SUMMARY
March 10, 2022

2022COA31

No. 21CA0764, *People in Interest of A-J.A.B.* — 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" — Knows — Reason to Know — Due Diligence

The mother of the child in this dependency and neglect case repeatedly asserted that the child may have Native American — possibly "Cherokee" or "Lakota Sioux" — heritage. But the Adams County Human Services Department (Department) did not gather additional information to determine whether there was a reason to know the child was an Indian child. And, at the termination of parental rights hearing, the juvenile court found that this case was not governed by the Indian Child Welfare Act of 1978 (Federal ICWA statute), 25 U.S.C. §§ 1901-1963. (The father of the child had

declared that he did not have Indian heritage; no family member or extended family member disputed father's declaration.)

A division of the court of appeals concludes that the juvenile court and the Department did not comply with Colorado's ICWA statute, section 19-1-126, C.R.S. 2021. In doing so, the division concludes that the juvenile court did not have "reason to know" the child was an Indian child under 25 U.S.C. § 1912(a) and section 19-1-126(1)(a)(II). But the division concludes that section 19-1-126(3) still required the court to direct the Department to "exercise due diligence" to assist the court in determining whether there is "reason to know" that the child is an Indian child.

Because the record does not show compliance with section 19-1-126(3), the division remands the case with instructions for the juvenile court to direct the Department to "exercise due diligence" and assist the juvenile court to properly determine whether, with more adequate information, there is "reason to know" that the child is an Indian child under section 19-1-126(3).

COLORADO COURT OF APPEALS **2022COA31**

Court of Appeals No. 21CA0764
Adams County District Court No. 20JV106
Honorable Katherine R. Delgado, Judge

The People of the State of Colorado,

Appellee,

In the Interest of A-J.A.B., a Child,

and Concerning H.J.B.,

Appellant.

ORDER OF LIMITED REMAND

Division III
Opinion by JUDGE FURMAN
Lipinsky and Brown, JJ., concur

Announced March 10, 2022

Heidi M. Miller, County Attorney, Rebecca Wiggins-Tinsley, Deputy County Attorney, Westminster, Colorado, for Appellee

Laura Dunbar, Guardian Ad Litem

The Morgan Law Office, Kris P. Morgan, Colorado Springs, Colorado, for Appellant

¶ 1 The mother of the child in this dependency and neglect proceeding repeatedly asserted that the child may have Native American — possibly "Cherokee" or "Lakota Sioux" — heritage. But the Adams County Human Services Department (Department) did not gather additional information to determine whether there was a reason to know the child was an Indian child. And, at the termination of parental rights hearing, the juvenile court found that this case was not governed by the Indian Child Welfare Act of 1978 (Federal ICWA statute), 25 U.S.C. §§ 1901-1963. (The father of the child had declared that he did not have Indian heritage; no other family member or extended family member disputed father's declaration.)

¶ 2 H.J.B. (mother) appeals the juvenile court's judgment terminating her parental rights to A-J.A.B. (the child). She contends that the juvenile court committed reversible error in not ensuring the Department complied with the inquiry and notice requirements of the Federal ICWA statute and Colorado's ICWA statute, section 19-1-126, C.R.S. 2021. We agree that the court erred, but we disagree that the error is reversible. We therefore

remand the case for the juvenile court to ensure compliance with the Federal and Colorado ICWA statutes.

I. Mother's Indian Heritage Assertion

¶ 3 In March 2020, the Department filed a petition in dependency and neglect concerning the child. In the petition, the Department stated that it had received no information indicating that the child was a member of an Indian tribe or eligible for membership in an Indian tribe. But it did not state in the petition what efforts were made to determine whether the child was an Indian child.

¶ 4 At the shelter hearing, mother's counsel told the court that mother "indicated she has some Cherokee and Lakota Sioux through her grandmother." Mother added that, although she had the "heritage," she was not "sure anyone [in her family] ever registered" as a member of a tribe and that she "probably won't qualify" for membership. The court acknowledged that "every tribe has different qualifications in terms of whether eligibility is available" and ordered mother to "fill out the ICWA paperwork" so the Department could investigate the child's eligibility.

¶ 5 Although mother did not provide an ICWA assessment form or other "ICWA paperwork" at the next hearing, she persisted in

asserting that she had "Native American heritage." The court found that the case "may" be an ICWA case, but it did not instruct the Department to take any action to investigate mother's claim of Indian heritage. In June 2020, the court entered a dispositional order without addressing the ICWA issue.

¶ 6 In October 2020, the Department's attorney asked the court to make another ICWA inquiry because the Department had "not resolved that issue" yet. Mother again maintained that she had "Cherokee and Lakota Sioux" heritage; the court again said the case "may be an ICWA case"; and the court again ordered mother to submit an ICWA assessment form. But, at the next hearing, the Department reported that it still had received no ICWA information from mother.

