

The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
November 30, 2017

2017COA153

No. 17CA0070, People in Interest of K.G. — Juvenile Court — Dependency and Neglect — Child Custody — ICWA

The court concludes that the district court's order allocating parental rights is a child custody proceeding to which the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963 (2012), applies because the children were involuntarily removed from the parent and the parent was not entitled to regain custody on demand. Because the district court did not adequately address the question whether either child might be an Indian child in this case, the case is remanded to conduct further proceedings.

Court of Appeals No. 17CA0070
Mesa County District Court No. 15JV270
Honorable Valerie J. Robison, Judge

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of K.G. and A.R., Children,

and Concerning G.G.,

Respondent-Appellant.

ORDER OF LIMITED REMAND

Division A
Furman, Ashby, and Welling, JJ.
PER CURIAM

Order Issued November 8, 2017
Order Published November 30, 2017

J. Patrick Coleman, County Attorney, Katherine A. Barnes, Assistant County Attorney, Grand Junction, Colorado, for Petitioner-Appellee

Martha Kent, Guardian Ad Litem

Leo L. Finkelstein Attorney at Law, P.C., Leo L. Finkelstein, Colorado Springs, Colorado, for Respondent-Appellant

¶ 1 In this dependency and neglect proceeding, mother, G.G., appeals the district court's order allocating parental responsibilities regarding her children, K.G. and A.R. Because the proceeding did not comply with the inquiry and notice requirements of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963 (2012), we remand the case for further proceedings.

I. Background

¶ 2 The district court adjudicated the children dependent and neglected in the summer of 2015. The Mesa County Department of Human Services (Department) placed the children with their maternal aunt and uncle, where they remained throughout the case.

¶ 3 In February 2016, the Department moved for an allocation of parental responsibilities to the aunt and uncle. As grounds, the Department cited mother's inadequate compliance with her treatment plan, the incarceration of A.R.'s father, and the concession by K.G.'s father that he could not care for K.G. The district court granted the motion in August 2016.

¶ 4 The court did not address the applicability of ICWA before it entered its order allocating parental responsibilities. Neither the

court nor the Department thoroughly inquired whether the children were Indian children. And, although the record indicates that the Department had reason to know at least one of the children might be an Indian child, there is no indication that the Department sent notice to the child's tribe.

¶ 5 But an allocation of parental responsibilities that removes an Indian child from the child's parent or Indian custodian is subject to ICWA. Therefore, we remand the case to the district court to conduct further proceedings to determine whether the children are Indian children in accordance with ICWA.

II. ICWA: Purpose and Guiding Principles

¶ 6 Congress enacted ICWA to address "rising concern" over the consequences of "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." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Accordingly, ICWA establishes that a tribe is entitled to intervene in child custody proceedings involving its children, and a tribal court is the preferred jurisdiction

for such proceedings. *See People in Interest of T.E.R.*, 2013 COA 73, ¶ 7.

¶ 7 To ensure tribes have an opportunity to be heard, Colorado’s ICWA-implementing legislation requires trial courts and child welfare agencies to inquire into children’s Indian heritage and send notice to appropriate tribes. *See* § 19-1-126(1)-(2), C.R.S. 2017.

¶ 8 In 2016, the Bureau of Indian Affairs issued regulations and guidelines that clarify ICWA’s inquiry and notice requirements. *See* 25 C.F.R. §§ 23.107-.109, .111 (2017) (2016 Rule); Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act 11, 30-38 (Dec. 2016), <https://perma.cc/3TCH-8HQM> (2016 Guidelines). Federal guidelines on ICWA are not binding, but they provide useful guidance in interpreting the statute. *See People in Interest of L.L.*, 2017 COA 38, ¶ 16.

¶ 9 We recognize that the 2016 Guidelines and 2016 Rule were not in effect when the district court made its rulings in this case. But the guidelines that were in effect at that time describe substantially similar inquiry and notice requirements. *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,146-47 (Feb. 25, 2015).

