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ADVANCE SHEET HEADNOTE
September 12, 2022

2022 CO 42

No. 22SC29, ***People in the Int. of E.A.M.*** **—Indian Child Welfare Act ("ICWA")—§ 19-1-126, C.R.S. (2021)—"Reason to Know" Child is an Indian Child—Mere Assertions of Indian Heritage.**

In this dependency and neglect case, the supreme court addresses the notice provisions in the Indian Child Welfare Act ("ICWA"). Those provisions apply when the court knows or has reason to know that an Indian child is involved in a child custody proceeding, including a dependency and neglect proceeding. Whether the court "knows" that a child is an Indian child is fairly straightforward. Whether the court has "reason to know" that a child is an Indian child—not so much.

The supreme court now holds that mere assertions of a child's Indian heritage (including those that specify a tribe or multiple tribes by name), without more, are not enough to give a juvenile court "reason to know" that the child is an Indian child. Instead, such assertions trigger the due diligence requirement in Colorado's ICWA-implementing statute, § 19-1-126(3), C.R.S. (2021).

Because the juvenile court correctly found that it didn't have reason to know that E.A.M. is an Indian child, it properly directed the Denver Human Services Department to exercise due diligence in gathering additional information that would assist in determining whether there was reason to know that E.A.M. is an Indian child. Accordingly, the supreme court reverses the division's decision to vacate the juvenile court's termination judgment. The matter is remanded to the court of appeals for further proceedings consistent with this opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2022 CO 42

Supreme Court Case No. 22SC29
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 21CA381

Petitioner:

The People of the State of Colorado,

In the Interest of a Minor Child:

E.A.M.

v.

Respondent:

D.R.M.

Judgment Reversed
en banc
September 12, 2022

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 No resource "is more vital to the continued existence and integrity of Indian tribes than their children," and because the United States has a special relationship with Indian tribes and a responsibility to Indian people, it "has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3) (2018). This compelling declaration was made by Congress more than four decades ago as it adopted the Indian Child Welfare Act ("ICWA"). Congress found "that an alarmingly high percentage of Indian families" were being "broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(4). More specifically, Congress was concerned that the states, in exercising jurisdiction over Indian child custody proceedings through administrative and judicial bodies, were often failing "to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). Congress had become increasingly troubled "over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

¶2 To combat these social maladies, ICWA set "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902 (2018). The newly minted standards sought to ensure that the placement of Indian children in foster or adoptive homes would reflect "the unique values of Indian culture" while providing "assistance to Indian tribes in the operation of child and family service programs." *Id.*

¶3 ICWA applies to state dependency and neglect proceedings involving Indian children. *People in Int. of K.C. v. K.C.*, 2021 CO 33, ¶ 24, 487 P.3d 263, 269. Under ICWA, when the court "knows or has reason to know" that a child who is the subject of a dependency and neglect proceeding is an Indian child, it has an obligation to ensure that the petitioning party (i.e., a social services department) gives notice of the proceeding to any identified Indian tribes. 25 U.S.C. § 1912(a) (2018).

¶4 Whether the court "knows" that a child is an Indian child is a fairly straightforward inquiry. But whether the court has "reason to know" that a child is an Indian child is a different kettle of fish. The latter inquiry has caused much consternation among judges and lawyers. And it's the one we grapple with today. As relevant here, the court has reason to know that a child is an Indian child when "[a]ny 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." 25 C.F.R. § 23.107(c)(2) (2022). "If the court receives information that the child may have Indian heritage," it must direct the petitioning 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." § 19-1-126(3), C.R.S. (2021).

¶5 In this dependency and neglect case, the juvenile court terminated Mother's parental rights with respect to E.A.M. Mother appealed, complaining that the court had failed to comply with ICWA by not ensuring that the petitioning party, the Denver Human Services Department ("the Department"), had provided notice of the proceeding to the tribes that she and other relatives had identified as part of E.A.M.'s heritage. The Department and the child's guardian ad litem responded that the assertions of Indian heritage by Mother and other relatives had not given the juvenile court reason to know that the child is an Indian child. Rather, they maintained, such assertions had merely triggered the due diligence requirement in section 19-1-126(3), and here, they continued, the Department had exercised due diligence. A division of the court of appeals agreed with Mother, vacated the termination judgment, and remanded with directions to ensure compliance with

ICWA's notice requirements. *People in Int. of E.M.*, 2021 COA 152, ¶ 1, 507 P.3d 113, 114. We now reverse.

¶6 We hold that mere assertions of a child's Indian heritage (including those that specify a tribe or multiple tribes by name), without more, are not enough to give a juvenile court "reason to know" that the child is an Indian child. Instead, such assertions trigger the due diligence requirement in section 19-1-126(3). Here, the juvenile court correctly found that it didn't have reason to know that E.A.M. is an Indian child. Accordingly, it properly directed the Department to exercise due diligence in gathering additional information that would assist in determining whether there was reason to know that E.A.M. is an Indian child.