¶ 7 In December 2020, the Department moved to terminate mother's parental rights. Mother did not appear at the pretrial hearing, but her attorney reported that she had spoken with the child's maternal grandmother, who said she "thought that the heritage may be Lakota." Even so, counsel stated that "[b]ased on what the maternal grandmother [t]old me[,] it doesn't sound like there's a reason to believe that ICWA would apply or that [mother or

the child are] enrolled" members of a tribe. Relying on counsel's statement, the court found that "there [was] no reason to believe that this case [was] governed by [ICWA]."

¶ 8 At the termination hearing, the court again found that ICWA did not apply because "no information ha[d] been provided to the [c]ourt regarding the respondent mother's enrollment [or] eligibility for enrollment in a federally recognized tribe." The court terminated mother's parental rights.

II. Mother's Appeal on Indian Heritage

¶ 9 On appeal, mother contends that, because the juvenile court had "reason to know" that the child was an Indian child based on her assertions that she may have Cherokee and Lakota Sioux heritage, the Department had to send notice of the proceeding to the Cherokee and Sioux tribes under section 19-1-126(1)(b). In contrast, the Department and the guardian ad litem (GAL) contend that, because the information mother provided did not give the court "reason to know" that the child was an Indian child under section 19-1-126(1)(a)(II), the Department had no obligation to send notice to any Indian tribe.

¶ 10 While we agree with the Department and GAL that the juvenile court did not have "reason to know" that the child is an Indian child, we disagree that the Department had no further obligations. Rather, we conclude that section 19-1-126(3) required the court to direct the Department to "exercise due diligence" to assist the court in determining whether there is "reason to know" that the child is an Indian child.

¶ 11 (Although mother asserted that she had "Lakota Sioux" heritage, the list of federally recognized tribes includes no Lakota tribes. *See People in Interest of M.V.*, 2018 COA 163, ¶ 44. The Bureau of Indian Affairs previously maintained a list of federally recognized tribes based on historical tribal affiliation, which lists sixteen Sioux tribes. List of Designated Tribal Agents by Tribal Affiliation, 84 Fed. Reg. 20,387, 20,424 (May 9, 2019), https://perma.cc/K3DD-KQR5. Consequently, we will use the title "Sioux," rather than "Lakota Sioux.")

¶ 12 To exercise due diligence, the Department had to identify every federally recognized tribe associated with the Cherokee and Sioux ancestry groups, explore the basis of mother's Indian heritage claim to determine what additional information it needed to obtain, and

provide that information to assist the court in determining whether there is "reason to know" the child is an Indian child.

¶ 13 We therefore remand the case for the juvenile court to direct the Department to exercise due diligence under section 19-1-126(3) to assist the court in determining whether there is "reason to know" that the child is an Indian child.

A. Standard of Review

¶ 14 Whether the juvenile court and Department complied with the Federal and Colorado ICWA statutes 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). We also review questions of statutory construction de novo. *People in Interest of C.S.*, 2017 COA 96, ¶ 17.

¶ 15 But we will not disturb a juvenile court's factual findings when they are supported by the record. *People in Interest of A.J.L.*, 243 P.3d 244, 249-50 (Colo. 2010). And the decision of what weight to give evidence is within the court's discretion. *Id.* at 250.

B. Legal Framework

¶ 16 In 1978, Congress enacted the Federal ICWA statute to protect and preserve Indian tribes and their resources and to protect Indian children by establishing minimum federal standards for child

custody proceedings involving Indian children. 25 U.S.C. §§ 1901-1902.

¶ 17 Congress authorized the Secretary of the Department of the Interior to develop rules to implement the statute. 25 U.S.C. § 1952. In 1979, the Bureau of Indian Affairs (BIA) promulgated a set of nonbinding guidelines. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) (1979 Guidelines). The BIA did not promulgate rules implementing the Federal ICWA statute until 2016. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,803 (June 14, 2016) (2016 Final Rule). In 2016, it also promulgated a new set of guidelines. Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act (Dec. 2016), https://perma.cc/3TCH-8HQM (2016 Guidelines); *see also People in Interest of L.L.*, 2017 COA 38, ¶ 16 (noting that, although the BIA's guidelines are not binding, we consider them persuasive).

¶ 18 The 2016 Guidelines explain the purpose of the Federal ICWA statute.

> Congress found "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 . . . ." Although the crisis flowed from multiple causes, Congress found that non-Tribal public and private agencies had played a significant role, and that State agencies and courts had often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. To address this failure, ICWA establishes minimum Federal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms Tribal jurisdiction over child-custody proceedings involving Indian children.

2016 Guidelines at 5 (footnotes omitted).

¶ 19 Our legislature enacted Colorado's ICWA statute in 2002. Ch. 217, secs. 1, 3, § 19-1-126, 2002 Colo. Sess. Laws 783-85; *see also* 25 U.S.C. § 1921 (allowing states to enact statutes to clarify or add protections to the federal statute but prohibiting state statutes from lowering ICWA protections). In 2019, our legislature amended Colorado's ICWA statute to align it with the 2016 Final Rule. Ch. 305, sec. 1, 2019 Colo. Sess. Laws 2791.

¶ 20 The Federal and Colorado ICWA statutes apply to an Indian child involved in a child custody proceeding. *L.L.*, ¶ 12; *see In re*

M.G., 2020 COA 66, ¶ 7 (recognizing that for ICWA's substantive provisions to apply, the child must be an Indian child).

