Indian child but directed the Department to exercise due diligence to gather additional information that would assist it in determining whether there was reason to know that the child is an Indian child.

¶ 3 The Department subsequently filed several affidavits of diligent efforts related to ICWA. The court continued to find it had no reason to know the child is an Indian child and ordered the Department to continue to investigate. The Department did not send a notice to any tribe or to the Bureau of Indian Affairs (BIA) as part of its investigation.

¶ 4 The Department later moved to terminate the legal relationship between mother and the child. Following a hearing, the court again decided that it had no reason to know the child is an Indian child and, therefore, this case was not governed by ICWA. The court entered a judgment terminating mother's parental rights.

II. ICWA Compliance

¶ 5 Mother contends that the juvenile court failed to comply with ICWA because it did not ensure that appropriate notice of the proceeding was given to the tribes identified by her and other maternal relatives. The Department and the child's guardian ad litem counter that ICWA's notice provisions were not triggered because neither the Department nor the court had reason to know that the child is an Indian child. We agree with mother.

A. Legal Framework

¶ 6 ICWA aims to protect and to 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); *In re Marriage of Stockwell*, 2019 COA 96, ¶ 6. Indian tribes have an interest in Indian children distinct from, but equivalent to, parental interests. *B.H. v. People in Interest of X.H.*, 138 P.3d 299, 303 (Colo. 2006); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989). Therefore, in a proceeding in which ICWA may apply, tribes must have a meaningful opportunity to participate in determining whether a child is an Indian child and to be heard on ICWA's applicability. *B.H.*, 138 P.3d at 303.

¶ 7 If the court knows or has reason to know that an Indian child is involved in a child custody proceeding, including termination of parental rights, the petitioning party must provide notice to any identified Indian tribes. 25 U.S.C. § 1912(a); § 19-1-126(1)(b); *see also People in Interest of L.L.*, 2017 COA 38, ¶ 34. To comply with ICWA's notice provisions, the Department must directly notify each tribe by registered mail with return receipt requested of the pending child custody proceeding and its right to intervene. *People in*

Interest of M.V., 2018 COA 163, ¶ 26. And copies of these notices must be sent to the appropriate regional director of the BIA. 25 C.F.R. § 23.11(a) (2020); *see also M.V.*, ¶ 28.

¶ 8 Whether ICWA's notice requirements are satisfied is a question of law that we review de novo. *People in Interest of T.M.W.*, 208 P.3d 272, 274 (Colo. App. 2009).

B. Reason to Know

¶ 9 The juvenile court must ask each participant on the record at the commencement of every emergency, voluntary, or involuntary child-custody proceeding "whether the participant knows or has reason to know that the child is an Indian child." 25 C.F.R. § 23.107(a) (2020); *Stockwell*, ¶¶ 8-9. An "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) . . . 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).

¶ 10 The juvenile court has "reason to know" that a child is an Indian child if

> (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian

> Tribe, Indian organization, or agency informs the court that the child is an Indian child;
>
> (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
>
> (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
>
> (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
>
> (5) The court is informed that the child is or has been a ward of a Tribal court; or
>
> (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

25 C.F.R. § 23.107(c); § 19-1-126(1)(a)(II). These factors should be interpreted expansively. *See People in Interest of S.B.*, 2020 COA 5, ¶ 10; *M.V.*, ¶ 43.

¶ 11 Likewise, our supreme court has determined that the threshold requirement for sending notice is not intended to be high. *B.H.*, 138 P.3d at 303. This follows because a court's ability to ascertain membership in a particular tribe without a tribal

determination may vary greatly depending on an individual tribe's criteria for membership and its process for acquiring or establishing membership. *Id.* Under ICWA, qualification for membership is left to the individual tribes. *Id.*

¶ 12 The "reason to know" standard does not necessarily require a participant to identify the specific tribe with which a child or a child's biological parent is affiliated. In some circumstances, a participant may be able to identify only a tribal ancestral group and, if so, the Department must notify each tribe in that group. *See People in Interest of L.H.*, 2018 COA 27, ¶ 8. Also, a participant's identification of a tribal connection to a specific state or region may be sufficient to give a court a reason to know that a child is an Indian child. *See People in Interest of I.B.R.*, 2018 COA 75, ¶¶ 13-16.