¶7 Just what constitutes due diligence in the context of section 19-1-126(3) isn't before us. Although the juvenile court ultimately determined that the Department had satisfied the statutory due diligence requirement, we pass no judgment on the matter because the issue isn't properly teed up and hasn't been fully briefed. And because we reverse the division's decision to vacate the juvenile court's termination judgment, we also do not reach the question of whether the division erred in departing from decisions by other divisions when it chose to vacate the judgment instead of remanding on a limited basis for further determinations

concerning ICWA compliance.[1] We remand, however, to allow the division to consider Mother's outstanding claim, which alleges that the Department failed to undertake reasonable efforts to rehabilitate her.

I. ICWA and Colorado's ICWA Statute

¶8 Before reciting this case's facts and procedural history, we examine ICWA and Colorado's ICWA-implementing statute to place in context what occurred in the juvenile court.

A. Background

¶9 Congress passed ICWA in 1978 to protect and preserve Indian tribes and their resources, as well as to safeguard Indian children who are either members of an Indian Tribe or eligible for such membership. *People in Int. of M.V.*, 2018 COA 163, ¶ 10, 432 P.3d 628, 632. ICWA establishes minimum federal standards for child custody proceedings involving Indian children. *Id.* We've made clear that

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[1] We granted certiorari to review the following two issues:

1. Whether the court of appeals erred in its analysis and application of section 19-1-126, C.R.S. (2021), and 25 C.F.R. § 23.107(c) in concluding that the juvenile court had "reason to know" the child is an "Indian child" under the Indian Child Welfare Act ("ICWA").
2. Whether the court of appeals, in departing from decisions of other divisions, erred in vacating the judgment of the juvenile court and authorizing a new appeal from any reinstated termination judgment rather than a limited remand for further determinations.

ICWA "recognizes that Indian tribes have a separate interest in Indian children, distinct from, but equivalent to, parental interests." *B.H. v. People in Int. of X.H.*, 138 P.3d 299, 303 (Colo. 2006).

¶10 Congress authorized the United States Department of the Interior ("DOI") to promulgate rules and regulations necessary to effectuate ICWA. 25 U.S.C. § 1952 (2018). In 1979, a year after ICWA came into existence, the DOI, through the Bureau of Indian Affairs ("BIA"), issued a set of ICWA guidelines for state courts. *See* Bureau of Indian Affs., *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 (Nov. 26, 1979) [https://perma.cc/TBB7-HZ6Y] ("1979 Guidelines"). The 1979 Guidelines interpreted certain ICWA provisions and instituted procedures to protect the rights guaranteed by ICWA. *Id.*

¶11 But the 1979 Guidelines were not regulations and, therefore, lacked "binding legislative effect." *Id.* It wasn't until 2016, nearly four decades after ICWA's enactment, that the DOI, through the BIA, disseminated federal regulations related to ICWA ("federal regulations"). Indian Child Welfare Act Procs., 81 Fed. Reg. 38,778 (June 14, 2016); *see generally* 25 C.F.R. § 23. The federal regulations clarify some provisions in ICWA, including by defining key terms. *People in Int. of K.M. v. V.K.L.*, 2022 CO 35, ¶ 23, 512 P.3d 132, 140.

¶12 Roughly six months after the federal regulations came into being, the BIA replaced the 1979 Guidelines with new guidelines to aid state courts in their

application of ICWA and the federal regulations. Bureau of Indian Affs., *Guidelines for Implementing the Indian Child Welfare Act*, 81 Fed. Reg. 96,476 (Dec. 30, 2016) [https://perma.cc/3TCH-8HQM] ("2016 Guidelines"). The 2016 Guidelines "elaborate on the definitions and notification provisions found in the federal regulations." *V.K.L.*, ¶ 24, 512 P.3d at 140. Although the 2016 Guidelines are no more binding than their predecessors, they have been considered persuasive by some courts. *See B.H.*, 138 P.3d at 302 n.2. And our court recently embraced both the federal regulations and the 2016 Guidelines, noting that they "are essential to aiding courts in their interpretation and application of ICWA's provisions." *V.K.L.*, ¶ 24, 512 P.3d at 140.

¶13 Our General Assembly integrated ICWA into the Colorado Children's Code in 2002, largely by enacting section 19-1-126 ("Compliance with the federal 'Indian Child Welfare Act'"). *Id.* at ¶ 25, 512 P.3d at 140 (citing Ch. 217, secs. 1, 3, § 19-1-126, 2002 Colo. Sess. Laws 782, 782–85). In so doing, the legislature underscored our state's "commit[ment] to consistent application of and compliance with the provisions of the federal 'Indian Child Welfare Act,'" echoing Congress's pronouncement that there is nothing more vital to the continued existence and integrity of Indian tribes than their children. Ch. 217, sec. 1, Legislative Declaration, 2002 Colo. Sess. Laws 782, 783. As pertinent here,

section 19-1-126 was amended in 2019 to conform to the federal regulations and the 2016 Guidelines. Ch. 305, sec. 1, § 19-1-126, 2019 Colo. Sess. Laws 2791, 2791.