¶ 21 "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); *see* 2016 Guidelines at 10 (explaining that the statutory definition of "Indian child" is based on the child's political ties to a federally recognized Indian tribe, either by virtue of the child's own membership in the tribe, or through a biological parent's membership and the child's eligibility for membership).

¶ 22 "Child custody proceeding" is defined as a foster care placement, a proceeding to terminate parental rights, or preadoptive and adoptive placements. 25 U.S.C. § 1903(1); *see also* § 19-1-126(1) (equating "child custody proceeding" in Colorado's ICWA statute with the Federal ICWA statute).

C. Legal Requirements

¶ 23 Mother's case falls within the comprehensive Federal and Colorado ICWA inquiry and notice statutory provisions that are designed to facilitate a determination of whether a child is an

"Indian child." *See In re Isaiah W.*, 373 P.3d 444, 447 (Cal. 2016); *see also* 2016 Guidelines at 11 (explaining that the "applicability of ICWA to a child-custody proceeding turns on the threshold question of whether the child in the case is an 'Indian child'").

¶ 24 These provisions also ensure that an Indian tribe knows of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child. *In re Isaiah W.*, 373 P.3d at 447; *see also* 25 U.S.C. § 1911(a), (c).

¶ 25 To fulfill these purposes, the inquiry and notice provisions require local departments and juvenile courts to inquire early and often whether a participant knows or has reason to know that the subject child is an Indian child. *See* 2016 Guidelines at 11 (noting that it is "critically important that there be inquiry . . . by courts, State agencies, and participants to the proceedings as soon as possible"). So, we start with the inquiry requirements.

1. The Department's Inquiry Requirement

¶ 26 When a department of social services files a new dependency and neglect case, Colorado's ICWA statute assumes the department has *already inquired* whether the subject child is an Indian child from available family members or available extended family

members. This is because the department must make one of two disclosures in the petition.

¶ 27 First, if the department has determined that the child is an Indian child from these inquiries, it must

- "disclose in the complaint, petition, or other commencing pleading filed with the court that the child who is the subject of the proceeding is an Indian child and the identity of the Indian child's tribe," § 19-1-126(1)(c);
- "identify what reasonable efforts have been made to send notice" by registered or certified mail, return receipt requested, to the parent(s) or the child's Indian custodian(s), and to the tribe(s), *id.*; and
- distribute any tribal responses to the parties and deposit these responses with the court, *id.*

¶ 28 Second, if the department has not determined that the child is an Indian child, then the department must disclose "in the complaint, petition, or other commencing pleading filed with the court" "what *efforts*" it "made in determining whether the child is an Indian child." § 19-1-126(1)(c) (emphasis added).

¶ 29 (We recognize the Federal and Colorado ICWA statutes apply to cases other than dependency and neglect cases. But because a department of social services is the exclusive party authorized to file a dependency and neglect petition, *see McCall v. Dist. Ct.*, 651 P.2d 392, 393 (Colo. 1982), and because, here, the Department moved to terminate mother's parental rights, we limit our discussion to the requirements imposed on departments of social services, *see* 25 U.S.C. § 1912(a).)

2. The Juvenile Court's Inquiry Requirement

¶ 30 Colorado's ICWA statute also requires the juvenile court to "make inquiries to determine whether the child who is the subject of the proceeding is an Indian child." *People in Interest of K.C. v. K.C.*, 2021 CO 33, ¶ 46 (quoting § 19-1-126(1)(a)(I)); *see also* 2016 Guidelines at 9. Section 19-1-126(1)(a)(I)(A) imposes the following inquiry requirements on the juvenile court:

- The court must ask each participant in a child custody proceeding "whether the participant knows or has reason to know that the child is an Indian child."
- "The inquiry is to be made at the commencement of the proceeding, and all responses must be on the record."

Id.

¶ 31 If the participants deny that there is any reason to know that the child is an Indian child, the court must then "instruct the participants to inform the court if any participant subsequently receives information that provides reason to know the child is an Indian child." *Id.*

¶ 32 Because the Federal and Colorado ICWA statutes apply to cases involving an Indian child, the focus of the inquiry is whether the participant or the court "knows" or has "reason to know" the child is an Indian child. But the Federal and Colorado ICWA statutes do not define "knows" or "reason to know." So, we look to the common meaning of these terms. *See People v. Sprinkle*, 2021 CO 60, ¶ 28 (stating that when our legislature does not define a term, we assume the legislature intended the word to have its common meaning); *see also Cowen v. People*, 2018 CO 96, ¶ 14 ("When determining the plain and ordinary meaning of words, we may consider a definition in a recognized dictionary.").

a. A Participant or the Court "Knows" the Child is an Indian Child

¶ 33 "Know" is commonly defined as "to be aware of the truth or factuality of" or to "be convinced or certain of." Merriam-Webster Dictionary, https://perma.cc/F9LN-JGS2.