III. Analysis

¶ 10 To determine whether ICWA applies to a child custody proceeding, the parties and the court must ask two fundamental questions: (1) Does ICWA apply to the proceeding? (2) Does ICWA apply to this child? *L.L.*, ¶ 13; 2016 Guidelines at 9.

¶ 11 As discussed below, we conclude that (1) ICWA applies to this proceeding and (2) the district court did not adequately address the question whether either child might be an Indian child in this case. So we must remand the case to the district court to determine whether the children are Indian children.

A. Is the Proceeding Subject to ICWA?

¶ 12 Because the material facts are evident in the record, we may resolve this question as a matter of law. *See Pham v. State Farm Mut. Auto. Ins. Co.*, 70 P.3d 567, 572 (Colo. App. 2003).

¶ 13 ICWA applies when an Indian child is the subject of a child custody proceeding or emergency proceeding. 25 C.F.R. § 23.103(a) (2017). As relevant here, a “child custody proceeding” encompasses any action, other than an emergency proceeding, that could result in foster care placement. 25 C.F.R. § 23.2 (2017). ICWA defines foster care placement to include

any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

25 U.S.C. § 1903(1)(i) (2012); *see also* 25 C.F.R. § 23.2.

¶ 14 ICWA applies to an action that *may* result in foster care placement, even if it ultimately does not. 25 C.F.R. § 23.2; 2016 Guidelines at 79. If the child may be involuntarily removed from the parent or involuntarily placed, then ICWA applies to the proceeding. 2016 Guidelines at 13.

¶ 15 Conversely, ICWA does not apply to a voluntary placement that an Indian child’s parent has chosen of his or her free will and without threat of removal — unless the parent cannot regain custody upon demand. 2016 Guidelines at 13; *see* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,800 (June 14, 2016) (“If a parent entrusts someone with the care of the child without State or Tribal involvement, that arrangement would not prohibit the parent from having the child returned upon demand, and therefore would not meet the definition of a ‘child-custody proceeding.’”).

¶ 16 In this case, the proceeding to allocate parental responsibilities removed the children from mother for placement in the home of a guardian. The proceeding was not voluntary.

¶ 17 And, although the proceeding did not terminate mother's parental rights, mother could not have had the children returned to her upon demand. Instead, modification of parenting time, custody, and decision-making responsibilities granted under an allocation of parental responsibilities is subject to the requirements of section 14-10-129, C.R.S. 2017, and section 14-10-131, C.R.S. 2017. Those statutes impose procedural and substantive barriers that mother must overcome to regain custody and control of the children. For example, a court could not entertain a motion to modify parenting time, custody, or decision-making for at least two years after entry of the allocation of parental responsibilities absent extraordinary circumstances. § 14-10-129(1.5) (modification of parenting time requires relocation or endangerment); § 14-10-131(1) (modification of custody or decision-making subject to endangerment standard). And any such motion would require mother to show that a change of circumstances had occurred in the children or their guardian — not mother — and that the

modification was necessary to serve the best interests of the children. § 14-10-129(2) (parenting time); § 14-10-131 (custody and decision-making).

¶ 18 Thus, this proceeding is a “child custody proceeding” within the meaning of ICWA. *See In re N.B.*, 199 P.3d 16, 19-20 (Colo. App. 2007) (ICWA’s broad definition of “child custody proceeding” includes stepparent adoption).

B. Is This an Indian Child?

¶ 19 Two preliminary measures aim to ensure that tribes have an opportunity to be heard in cases that may lead to the separation of Indian children from their families and tribes: (1) inquiry into the child’s Indian heritage and (2) notice to tribes.

¶ 20 The trial court and the parties share the duties of inquiry and notice. *See L.L.*, ¶¶ 19-20, 27-32.