B. Relevant Provisions, Regulations, and Guidelines

¶14 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) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4) (2018). Colorado law has adopted ICWA's definition of "Indian child," albeit not as part of section 19-1-126. *See* § 19-1-103(83), C.R.S. (2021).

¶15 Notably, ICWA doesn't delineate tribal membership or eligibility for such membership. *K.C.*, ¶ 28, 487 P.3d at 270. Membership and eligibility for membership are matters left to the exclusive control of Indian tribes. *Id.* But tribes do not employ uniform criteria to ascertain membership or eligibility for membership. For example, although many tribes require registration or enrollment as a condition of membership, others automatically include descendants as members. *In re Termination of Parental Rights to Arianna R.G.*, 657 N.W.2d 363, 369 (Wis. 2003). Depending on any individual tribe's standard for membership, or its process for granting membership, a court may not possess the ability to discern membership or eligibility for membership in a particular tribe without a tribal determination. *See B.H.*, 138 P.3d at 303. Unsurprisingly, then,

tribes themselves are the best source of information concerning membership and eligibility for membership, *id.*, and a "court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe," 25 C.F.R. § 23.108(b) (2022); § 19-1-126(1) (implementing 25 C.F.R. § 23, including 25 C.F.R. § 23.108(b)).

¶16 Because Indian tribes have a distinct interest in Indian children, ICWA's notice provisions require the petitioning party in a child custody proceeding involving an Indian child to "notify the parent or Indian custodian and the Indian child's tribe . . . of the pending proceedings and of their right of intervention." 25 U.S.C. § 1912(a); § 19-1-126(1)(b) (incorporating 25 C.F.R. § 23.111(d)(6)(ii)–(iii)). To assist in identifying federally recognized tribes and their agents for service, the BIA has traditionally published a list of recognized tribes and their agents in the Federal Register by region and by historical tribal affiliation. *M.V.*, ¶ 29, 432 P.3d at 634.

¶17 Any notice under ICWA must provide sufficient information to allow the identified tribes to assess whether the child in question is a member or eligible for membership. *Id.*; § 19-1-126(1)(b) (incorporating 25 C.F.R. § 23.111(d)(1)–(4)). Therefore, the notice must include a copy of the petition, the complaint, or other document by which the child custody proceeding was initiated. *M.V.*, ¶ 28, 432 P.3d at 634; § 19-1-126(1)(b) (incorporating 25 C.F.R. § 23.111(d)(5)).

¶18 The child's Indian custodian and tribe shall both "have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c) (2018); § 19-1-126(1)(b) (incorporating 25 C.F.R. § 23.111(d)(6)(iii)). And the notice must so inform them. *M.V.*, ¶ 26, 432 P.3d at 634. If a hearing has already been set, the notice must contain the date, time, and location of the hearing. *Id.* at ¶ 28, 432 P.3d at 634; § 19-1-126(1)(b) (incorporating 25 C.F.R. § 23.111(d)).

¶19 But the notice provisions are not the be-all and end-all of ICWA. As we explained last term:

> ICWA provides that the party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d). Moreover, prior to the entry of an order terminating the parental rights of an Indian child, the court must hear the testimony of "qualified expert witnesses" and make "a determination, supported by evidence beyond a reasonable doubt" (as opposed to the clear and convincing evidence standard used in non-ICWA, state court termination proceedings) "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). And last, if a court removes an Indian child from the custody of a parent or Indian custodian, or if the court terminates parental rights under state law, then the affected child, parent, Indian custodian, or nation "may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of [ICWA]." 25 U.S.C. § 1914 (2018).

K.C., ¶ 26, 487 P.3d at 269–70. Hence, a determination that ICWA is applicable has a cascade of ramifications. Given the division's ruling, though, we keep our focus on ICWA's notice provisions.

¶20 So, when do ICWA's notice provisions apply? ICWA's notice provisions apply when the court knows or has reason to know that an Indian child is involved in a child custody proceeding, including a dependency and neglect proceeding. 25 U.S.C. § 1912(a); § 19-1-126(1)(b). In light of this standard, the petitioning party in a dependency and neglect proceeding must state in its initial pleading whether it has already determined that the child is an Indian child. § 19-1-126(1)(c). If so, the petitioning party must identify the Indian child's tribe(s), set forth the reasonable efforts it has made to send notice of the proceeding to the child's Indian custodian(s) and tribe(s), and share with the court and the parties any tribal responses it has received. *Id.* If the petitioning party hasn't yet determined whether the child is an Indian child, it must describe the efforts it has undertaken to make that determination. *Id.*

¶21 Regardless of what the initial pleading states, the court must ask the participants on the record at the commencement of every "proceeding" whether they know or have reason to know that the child is an Indian child. 25 C.F.R. § 23.107(a); § 19-1-126(1)(a)(I)(A). In the event that the participants lack knowledge or reason to know that the child is an Indian child, the court must direct

them to inform the court if they later receive information that gives them reason to know that the child is an Indian child. 25 C.F.R. § 23.107(a); § 19-1-126(1)(a)(I)(A).