¶ 34 And, as noted, a child is an "Indian child" if the child is a member of a tribe or is eligible for membership through a biological parent's membership in a tribe. 25 U.S.C. § 1903(4). But the Federal and Colorado ICWA statutes don't define what constitutes tribal membership. Membership, instead, is "left to the control of each individual tribe." *B.H. v. People in Interest of X.H.*, 138 P.3d 299, 303 (Colo. 2006); *see also* 25 C.F.R. § 23.108(a) (2020) (providing that the "Indian Tribe . . . determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe"); *see also* 2016 Guidelines at 15 ("Congress expressly recognized that State courts and agencies often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.").

¶ 35 Thus, a participant or the court "knows" the child is an Indian child when made aware of the truth of this fact after a tribe or tribes have verified the child's membership, or verified the child's eligibility for membership through a biological parent's membership. 25 C.F.R. § 23.108(a); *see also M.G.*, ¶ 7 (applying the definition of Indian child).

b. A Participant or the Court Has "Reason to Know" the Child is an Indian Child

¶ 36 "Reason to know" is commonly defined as "[i]nformation from which a person of ordinary intelligence . . . would infer that the fact in question exists or that there is a substantial enough chance of its existence that, if the person exercises reasonable care, the person can assume the fact exists." Black's Law Dictionary 1520 (11th ed. 2019).

¶ 37 The BIA did not clarify what constitutes "reason to know" until it published the 2016 Final Rule. In this Rule, the BIA provided six factors for a court to consider when deciding whether it has "reason to know" that a child is an Indian child. 25 C.F.R. § 23.107(c) (2020). The BIA aligned the "reason to know" term in the 2016

Final Rule with the term used in the Federal ICWA statute. 2016 Final Rule at 38,803.

¶ 38 Our legislature incorporated the six "reason to know" factors in the 2019 amendments to Colorado's ICWA statute. Ch. 305, sec. 2, § 19-1-126, 2019 Colo. Sess. Laws 2792-93. As a result, Colorado's ICWA statute now provides that a court, on conducting the inquiry required under section 19-1-126(1)(a)(I)(A), has "reason to know" that a child involved in a child custody proceeding is an Indian child if

> (A) Any participant in the child-custody proceeding, officer of the court involved in the child-custody proceeding, Indian tribe, Indian organization, or agency informs the court that the child is an Indian child;
>
> (B) Any participant in the child-custody proceeding, officer of the court involved in the child-custody proceeding, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
>
> (C) The child who is the subject of the child-custody proceeding gives the court reason to know he or she is an Indian child;
>
> (D) 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;

> (E) The court is informed that the child is or has been a ward of a tribal court . . . ; or
>
> (F) The court is informed that the child or the child's parent possesses an identification card indicating membership in an Indian tribe.

§ 19-1-126(1)(a)(II)(A)-(F); *see also* 25 C.F.R. § 23.107(c).

¶ 39 Comments to the 2016 Final Rule note that these "reason to know" factors "allow a court to rely on facts or documentation indicating a Tribal determination such as Tribal enrollment documentation" and that "[t]his provision was added to the final rule in response to comments noting that sometimes Tribes are slow to respond to inquiries seeking verification of Tribal citizenship." 2016 Final Rule at 38,803.

¶ 40 Thus, any of these six "reason to know" factors demonstrate a substantial chance that the subject child is an Indian child and that the participant and the court can assume this fact exists.

3. Responses to the Court's Inquiry

¶ 41 The notice and filing obligations differ depending on the responses to the ICWA inquiries:

(1) If the juvenile court or department "knows" that the child is an Indian child (because a tribe or tribes have verified that

the child is a member of a tribe or is eligible for membership through a biological parent's membership), then the notice and filing obligations are governed by 25 U.S.C. § 1912(a) and section 19-1-126(1)(b) and (c).

(2) If the juvenile court is informed about one or more of the six "reason to know" factors described in section 19-1-126(1)(a)(II) (but a tribe or tribes have not verified the child's membership or eligibility for membership such that the court "knows" the child is an Indian child), then the notice and filing obligations are governed by 25 U.S.C. § 1912(a) and section 19-1-126(1)(b), (c), and (2).

(3) If the juvenile court receives information that the child may have Indian heritage, but the court does not have sufficient information to determine whether there is "reason to know" that the child is an Indian child (because none of the six "reason to know" factors exist), then the notice and filing obligations are governed by section 19-1-126(3).

(4) If the juvenile court is informed that the child does not have Native American or Alaska Native heritage and there is no other "reason to know" that the child is an Indian child,

then the notice and filing obligations depend on what a participant might later disclose to the department or court (based on the court's instruction that the participants are to inform the court if anyone subsequently receives information that provides "reason to know" the child is an Indian child). *See* § 19-1-126(1)(a)(I)(A).

4. The Notice Requirements Based on Responses

¶ 42 We now turn to the notice and filing obligations that arise under the Federal and Colorado ICWA statutes based on responses to the inquiries.

a. When the Court or Department Knows the Child is an Indian Child

¶ 43 If the court or department "knows" the child is an Indian child, Colorado's ICWA statute requires compliance with the notice requirements found in 25 C.F.R. § 23.111 (2020). *See* § 19-1-126(1)(b); *see also* 25 U.S.C. § 1912(a).