¶ 13 To assist in identifying federally recognized tribes and their agents for service, the BIA publishes a list of recognized tribes and their agents in the Federal Register by region and historical tribal affiliation. *L.H.*, ¶ 7; *see also* Designated Tribal Agents for Service of Notice, 85 Fed. Reg. 24004-02 (April 30, 2020); List of Designated Tribal Agents by Tribal Affiliation, 84 Fed. Reg. 20,387-02, 20,424

(May 9, 2019), https://perma.cc/K3DD-KQR5 (Tribal Agents by Affiliation).

C. Analysis

¶ 14 In response to the juvenile court's inquiry on the record, mother said she has Sioux or Apache heritage. She also submitted forms indicating that she (or someone in her family) has Indian heritage, the child is eligible for enrollment in an Indian tribe, and the child has "Sioux Apache" ancestry. The Department later presented an affidavit averring that

- Mother "suspects" she has Native American heritage through Sioux and Apache, New Mexico and South Dakota;
- Maternal grandmother reported the family has some Native American heritage including "Cherokee and something else and might have some Sioux," but family members are not registered in any tribe;
- Maternal grandfather reported his father is "Sioux Indian";
- Maternal great-grandmother reported the family "might have a little bit of Indian," including Apache; and

- Other family members deny Native American heritage and allege that family members saying they have Indian heritage are confused or misinformed.

¶ 15 To be sure, this information does not definitively establish that the child is either a member of a tribe or eligible for membership in a tribe and the biological child of a tribal member. But such certainty is not necessary for the court to have reason to know that the child is an Indian child.

¶ 16 Recall that the federal regulation and the Colorado statute implementing ICWA's "reason to know" component distinguish between information that the child is an Indian child, 25 C.F.R. § 23.107(c)(1); § 19-1-126(1)(a)(II)(A), and information *indicating* that the child is an Indian child, 25 C.F.R. § 23.107(c)(2); § 19-1-126(1)(a)(II)(B). These two provisions cannot have the same meaning because that would make one superfluous. *See Lombard v. Colorado Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008) ("[W]hen examining a statute's language, we give effect to every word and render none superfluous because we 'do not presume that the legislature used language idly and with no intent that meaning should be given to its language.'") (citation omitted). So the latter

provision — pertaining to information indicating that the child is an Indian child — can apply when the court has information that the child may have ancestors affiliated with a specific tribe but the information does not satisfy all the criteria of the Indian child definition.

¶ 17 As a result, divisions of this court have repeatedly recognized that, where a district court receives information that the child's family may have connections to specific tribes or ancestral groups, the court has "reason to know" that the child is an Indian child — even where the information itself does not establish that the child fully satisfies the definition of an Indian child. *See S.B.*, ¶¶ 13, 21; *M.V.*, ¶¶ 43-44; *L.L.*, ¶¶ 21, 47; *L.H.*, ¶¶ 6-12; *see also People in Interest of K.C. v. K.C.*, 2021 CO 33, ¶¶ 11-12, 46-47 (noting that the Department gave the required notices to the Chickasaw Nation after father indicated that he had Chickasaw heritage but he was not a member of the Nation).

¶ 18 In this case, the information known to the juvenile court indicated that the child's maternal family has tribal connections to specific ancestral groups — the Apache, Sioux, and Cherokee. Therefore, the information was sufficient to give the court reason to

know that the child is an Indian child and, thus, to trigger ICWA's notice provisions.

¶ 19 Arguing to the contrary, the Department relies on section 19-1-126(3) and says the information merely "gave rise to the need for the Department to exercise 'due diligence' pursuant to" that provision. As relevant here, section 19-1-126(3) provides:

> If the court receives information that the child may have Indian heritage but does not have sufficient information to determine that there is reason to know that the child is an Indian child pursuant to subsection (1)(a)(II) of this section, the court shall direct the petitioning or filing party to exercise due diligence in gathering additional information that would assist the court in determining whether there is reason to know that the child is an Indian child.