¶22 ICWA doesn't define "knows" or "reason to know." But we've recognized that, in light of ICWA's purpose to permit tribal participation in child custody proceedings involving tribal members or eligible tribal members, "the threshold requirement for notice was clearly not intended to be high." *B.H.*, 138 P.3d at 303. Of course, a low threshold doesn't mean no threshold.

¶23 Whether the court "knows" that a child is an Indian child is fairly straightforward.[2] Whether the court has "reason to know" that a child is an Indian child—not so much.

¶24 The federal regulations state that a court has "reason to know" that a child is an Indian child if:

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[2] A court "knows" that a 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." *People in Interest of A-J.A.B.*, 2022 COA 31, ¶ 35, 511 P.3d 750, 757; *see also* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/*know* [https://perma.cc/UL3Q-MRD3] (defining "know" as "to be aware of the truth or factuality of").

> (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).

¶25 The Colorado legislature incorporated these factors into section 19-1-126 in 2019, a few years after the federal regulations were promulgated. *See* 2019 Colo. Sess. Laws at 2792–94. The six reason-to-know factors that now appear in section 19-1-126 mirror those in the federal regulations. *Compare* § 19-1-126(1)(a)(II) *with* 25 C.F.R § 23.107(c).[3]

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[3] If there is reason to know that the child is an Indian child but there is insufficient information to determine that the child is or is not an Indian child, the court must treat the child as an Indian child throughout the proceeding unless and until it is

¶26 At the same time our legislature adopted the six reason-to-know factors in the federal regulations, it replaced subsection (3) in our ICWA statute with a new provision. *See* 2019 Colo. Sess. Laws at 2794. Subsection (3) now tells the court how to proceed if it possesses information that the child may have Indian heritage but nevertheless lacks sufficient information to find that there is reason to know that the child is an Indian child:

> 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.

§ 19-1-126(3).

¶27 Hence, there are three possible scenarios: (1) the court knows that the child is an Indian child; (2) the court has reason to know that the child is an Indian child; and (3) the court neither knows nor has reason to know that the child is an Indian

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determined on the record that the child does not meet the definition of an Indian child. 25 C.F.R. § 23.107(b)(2); § 19-1-126(2)(b). This is why ICWA's notice provisions apply just the same when the court knows that the child is an Indian child and when the court merely has reason to know that the child is an Indian child.

child but receives information that the child has or may have Indian heritage.[4] The ICWA notice provisions apply in the first two scenarios, while the due diligence requirement in section 19-1-126(3) applies in the third scenario.

¶28 Against this backdrop, we turn now to this case's facts and procedural history.

II. Facts and Procedural History

¶29 E.A.M. was born in August 2019. He was abandoned at the hospital following his birth, and no family members could immediately be located.

¶30 Five days after E.A.M. came into the world, the Department petitioned the juvenile court to adjudicate him dependent and neglected. During the first court appearance, Mother stated that she has possible Sioux and Apache heritage but denied being enrolled in either tribe. She added that she wasn't sure if she or E.A.M. are even eligible to be enrolled in one of those tribes. The juvenile court was aware that in Mother's prior dependency and neglect actions involving other children, notice had been sent to the Apache and Sioux Tribes, but ICWA's notice provisions had been found to be inapplicable in both cases. Recognizing that it couldn't simply rely on those findings, however, the court considered Mother's

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[4] Although section 19-1-126(3) refers only to information that the child "may have" Indian heritage, we perceive no basis to afford different treatment to information that the child *has* Indian heritage.

assertion regarding E.A.M. specifically and concluded that it wasn't sufficient to provide reason to know that the child is an Indian child. Instead, the court directed the Department to "exercise due diligence to investigate" whether E.A.M. is eligible to be "enrolled in either the Sioux or Apache tribes."

¶31 Mother thereafter submitted an "ICWA ancestry chart" and a "Denver Juvenile Court ICWA Inquiry" form, both of which contained information related to her claim regarding E.A.M.'s heritage. The Department followed up on that information as part of its ICWA investigation. Throughout the proceeding, the Department regularly submitted investigation updates via affidavits of due diligence, consistently reporting that it had no reason to know that E.A.M. is an Indian child.