¶ 44 25 C.F.R. § 23.111 requires the department to send notice of the child custody proceeding to (1) each tribe of which the child may be a member or in which the child is eligible for membership if a biological parent is a member; (2) the child's parents; and (3) if

applicable, the child's Indian custodian. 25 C.F.R. § 23.111(a), (b). These notices must

- be sent by registered or certified mail with return receipt requested and be filed with the court together with any return receipts or other proof of service, 25 C.F.R. § 23.111(c); and
- "be in clear and understandable language," and include the following information:

> (1) The child's name, birthdate, and birthplace;
>
> (2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;
>
> (3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;
>
> (4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member); [and]
>
> (5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing.

25 C.F.R. § 23.111(d).

¶ 45 The notices must also contain various statements related to the parents', Indian custodian's, and tribe's rights in the proceedings, including the tribe's right to intervene and petition for a transfer to a tribal court, and the potential legal consequences of the proceedings. *M.V.*, ¶ 28; *see also* 25 C.F.R. § 23.111(d)(6), (e), (f), (g).

¶ 46 Any responses that the tribe sends to the department "must be distributed to the parties and deposited with the court." § 19-1-126(1)(c).

¶ 47 25 C.F.R. § 23.111(a) requires the court to *ensure* that the department: (1) sends notice of every child custody proceeding, as set forth above; and (2) files an original or a copy of each notice with the court, along with any return receipts or other proof of service.

b. When the Court Has "Reason to Know" the Child is an Indian Child

¶ 48 Colorado's ICWA statute recognizes that the court may not have *evidence* of a tribe's determination that the child is not an Indian child, or verification of a child's membership or eligibility for membership, despite being informed about one of the six "reason to

know" factors. For example, the court might be informed that the child lives on a reservation or has been a ward of a tribal court, but the tribe has not had time to provide evidence of the child's enrollment. *See* 2016 Final Rule at 38,803.

¶ 49 When the court has "reason to know" the child is an Indian child" but lacks "sufficient evidence to determine that the child is or is not an Indian child," then Colorado's ICWA statute requires the department to use

> due diligence to identify and work with all of the tribes of which there is reason to know the child may be a member, or eligible for membership, to verify whether the child is in fact a member, or a biological parent is a member and the child is eligible for membership.

§ 19-1-126(2)(a); *see K.C.*, ¶ 46.

¶ 50 The legislature did not define "due diligence" in this context, so we look to the common meaning of this term. *Sprinkle*, ¶ 28. Diligence is defined as "steady, earnest, and energetic effort" and "devoted and painstaking work and application to accomplish an undertaking." Merriam-Webster Dictionary, https://perma.cc/AH5U-7XB2. "Due diligence" is defined as "[t]he diligence reasonably expected from, and ordinarily exercised by, a

person who seeks to satisfy a legal requirement or to discharge an obligation." Black's Law Dictionary 573 (11th ed. 2019).

¶ 51 Thus, to satisfy its due diligence obligation under section 19-1-126(2), the department must earnestly seek to satisfy the legal requirement of (1) identifying and working with all tribes of which there is "reason to know" the child may be a member or eligible for membership to (2) verify whether the child is a member or a biological parent is a member and the child is eligible for membership. The court must then *confirm* by way of a report, declaration, or testimony in the record that the department used due diligence. § 19-1-126(2); *see also* 25 C.F.R. § 23.107(b).

¶ 52 And the court must *treat the child as an Indian child* unless — and until — it is determined on the record that the child does not meet the definition of an Indian child. § 19-1-126(2)(b).

¶ 53 Because section 19-1-126(1)(b) also applies when the court has "reason to know" that the child is an Indian child, *see also* 25 U.S.C. § 1912(a) (requiring notification of the child custody proceeding "where the court knows or has reason to know that an Indian child is involved"), and section 19-1-126(2)(b) requires the court to treat the child as an Indian child until it determines the

child is not an Indian child, the notice and filing requirements in section 19-1-126(1)(b) and (c) apply. So, the department must send, and the court must *ensure* that the department sends, the statutorily required notice of every child custody proceeding under 25 C.F.R. § 23.111 when the court has "reason to know" the child is an Indian child. And the department must file copies of such notices and any return receipts with the court. *Id.*

¶ 54 The 2016 Guidelines encourage courts and departments to "include enough information in the requests for verification to allow the Tribes to readily determine" whether the child is an Indian child. 2016 Guidelines at 21. This includes the categories of information that must be provided under 25 C.F.R. § 23.111(d).

¶ 55 Where the identity or location of the child's parents, the child's Indian custodian, or the tribes cannot be ascertained, but there is "reason to know" the child is an Indian child, notice of the child custody proceeding must be sent to the appropriate BIA Regional Director. *See* 25 C.F.R. § 23.111(e).

c. When the Court Has Information That the Child May Have Indian Heritage

¶ 56 Colorado's ICWA statute also imposes requirements on the juvenile court and the department when "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." § 19-1-126(3). Under such circumstances,

> the court shall direct the [department] 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. The court shall direct the [department] to make a record of the effort taken to determine whether or not there is reason to know that the child is an Indian child.