¶ 21 The trial court must ask each participant on the record at the beginning of each emergency, voluntary, or involuntary child custody proceeding “whether the participant knows or has reason to know that the child is an Indian child.” 25 C.F.R. § 23.107(a); *see* § 19-1-126(2) (providing that when the petition does not disclose whether the child is an Indian child, the court shall inquire of the

parties at the first hearing whether the child is an Indian child and whether the parties have complied with ICWA). “State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.” 25 C.F.R. § 23.107(a). The 2016 Rule requires inquiry at each new child custody proceeding. 2016 Guidelines at 11.

¶ 22 If the court has reason to know that a child is an Indian child, but insufficient evidence to make a determination, the court must confirm that the department involved in the case used due diligence to identify and work with all of the tribes for which there is reason to know that the child may be a member or eligible for membership. The court must also ensure that the department sends notice of the proceeding to any identified Indian tribe. *L.L.*, ¶¶ 22-25 (citing § 19-1-126(2); 25 C.F.R. §§ 23.107(b)(1), 23.111(a)). Thereafter, the court must treat the child as an Indian child unless and until the court determines on the record that the child does not meet the definition of Indian child. *Id.* at ¶ 26 (citing 25 C.F.R. § 23.107(b)(2)). The threshold requirement for notice is not high. *B.H. v. People in Interest of X.H.*, 138 P.3d 299, 303 (Colo. 2006).

¶ 23 The department must determine whether the child is an Indian child as soon as possible. 2016 Guidelines at 11. Its investigation should begin before the first court hearing. *L.L.*, ¶ 30. The department must “[m]ake continuing inquiries to determine whether the child who is the subject of the proceeding is an Indian child and, if so, [must] determine the identity of the Indian child’s tribe.” § 19-1-126(1)(a); *see B.H.*, 138 P.3d at 303 (“[T]ribes must have a meaningful opportunity to participate in determining whether the child is Indian and to be heard on the issue of ICWA applicability.”) (citations omitted).

C. This Proceeding Did Not Comply With ICWA’s Inquiry and Notice Requirements

¶ 24 In this case, the Department filed a Family Services Plan in July 2015 that stated the following:

- A.R.’s father did not report any Indian heritage.
- K.G.’s father reported that his mother was one quarter Cherokee, and his maternal grandfather was one half Cherokee Choctaw.
- The Department planned to notify the Bureau of Indian Affairs and appropriate Indian tribes.

¶ 25 But there is no indication in the record that anyone asked mother whether she knew or had reason to know the children were Indian children. Nor did the court make the required inquiry on the record as to any of the three parents, the guardian ad litem, or the Department. And there is no indication that the Department sent the required notices to the Cherokee tribes on behalf of K.G.

¶ 26 Thus, the proceeding did not comply with ICWA's inquiry and notice requirements.

IV. Conclusion

¶ 27 We therefore remand the case to the district court for the limited purpose of conducting a proper inquiry and providing notice to the appropriate tribes under ICWA.

¶ 28 On remand, the district court shall make the appropriate inquiries on the record. In addition, the court shall direct the Department to make a record showing it has completed the inquiries required by section 19-1-126(1)(a) and ICWA, and showing the result of those inquiries.

¶ 29 The court shall also direct the Department to comply with the notice provisions of section 19-1-126 and ICWA by sending notice to the Cherokee tribes regarding K.G. and, if the inquiries on

remand reveal additional reason to know either child may be a member of or eligible for membership in a tribe or tribes, to such tribe or tribes. After allowing adequate time for the tribe or tribes to respond, the court shall then make a determination as to each child whether the child is an Indian child.

¶ 30 This court respectfully requests that the remand proceedings be completed with all due speed. Upon completion of the remand proceedings, the Department shall immediately forward a certified copy of the district court's order to this court, and the case shall be recertified. The order entered on remand and all related remand proceedings shall be made a part of the record on appeal.

¶ 31 The Department shall notify this court in writing of the status of the remand proceedings twenty-eight days after the date of this order and every twenty-eight days thereafter until the district court issues its order.

BY THE COURT:

Furman, J.
Ashby, J.
Welling, J.