¶32 Below we summarize the cumulative information gathered by the Department regarding the assertions of E.A.M.'s Indian heritage by Mother and other relatives:

- **Mother.** Mother claimed that she has Indian heritage through "Sioux and Apache, New Mexico and South Dakota." She specifically alleged that her father is "Sioux Apache," that her paternal grandfather is Sioux and enrolled in a tribe, and that her paternal grandmother is Apache and enrolled in a tribe. However, as mentioned, Mother was clear that she and E.A.M. are not enrolled in any tribe, and she said that she was unsure whether they were eligible to be so enrolled.

- **Mother's mother.** Mother's mother said that the family has a connection with the Cherokee Tribe or the Sioux Tribe.

- **Mother's father.** Mother's father initially denied any Indian heritage but later claimed that his father is Sioux. However, Mother's paternal uncle told the Department that Mother's father incorrectly assumes that there is Indian heritage in the family. He added that both of Mother's paternal grandparents state that the family is "entirely Hispanic."

- **Mother's paternal grandmother.** Consistent with the statements made by Mother's paternal uncle, Mother's paternal grandmother denied any Indian heritage.

- **Mother's maternal grandmother.** Mother's maternal grandmother reported that the family has some Indian heritage, including "Cherokee and something else," possibly "some Sioux." However, she indicated that no one in her family is registered in any tribe.

- **Mother's maternal great-grandmother.** Mother's maternal great-grandmother said that her family "might have a little bit of Indian," possibly Apache.

¶33 Because the Department viewed the assertions of Indian heritage by Mother and other relatives as falling short of constituting reason to know that E.A.M. is an Indian child, it did not send notice of the proceeding to any of the identified tribes. And, in line with the Department's position, the juvenile court repeatedly found throughout the proceeding that it didn't have reason to know that E.A.M. is an Indian child. Instead, at each hearing, pursuant to section 19-1-126(3), the court ordered the Department to exercise due diligence in gathering information that would assist in determining whether there is reason to know that E.A.M. is an Indian child.

¶34 At some point, the Department asked the juvenile court to terminate the legal relationship between Mother and E.A.M., alleging that (1) the treatment plan the court had approved for Mother had been unsuccessful, (2) Mother remained unfit to be a parent, and (3) her conduct or condition was unlikely to change within a reasonable time. *See* § 19-3-604(1)(c), C.R.S. (2021). During the termination hearing, the court stood by its previous determinations regarding the inapplicability of ICWA's notice provisions. The court specifically found that, while Mother and other relatives had made "a general assertion of [Indian] heritage," the Department's investigation demonstrated that "there wasn't anything that rose to the level of providing the Department with reason to know" that E.A.M. is an Indian child. And, continued the court, the Department had exercised due diligence by undertaking "numerous efforts to try to obtain additional information from relatives regarding whether there was any Native American, American Indian, or Alaskan Native heritage."

¶35 Having found both that the Department was not required to give notice of the proceeding to the identified tribes and that the Department had fulfilled the due diligence requirement in section 19-1-126(3), the court went forward with the termination hearing. At the conclusion of the hearing, the court terminated Mother's parental rights as to E.A.M.

¶36 Mother appealed, arguing, as relevant here, that the juvenile court had violated ICWA by not ensuring that the Department had provided appropriate notice of the proceeding to the identified tribes.[5] The Department and the guardian ad litem countered that ICWA's notice provisions had not been triggered because there was no reason to know that E.A.M. is an Indian child. A division of the court of appeals sided with Mother, vacated the termination judgment, and remanded with directions to satisfy ICWA's notice requirements. *E.M.*, ¶ 1, 507 P.3d at 114.

¶37 The division acknowledged that the record did not "definitively establish" that E.A.M. fits the statutory definition of "Indian child," as he is neither (a) a tribal member nor (b) eligible for tribal membership and the biological child of a tribal member. *Id.* at ¶ 15, 507 P.3d at 116. But the division observed that such certainty is not necessary to provide reason to know that a child is an Indian child. *Id.* Instead, held the division, a court has "reason to know" that a child is an Indian child if it "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

[5] Mother also contended that the Department had failed to make reasonable efforts to rehabilitate her. Because the division ruled in Mother's favor on ICWA grounds, it declined to address this claim. Accordingly, this claim remains outstanding.

definition." *Id.* at ¶ 16, 507 P.3d at 117. And, posited the division, the due diligence provision in section 19-1-126(3) didn't alter the analysis. *Id.* at ¶¶ 19–20, 507 P.3d at 117. Therefore, ruled the division, the Department should have complied with ICWA's notice requirements and the juvenile court should have ensured such compliance. *Id.* at ¶ 23, 507 P.3d at 118.