Id.

¶ 57 Although our legislature did not include a definition of "due diligence" in this context, we presume that it intended the term to have a similar meaning as in section 19-1-126(2). *See Montezuma Valley Irrigation Co. v. Bd. of Cnty. Comm'rs*, 2020 COA 161, ¶ 25.

¶ 58 Recall that the inquiry and notice requirements facilitate a determination of whether the child is an "Indian child" under ICWA.

In re Isaiah W., 373 P.3d at 447. Recall, also, that tribes determine whether the child is a member of a tribe or whether the child is eligible for membership through a biological parent's membership. 25 C.F.R. § 23.108(a). But an assertion of possible Indian heritage alone does not fall within a "reason to know" factor that would permit a participant or the court to assume the child is an "Indian child" under section 19-1-126(1)(a)(II). Thus, this type of an assertion does not require formal notice to a tribe or tribes to determine whether the child is an "Indian child."

¶ 59 Instead, to satisfy the "due diligence" obligation under section 19-1-126(3), the department must earnestly endeavor to satisfy the legal requirement of gathering *additional* information that will assist the court in determining whether there is "reason to know" the child is an Indian child. *See* 2016 Guidelines at 11 (providing that states or courts "may choose to require additional investigation into whether there is reason to know the child is an Indian child").

¶ 60 The Colorado legislature did not define what additional information the department must gather under this subsection. But the legislature did define the six "reason to know" factors that permit a participant or a court to assume the child is an Indian

child. And the legislature clarified who might possess information about the six "reason to know" factors. *See* § 19-1-126(1)(a)(II). Hence, to satisfy its "due diligence" obligation under section 19-1-126(3), the department must gather *additional* information in several areas.

¶ 61 First, the department must earnestly inquire of any person disclosing possible Indian heritage to determine the basis of that person's belief or understanding. This inquiry, and any follow-up inquiries, will be the key to determining what due diligence is required in any particular case. Thus, what constitutes "due diligence" will necessarily vary depending on the circumstances of each case.

¶ 62 Second, an assertion of possible Indian heritage may include multiple federally recognized tribes within an affiliated ancestral group. Thus, section 19-1-126(3) also requires the department to contact available family members and available extended family members and clarify what tribal ancestral group, and federally recognized tribes affiliated with the ancestral group, the parent or child might be affiliated with. The department must make these

family contacts to satisfy its "due diligence" obligation under section 19-1-126(3).

¶ 63 Third, from these inquiries, the department should be able to identify any other persons, agencies, organizations, or tribes that might have *additional* information about whether there is "reason to know" the child is an Indian child (e.g., whether any family member is or was a tribal member, whether the child was a ward of the tribal court, or whether a prior court has confirmed the child's Indian heritage). Then, after obtaining any additional information necessary to accomplish due diligence in this case, the department must advise the court whether the information satisfies one of the "reason to know" factors. *See* § 19-1-126(1)(a)(II).

¶ 64 The department may choose to contact the tribe or tribes within the identified ancestral group or groups to identify whether there is "reason to know" the parent or child is a member of any such tribe. *See* 2016 Guidelines at 18, 21. Such contact may be necessary when, for example, there are no other satisfactory sources of additional information. If the department makes this choice, the department should provide as much of the information required by 25 C.F.R. § 23.111(d) as possible to assist the tribes in

determining whether there is "reason to know" the child is an Indian child. *See* 2016 Guidelines at 21.

¶ 65 We recognize that section 19-1-126(3) does not require the department to send the notice to a tribe by registered or certified mail with return receipts requested. But section 19-1-126(3) requires the department to "make a record of the effort taken to determine whether or not there is reason to know that the child is an Indian child." So, the department must be able to demonstrate on the record that it made such an effort and how it did so.

¶ 66 The court may consider the nature and credibility of the source of the information and the basis of the source's knowledge when making its findings as to whether there is "reason to know" the child is an Indian child under section 19-1-126(3). *See, e.g.*, *B.H.*, 138 P.3d at 303. In assessing whether "due diligence" has been exercised, the juvenile courts must remain mindful that it is the tribe's prerogative alone to determine who is and who is not a member of or eligible for membership in the tribe. *See* 25 C.F.R. § 23.108(a).

D. Application

¶ 67 We disagree with mother that the court had "reason to know" the child was an Indian child. The juvenile court had information that the child may have Cherokee and Sioux heritage, but mother told the court she was not a member of — and had no information indicating that the child was a member of or eligible for membership in — any such tribes. Based on this information, we conclude that the court did not have "reason to know" that the child is an Indian child.

1. The Court Had Information About the Child's Indian Heritage that Did Not Establish "Reason to Know" the Child is an Indian Child

¶ 68 Based on the record, the following five "reason to know" factors do not appear to be applicable:

(1) No one informed the court that the child was an Indian child. § 19-1-126(1)(a)(II)(A).

(2) The child, who was a newborn at the outset of the case, did not provide the court with any information that she was an Indian child. § 19-1-126(1)(a)(II)(C).