Subsection (1)(a)(II) mirrors the "reason to know" factors of 25 C.F.R. § 23.107(c) that we have discussed. The General Assembly incorporated these factors into subsection (1)(a)(II) simultaneously with adopting the version of subsection (3) quoted above. *See* Ch. 305, sec. 2, § 19-1-126, 2019 Colo. Sess. Laws 2792-94. These 2019 amendments were intended to "align Colorado's statute with the updated ICWA regulations to ensure continuing compliance with federal law." Ch. 305, sec. 1, 2019 Colo. Sess. Laws 2791. So

these amendments require "the court and each party to the proceeding" to "comply with the federal implementing regulations" of ICWA. § 19-1-126(1).

¶ 20 Given all this, there is no doubt that the "reason to know" standard mentioned in section 19-1-126(3) is the same "reason to know" standard set forth in 25 C.F.R. § 23.107(c). As explained, under that standard as consistently applied by Colorado appellate courts, the juvenile court here had reason to know that the child is an Indian child. And, because section 19-1-126(3)'s directions apply only when the court does *not* have reason to know that the child is an Indian child, they did not govern this case. *Cf. People in Interest of D.B.*, 2017 COA 139, ¶ 10 (recognizing that statutes enacted for the benefit of Indians, as well as regulations, guidelines, and state statutes promulgated for their implementation, must be liberally construed in favor of Indian interests); *K.C.*, ¶ 22 (same).

¶ 21 The Department also points out that, in two previous dependency and neglect proceedings involving mother and the child's father, notice was sent to the Apache and Sioux tribes, and the tribes reported that those children were not Indian children. Although conceding that the juvenile court could not rely solely

upon prior findings to determine that ICWA does not apply to this case, the Department contends that the court properly considered the prior findings and the Department's affidavits of diligent efforts to determine that the court did not have reason to know the child is an Indian child. *See People in Interest of A.D.*, 2017 COA 61, ¶ 20.

¶ 22 A court, however, must make continuing inquiries to ensure that any ICWA determination is not based on information, such as enrollment criteria, that might be outdated or incorrect. *Id.* Here, the Department's investigation did not ensure that enrollment criteria for the Apache or Sioux tribes had not changed. Moreover, the investigation revealed a third affiliation, Cherokee, that had not been previously examined. We cannot conclude that the juvenile court ensured that the ICWA determination was not based on outdated or incorrect information when the court did not require the Department to send notices to the tribes identified by the child's family in this proceeding.

¶ 23 For these reasons, the record does not demonstrate compliance with ICWA's provisions, and we remand the case to the juvenile court for it to ensure that ICWA's notice requirements are satisfied. *See L.H.*, ¶ 1.

III. Reasonable Efforts

¶ 24 We decline to address mother's contention that the juvenile court erred by finding that the Department made reasonable efforts to rehabilitate her. If ICWA ultimately applies on remand, this contention may no longer be an issue. *See In re Marriage of Mead*, 765 P.2d 1072, 1073 (Colo. App. 1988).

IV. Conclusion and Remand Directions

¶ 25 We vacate the judgment and remand the case to the juvenile court so that it may conduct further proceedings to determine if the child is an Indian child. On remand, the court shall direct the Department to provide notice to all tribes affiliated with the Apache, Sioux, and Cherokee, as well as to the BIA.

¶ 26 After receiving responses, if any, from the tribes and the BIA, the juvenile court must then determine whether the child meets the definition of an Indian child under 25 U.S.C. § 1903(4).

¶ 27 If the court determines that the child is not an Indian child, the court may reinstate the termination judgment. Mother may appeal the judgment, as well as the court's determination regarding the applicability of ICWA.

¶ 28 If, on the other hand, the court determines that the child is an Indian child, the court must follow ICWA's procedural and substantive standards that apply when a termination proceeding concerning Indian children occurs in state court.

JUDGE GROVE and JUDGE PAWAR concur.