¶38 The Department and the guardian ad litem petitioned us to review the case, and we granted certiorari. It is worth noting that different divisions of the court of appeals have recently reached conflicting conclusions on whether assertions of a child's Indian heritage suffice to trigger ICWA's notice requirements: two have answered in the negative, while two have answered in the affirmative. *Compare People in Int. of A-J.A.B.*, 2022 COA 31, ¶ 67, 511 P.3d 750, 761–62 (concluding that the juvenile court did not have "reason to know" the child was an Indian child where the court received information "that the child may have Cherokee and Sioux heritage" but mother stated she was not a member of either tribe and there was no basis to believe the child had membership or eligibility for membership in either tribe); *and People in Int. of Jay.J.L.*, 2022 COA 43, ¶ 3, 514 P.3d 312, 315 (following *A-J.A.B.*'s lead in concluding that "a parent's assertion of Indian heritage, standing alone, is insufficient to trigger ICWA's notice requirements but, rather, it invokes the petitioning party's obligation to exercise due diligence under section 19-1-126(3)"); *with E.M.*, ¶¶ 17–18, 507 P.3d at 117 (the opinion by the

division below); *and M.M.*, 2022 COA 61, ¶ 3, __ P.3d __ (following in the footsteps of the division below in concluding "that father's assertion of lineal tribal affiliation gave the juvenile court reason to know that the children are Indian children, thus triggering ICWA's notice requirements").

III. Analysis

A. Standard of Review and Pertinent Principles of Statutory Construction

¶39 We review questions of statutory construction de novo. *K.C.*, ¶ 21, 487 P.3d at 268. This includes ICWA-related construction questions. *See id.*, 487 P.3d at 268–69.

¶40 We are well-acquainted with the core principles of statutory construction. First and foremost, we must "consider the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts," and we must interpret statutory words and phrases in accordance with their plain and ordinary meaning. *Id.*, 487 P.3d at 269. Second, we must "strive to avoid statutory constructions that either render words or provisions superfluous or ineffective or that lead to absurd results." *Id.*

¶41 But in cases involving Indian law, we have acknowledged that "standard principles of statutory construction do not have their usual force." *Id.* at ¶ 22, 487 P.3d at 269 (quoting *B.H.*, 138 P.3d at 302). Instead, in matters of Indian law, "statutes are to be construed liberally in favor of the Indians, with ambiguous

provisions interpreted to their benefit." *Id.* (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). This canon of construction is "rooted in the unique trust relationship between the United States and the Indians." *Blackfeet Tribe of Indians*, 471 U.S. at 766 (quoting *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)).

B. Did the Juvenile Court Have Reason to Know That E.A.M. Is an Indian Child?

¶42 At the outset, we note that no one claims that the juvenile court knew that E.A.M. is an Indian child. Rather, the centerpiece of the parties' dispute is whether the juvenile court had reason to know that E.A.M. is an Indian child. If the court had such reason to know, it erred in finding that ICWA's notice provisions did not apply; if the court lacked such reason to know, it correctly found that ICWA's notice provisions did not apply and that the due diligence requirement in section 19-1-126(3) was triggered instead.

¶43 As mentioned, ICWA doesn't define "reason to know." We thus turn to the six factors in the federal regulations and in Colorado's ICWA statute for guidance. The parties agree that the first, third, fourth, fifth, and sixth factors are not at play here. No one told the court that E.A.M. is an Indian child (factor 1); E.A.M. did not address the court, much less report that he is an Indian child (factor 3); the court was not notified that E.A.M., one of his parents, or an Indian custodian is domiciled or resides on a reservation or in an Alaskan Native village (factor 4);

there is no indication in the record that E.A.M. is or has ever been a ward of a tribal court (factor 5); and there is no basis to believe that E.A.M. or one of his parents possesses an identification card reflecting membership in an Indian tribe (factor 6). Factor 2 is the only relevant one for our purposes.

¶44 Factor 2 asks whether the juvenile court has been informed by a participant in the proceeding, officer of the court, Indian organization or tribe, or agency that such individual or entity has "discovered information indicating that the child is an Indian child." 25 C.F.R. § 23.107(c)(2); § 19-1-126(1)(a)(II)(B). Only Mother and the Department directly provided pertinent information to the juvenile court here. Accordingly, the question is whether Mother or the Department advised the juvenile court that either had discovered information indicating that E.A.M. is an Indian child.

¶45 The juvenile court responded no, but the division said yes. The division reasoned that factor 2 applies whenever "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, 507 P.3d at 117. We disagree.

¶46 Factor 2 doesn't refer to information indicating that the child *may be* an Indian child. It refers to information indicating that the child *is* an Indian child. And, as the division recognized, having Indian heritage, alone, isn't enough to

satisfy all the criteria of the statutory definition of "Indian child." *See id.* at ¶ 17, 507 P.3d at 117. Recall that the statutory definition of "Indian child" refers to 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 the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4). The juvenile court was not told by Mother or the Department that information had been discovered indicating that E.A.M. is—not may be, but actually is—(a) a tribal member or (b) eligible for such membership and the biological child of a tribal member.