(3) Nothing in the record indicates that the child, or the child's parent, lives on a reservation or in an Alaska Native village. § 19-1-126(1)(a)(II)(D).

(4) No participant told the court that the child was a ward of a tribal court. § 19-1-126(1)(a)(II)(E); *see also* 25 U.S.C. § 1903(12).

(5) No one presented evidence that either the child or her parents possessed an identification card indicating membership in an Indian tribe. § 19-1-126(1)(a)(II)(F).

¶ 69 So, we must consider the single remaining "reason to know" factor: a participant in the case "informs the court that it has discovered information indicating that the child is an Indian child." § 19-1-126(1)(a)(II)(B).

¶ 70 In *People in Interest of E.M.*, 2021 COA 152, ¶¶ 14-15, a division of this court considered whether a juvenile court had "reason to know" that the child was an Indian child under section 19-1-126(1)(a)(II)(A) and (B) based on information about the child's Indian heritage similar to what we have here. The division held that the court did not have "reason to know" under subsection (A), but it did have "reason to know" under subsection (B). *E.M.*, ¶ 16. The

division determined that, because subsections (A) and (B) could not have the same meaning, the legislature must have intended subsection (B) to "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." *E.M.*, ¶ 16.

¶ 71 We agree with the *E.M.* division that information about the child's heritage does not constitute "reason to know" that the child is an Indian child under section 19-1-126(1)(a)(II)(A). Information about a possible affiliation with two tribal ancestral groups does not satisfy one of the six reason to know factors.

¶ 72 But we respectfully disagree with the *E.M.* division's conclusion that a court has "reason to know" that a child is an Indian child under section 19-1-126(1)(a)(II)(B) based on "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*." *E.M.*, ¶ 16 (emphasis added). This "reason to know" factor is based on whether a participant has subsequently discovered information indicating that the child is an Indian child. *See* § 19-1-126(1)(a)(II)(B); *see also* 25 U.S.C. §

1903(4) (defining "Indian child"). And the 2016 Guidelines note that the definition of Indian child "does not apply simply based on a child['s] or parent's Indian ancestry" but depends on "a political relationship" to a tribe. *See* 2016 Guidelines at 10.

¶ 73 The difference between subsections (A) and (B) of section 19-1-126(1)(a)(II) is temporal. The 2016 Guidelines explain that "subsequent discovery of information" is a recognition "that facts change during the course of a child-custody proceeding," so "courts must instruct participants to inform the court if they subsequently learn information that provides 'reason to know' the child is an 'Indian child.'" 2016 Guidelines at 11. The 2016 Guidelines further explain that "if the State agency subsequently discovers that the child is an Indian child, for example, or if a parent enrolls the child in an Indian Tribe, they will need to inform the court so that the proceeding can move forward in compliance with the requirements of ICWA." *Id.*

¶ 74 We thus conclude that section 19-1-126(1)(a)(II)(B) applies when a "participant in the child-custody proceeding, officer of the court involved in the child-custody proceeding, Indian tribe, Indian organization, or agency" later discovers information that the child is

a member of a tribe or that the child is eligible for membership through a biological parent's membership.

¶ 75 We aren't persuaded that *B.H.*, on which mother relies, leads to a different conclusion. In *B.H.*, the juvenile court had information that the child had Indian heritage, but it had not received information that the child or the child's mother was a member of a tribe. 138 P.3d at 300. Despite this information, the department contacted no tribes to verify the child's status as an Indian child. *Id.* The supreme court applied Colorado's ICWA statute and ultimately determined that, because the department and court "had *reason to believe* that a federally recognized Indian tribe could consider [the child] to be a tribal member or the eligible biological child of a member, potentially affected tribes were entitled to notice of the proceedings prior to any determination by the court." *Id.* (emphasis added).

¶ 76 When the supreme court decided *B.H.* in 2006, Colorado's ICWA statute required departments to notify tribes if they knew or had *reason to believe* that the child involved in the proceeding was an Indian child. § 19-1-126(1)(b), C.R.S. 2005. But our legislature removed the "reason to believe" language from Colorado's ICWA

statute and replaced it with "reason to know." 2019 Colo. Sess. Laws at 2792. And, as discussed, Colorado's ICWA statute defines the factors that constitute "reason to know." 2019 Colo. Sess. Laws at 2792-93. The *B.H.* court also relied on the 1979 BIA Guidelines, which, as noted, have been repealed. The *B.H.* court thus required notice to tribes under a different standard than the one in effect today.

¶ 77 We therefore conclude that, based on the record, there is not a "reason to know" that the child is an Indian child.

¶ 78 But this does not end our analysis. We conclude that the juvenile court erred because it did not direct the Department to (1) exercise "due diligence" in gathering *additional* information to assist the court in determining whether there is "reason to know" that the child is an Indian child and (2) make a record of the effort taken to determine whether or not there is "reason to know" that the child is an Indian child, as required by section 19-1-126(3).