¶47 What the court was told is simply that E.A.M. has Indian heritage because some of his relatives, including his Mother, believe they have Indian ancestors. This information in no way indicated to the court that E.A.M. is a member of an Indian tribe. Nor did it indicate to the court that E.A.M. is both eligible to be a member of an Indian tribe and the biological child of a member of an Indian tribe. To the contrary, the record is barren of information *pointing to* E.A.M. being a member of an Indian tribe, eligible for such membership, or the biological child of a tribal member.[6] Differently put, the assertions of Indian heritage by Mother and

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[6] Factor 2 uses the word "indicating"; "indicate" means "to point out or point to." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/*indicate* [https://perma.cc/R4CB-DX3J].

other relatives failed to satisfy *any* of the criteria of the statutory definition of "Indian child."[7]

¶48 As the 2016 Guidelines make clear, the statutory definition of "Indian child" doesn't apply merely "based on a child['s] or parent's Indian ancestry." 2016 Guidelines at 10. Rather, it applies based on the child's political ties to a federally recognized Indian tribe as a result of either (a) the child's own membership in the tribe or (b) a biological parent's membership in the tribe and the child's eligibility for such membership. *Id.*; *see also A-J.A.B.*, ¶ 72, 511 P.3d at 762 (observing that the definition of Indian child hinges on "a political relationship" to a tribe (quoting 2016 Guidelines at 10)); *Jay.J.L.*, ¶ 27, 514 P.3d at 318 (same).

¶49 But the division explained that it felt compelled to reach the conclusion it did to avoid rendering superfluous factor 1 or factor 2 in the federal regulations and in Colorado's ICWA statute. *E.M.*, ¶ 16, 507 P.3d at 116–17. Here are factors 1 and 2 again:

> (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;

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[7] Whether satisfying some of the criteria of the statutory definition of "Indian child" would suffice to indicate to a juvenile court that the child is an Indian child is not a question before us.

> (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[.]

25 C.F.R. § 23.107(c)(1), (2); *see also* § 19-1-126(1)(a)(II)(A), (B) (substantially similar). According to the division, since factor 1 covers information that the child *is* an Indian child, factor 2 must necessarily extend to information that the child *may be* an Indian child, including as a result of having Indian ancestry, even if the information doesn't satisfy every aspect of the Indian child definition. *E.M.*, ¶ 16, 507 P.3d at 116–17. Otherwise, said the division, the two provisions would have the same meaning. *Id.* We are not persuaded.

¶50 It is true, of course, that these factors are similar. So the division's concern is understandable. But the factors are not indistinguishable.

¶51 Factor 1 relates to situations in which a participant in the proceeding, officer of the court, Indian organization or tribe, or agency *informs the court that the child is an Indian child*. Factor 2, by contrast, relates to situations in which a participant in the proceeding, officer of the court, Indian organization or tribe, or agency informs the court that such individual or entity *has uncovered information indicating that the child is an Indian child*. In factor 1, the reporting individual or entity tells the court, without equivocation, that the child is (a) a tribal member or (b) eligible for such

membership and the biological child of a tribal member.[8] In factor 2, the reporting individual or entity stops short of unequivocally telling the court that the child is (a) a tribal member or (b) eligible for such membership and the biological child of a tribal member; instead, the reporting individual or entity discloses that such individual or entity has found information pointing to the child being (a) a tribal member or (b) eligible for such membership and the biological child of a tribal member.[9]

¶52 Mother nevertheless argues that our holding in *B.H.* requires us to affirm the division's decision. There, as here, the juvenile court received information that the child who was the subject of the proceeding had Indian heritage; and there, as here, the juvenile court lacked information as to whether the child was (a) a tribal member or (b) eligible for such membership and the biological child of a tribal member. Yet we determined that ICWA's notice provisions applied, reasoning that, since "membership is peculiarly within the province of each Indian tribe,

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[8] This reason-to-know factor differs from knowing that the child is an Indian child because an individual or entity "knows" that a child is an Indian child only "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." *A.-J.A.B.*, ¶ 35, 511 P.3d at 757.

[9] *A-J.A.B.* and *Jay.J.L.* distinguished factors 1 and 2 on other grounds. *See A-J.A.B.*, ¶¶ 73–74, 511 P.3d at 762–63; *Jay.J.L.*, ¶ 27, 514 P.3d at 318. We disavow both opinions in this regard.

sufficiently reliable information of virtually any criteria upon which membership might be based," including "considerations [of] . . . lineage," must be regarded as "adequate to trigger the notice provisions" of ICWA. *B.H.*, 138 P.3d at 304.

¶53 On the surface, *B.H.* appears to be dispositive, but closer analysis dispels that conclusion. We decided *B.H.* in 2006, a decade before the federal regulations were enacted and the 2016 Guidelines replaced the 1979 Guidelines. Although ICWA has always required notice when the court "knows or has reason to know" that an Indian child is involved in a child custody proceeding, the 1979 Guidelines equated that standard with "has reason to *believe*." 44 Fed. Reg. at 67586 (emphasis added); *see also B.H.*, 138 P.3d at 302 n.3 ("In describing the Act's requirements, the [1979] Guidelines characterize the standard for notice as 'reason to believe.'"). Consequently, the 1979 Guidelines set forth examples of circumstances creating "reason to believe," not factors establishing "reason to know," and the circumstances in the former are not included among the factors in the latter.

¶54 In *B.H.*, we expressly relied on the circumstances constituting "reason to believe" in the 1979 Guidelines. 138 P.3d at 303–04. And with good reason: Consistent with the 1979 Guidelines, the version of Colorado's ICWA statute in effect in 2006 referred to "knows or has reason to believe." § 19-1-126(1)(b), C.R.S. (2005). It wasn't until 2019 that our legislature, in an attempt to comport with the

federal regulations and the 2016 Guidelines, replaced "reason to believe" with "reason to know" in section 19-1-126(1)(b). 2019 Colo. Sess. Laws at 2792.

¶55 Thus, as the divisions in *A-J.A.B.* and *Jay.J.L.* aptly noted, *B.H.* "required notice to tribes under a different criterion than the one in effect today." *A-J.A.B.*, ¶ 76, 511 P.3d at 763; *Jay.J.L.*, ¶ 32, 514 P.3d at 319. As such, *B.H.* is inapposite.

¶56 In short, while assertions of a child's Indian heritage gave a juvenile court "reason to *believe*" that the child was an Indian child under Colorado law in 2006, *see B.H.*, 138 P.3d at 303–04 (emphasis added), the question we confront in this case is whether such assertions give a juvenile court "reason to *know*" that the child is an Indian child under Colorado law in 2022, § 19-1-126(1)(b) (emphasis added). We agree with the divisions in *A-J.A.B.* and *Jay.J.L.* that mere assertions of a child's Indian heritage (including those that specify a tribe or multiple tribes by name), without more, are not enough to give a juvenile court reason to know that the child is an Indian child. And, correspondingly, to the extent that other divisions of the court of appeals have expressly or impliedly reached a contrary conclusion, we overrule those decisions.[10]

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[10] *See e.g.*, *M.M.*, ¶ 3, __ P.3d __; *People in Int. of S.B.*, 2020 COA 5, ¶¶ 13, 21, 459 P.3d 745, 748–49; *M.V.*, ¶¶ 43–44, 432 P.3d at 636–37; *People in Int. of I.B.-R.*, 2018 COA 75, ¶¶ 9–16, 439 P.2d 38, 41–42; *People in Int. of L.H.*, 2018 COA 27, ¶¶ 9–12, 431 P.3d 663, 665–66; *People in Int. of J.L.*, 2018 COA 11, ¶¶ 13–22, 428 P.3d 612, 615–

¶57 Significantly, section 19-1-126(3) buttresses our holding. Again, that provision states that if the juvenile 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," then the court must direct the petitioning party to exercise due diligence in obtaining additional information that would assist the court in determining whether there is reason to know that the child is an Indian child. § 19-1-126(3). This subsection makes clear that, while the court may have information establishing that the child has Indian heritage, it may nevertheless lack sufficient information to determine that there is reason to know that the child is an Indian child. In other words, assertions of a child's Indian heritage do not necessarily establish reason to know that the child is an Indian child. Hence, section 19-1-126(3) belies the division's conclusion that the assertions of Indian heritage by Mother and other relatives automatically constituted reason to know that E.A.M. is an Indian child.

¶58 To be sure, assertions of a child's Indian heritage may be part of the information that establishes reason to know that the child is an Indian child. But such information, alone, can't suffice to satisfy the reason-to-know standard.

16; *People in Int. of K.G.*, 2017 COA 153, ¶¶ 19–26, 488 P.3d 304, 307–08; *People in Interest of L.L.*, 2017 COA 38, ¶¶ 21, 47, 395 P.3d 1209, 1212–13, 1216.

¶59 Here, the juvenile court correctly found that the assertions by Mother and other relatives that E.A.M. has Indian heritage didn't provide reason to know that E.A.M. is an Indian child. The juvenile court thus properly directed the Department, pursuant to section 19-1-126(3), to exercise due diligence in gathering additional information that would assist the court in determining whether there was reason to know that E.A.M. is an Indian child.

¶60 The juvenile court ultimately found that the Department had exercised due diligence as required by section 19-1-126(3). We do not review this determination, however, because it isn't before us. And given our resolution of this appeal, we also do not decide whether the division erred in departing from decisions by other divisions when it chose to vacate the judgment instead of remanding on a limited basis for further determinations concerning ICWA compliance. We must remand, though, to allow the court of appeals to resolve Mother's outstanding contention that the Department failed to make reasonable efforts to rehabilitate her.

III. Conclusion

¶61 For the foregoing reasons, we reverse the division's judgment and remand to allow the court of appeals to address Mother's claim that the Department didn't make reasonable efforts to rehabilitate her.