¶ 79 Although participants asked mother and her extended family what tribe or tribal ancestral group she or the child might be affiliated with, we see nothing in the record that indicates the Department made any efforts to gather *additional* information. This

includes no record of any effort to clarify the basis for the Indian heritage claim to determine who else needed to be contacted, and no record the Department made any other inquiries to assist the court in determining whether there is "reason to know" the child is an Indian child. And, on appeal, the Department and the GAL do not contend that the Department made any "due diligence" efforts to comply with section 19-1-126(3).

2. Reverse or Remand?

¶ 80 In *B.H.*, our supreme court reversed the judgment of the court of appeals, which had affirmed the district court's order terminating parental rights, with directions that the case be remanded. 138 P.3d at 299. The court instructed "that notice be given in accordance with the provisions of [ICWA]." *Id.* at 300. But it also held that if "it is ultimately determined, after proper notice," that the child "is not an Indian child, the district court's order terminating parental rights shall stand affirmed." *Id.* Thus, its holding was a conditional remand.

¶ 81 Our supreme court in *People in the Interest of C.A.K.*, 652 P.2d 603, 608 (Colo. 1982), recognized that the finality of a decision is of paramount importance to children who, by the time a termination

trial has happened, have been subject to a great deal of emotional trauma. Because we have concluded based on the record that there is not a "reason to know" that the child is an Indian child, we see no reason at this point in the proceedings to reverse the judgment terminating parental rights. Instead, we remand the case to the juvenile court to satisfy the requirements of section 19-1-126(3).

III. Procedure on Remand

¶ 82 We therefore remand the case for the juvenile court to *expeditiously* determine whether there is "reason to know" that the child is an Indian child before recertifying the case to our court for a decision. *See* § 19-1-109(1), C.R.S. 2021 (providing that appeals "shall be decided at the earliest practical time").

¶ 83 On remand, the juvenile court shall direct the Department to exercise "due diligence" by, first, earnestly inquiring of mother and grandmother the basis of their belief or understanding about the family's Indian heritage. This inquiry, and any further inquiries, will be the key to determining what other "due diligence" is required under the circumstances of this case. Second, from this inquiry, the Department should be able to identify other persons, agencies, organizations, or tribes that might have *additional* information

about whether there is "reason to know" the child is an Indian child. Then, after obtaining this *additional* information, the Department must advise the court whether the information satisfies one of the "reason to know" factors under section 19-1-126(1)(a)(II).

¶ 84 The Department's record of its exercise of "due diligence" can include information it provided to any identified tribes, along with any attachments, return receipts, and responses received from the tribes. *See* 25 C.F.R. § 23.111(a)(2); § 19-1-126(1)(b)-(c).

¶ 85 After the Department makes a record of its "due diligence" efforts, the juvenile court must enter findings as to whether the Department has satisfied the "due diligence" requirement under section 19-1-126(3) and whether there is "reason to know" that the child is an Indian child. *See B.H.*, 138 P.3d at 303.

¶ 86 If the juvenile court determines that *there is not* "reason to know" that the child is an Indian child, the Department must file a notice with this court along with a copy of the juvenile court's order within seven days after the issuance of the order making this determination. Then the appeal shall be recertified. A supplemental record, consisting of the court record created on remand, is due fourteen days after recertification. Within seven

days of the matter being recertified, if any party wishes to supplement the record with transcripts of hearings that occurred on remand, that party shall file a supplemental designation of transcripts with the juvenile court and this court. If supplemental transcripts are designated, the complete supplemental record, including the court record, will be due twenty-one days after the supplemental designation of transcripts was filed. And within fourteen days of recertification, mother may file a supplemental brief, not to exceed 3,500 words, limited to addressing the juvenile court's determination. If mother files a supplemental brief, then the other parties may file supplemental briefs in response, within fourteen days, not to exceed 3,500 words.

¶ 87 If the juvenile court determines that *there is* "reason to know" that the child is an Indian child, "but the court does not have sufficient evidence to determine that the child is or is not an Indian child," § 19-1-126(2), the court must then direct the Department to exercise "due diligence" under section 19-1-126(2)(a), and earnestly seek to satisfy the legal requirement of

- identifying all tribes of which there is "reason to know" the child is an Indian child; and

- working with these tribes to verify whether the child is a member or a biological parent is a member and the child is eligible for membership.

See § 19-1-126(2)(a).

¶ 88 The court must then *confirm* by way of a report, declaration, or testimony in the record that the Department used "due diligence." *Id.* The court will then have to determine whether the child is an Indian child.

¶ 89 If the juvenile court "*knows*" or has "*reason to know*" that the child is an Indian child, the Department must file a notice with this court along with a copy of the juvenile court's order within seven days after the issuance of the order making this determination. The appeal shall be recertified to permit a division of this court to issue an opinion vacating the termination judgment and remanding the case to the juvenile court with directions to follow the substantive and procedural requirements under the Federal and Colorado ICWA statutes.

¶ 90 We further order the Department to notify this court in writing of the status of the juvenile court proceedings if this matter is not concluded within twenty-eight days from the date of this order, and

to do so every twenty-eight days thereafter until the juvenile court issues its order on remand.

JUDGE LIPINSKY and JUDGE BROWN concur.