NO. 98003-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DEPENDENCY OF Z.J.G., AND M.G., MINORS

STATE OF WASHINGTON, DSHS

Respondent,

v.

S.G.

Appellant.

AMICUS MEMORANDUM FROM THE CHILDREN'S TRIBES IN SUPPORT OF THE PETITION FOR REVIEW

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INTEREST OF AMICUS

The Central Council of the Tlingit and Haida Indian Tribes of Alaska ("Tlingit & Haida") is a large federally-recognized tribal nation with headquarters in Juneau, Alaska. Tlingit & Haida is a regional tribe, with constituent community councils located in Southeast Alaska, including the village of Klawock. Klawock Cooperative Association (KCA) is a federally-recognized tribal nation that compacts with Tlingit & Haida for Tlingit & Haida to provide services, including Indian Child Welfare Act services. The minor children involved in this case are eligible for enrollment in Tlingit & Haida and KCA, making them the children's tribe for the purposes of both the Indian Child Welfare Act and the Washington Indian Child Welfare Act. Tlingit & Haida intervened in the trial court proceedings, but has been advised to file as amicus at this stage. Tlingit & Haida has a direct interest in the outcome of these proceedings both for the children involved here and all of their children in Washington state, where the largest number of Tlingit & Haida children reside outside of Alaska.

STATEMENT OF THE CASE

After the police removed the minor children in this case from their home, the trial court determined the children were not Indian children for the purposes of Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 et. seq. and Washington Indian Child Welfare Act (WICWA), RCW 13.38.010 et. seq. This despite the testimony from both parents indicating the children may be Indian children by naming specific tribal nations with whom they and their immediate family are associated, and despite the testimony of the social worker indicating the children may be Indian children.

This level of specificity in the parties' testimony regarding information indicating the children may be Indian children, as per 25 C.F.R. 23.107 (c)(2) and RCW 13.38.070(1), meant the lower court should have found there was reason to know there may be Indian children involved in the case, ensure legal notice was sent to Tlingit & Haida and to KCA, and to treat the children as Indian children until it was determined on the record they were not. 25 C.F.R. 23.107(b)(2). Without that finding, there was no requirement the Tribes receive legally required notice or that the family receive ICWA protections. The lower court holding will lead to disparate treatment of Indian children within Washington and across the country. Therefore, the Tribe respectfully asks the Court to accept this petition for review.

ARGUMENT

I. WHEN A COURT HAS REASON TO KNOW A CHILD MAY BE AN INDIAN CHILD, IT MUST SEND LEGAL NOTICE TO THE CHILDREN'S POTENTIAL TRIBES.

The decision below does not comply with the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 et. seq. and Washington Indian Child Welfare Act (WICWA), RCW 13.38.010 et. seq., nor the Federal Regulations, 25 C.F.R. pt 23. Under ICWA's jurisdictional structure, Tlingit & Haida and Klawock Cooperative Association (KCA) must rely on the state courts to provide the initial ICWA and WICWA protections to its children while the state's agency assembles the legal notices with all of the necessary information to determine tribal membership or eligibility for membership and mails it to the tribes.

The lower court is correct--the applicability of ICWA to child-custody proceedings turns on whether the child is an Indian child.[1] *In re Dependency of Z.J.G.*, 10 Wn. App. 2d 446, 449 (2019). The court's interpretation of ICWA's "reason to know" standard, 25 U.S.C. 1912(a), however, is simply far too narrow to substantially comply with the law. A parent's assertion of Indian heritage is exactly the kind of evidence that

[1] There is no dispute a shelter care proceeding was one that would be covered by ICWA and WICWA as an emergency hearing. *Z.J.G.* at 473.

ought to trigger ICWA's application, including formal notice. The only party that has conclusive evidence regarding membership is the Tribe itself, and their participation is completely dependent on proper notice from the state. As sovereign nations, Indian tribes have the sole discretion to determine who is eligible for membership in their tribe. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n. 36, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

Under the federal regulations that implement ICWA, state courts must ask each participant in an emergency or child-custody proceeding whether the participants know or have reason to know that the child is an Indian child. 25 C.F.R. § 23.107(a). Upon conducting the inquiry, a court has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if any participant in the proceeding informs the court of information *indicating* that the child is an Indian child. 25 C.F.R. § 23.107(c)(2) (emphasis added). The regulations also set forth five other instances in which a court has reason to know. *Id.* at § 23.107(c)(2) – (6).

ICWA and the federal regulations proscribe that once the court has reason to know the child may be an Indian child, but does not have conclusive evidence—as it cannot without the Tribe's confirmation that the child is or is not an Indian child—the court must work with all of the

tribes where there is reason to know the child may be a member to verify whether the child is in fact a member or eligible for membership. 25 C.F.R. § 23.107(b)(1). Moreover, if the court lacks sufficient evidence to make a determination on the child's status, as it did in this case, 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. 25 C.F.R. § 23.107(b)(2).

Therefore, this "reason to know" determination triggers *both* the notice provisions and the application of ICWA to a shelter care hearing. 25 U.S.C. 1912(a); 25 C.F.R. § 23.107 (b)(2). Narrowly construing the term "reason to know" in the regulations must then also constrict the definition of that same term in the statute–limiting both when a Tribe will receive notice and whether ICWA will be applied to the removal determination.

ICWA states when a court "knows or has reason to know an Indian child is involved," the agency must send notice. 25 U.S.C. 1912(a). But in this case, the agency relied on information from an "informal inquiry", which lead the court to the inexplicable conclusion there was no reason to believe the children were Indian children despite testimony to the contrary. *Z.J.G.* at 457. This meant that because of a phone call between the social worker and an unnamed tribal worker, and a misunderstanding

of the status of the children, the heightened standard of 25 U.S.C. 1922 was not applied to the hearing, and without formal notice, the Tribe could have lost track of their children in the Washington system.

Tlingit & Haida is a federally recognized tribe in southeast Alaska, and has over 31,000 tribal citizens spread across a large territory in Alaska and beyond. Citizens of Tlingit & Haida may also have dual membership with other federally-recognized tribes throughout southeast Alaska. If a tribe so wishes, the tribe may compact with Tlingit & Haida to provide child welfare services, or not. This contractual relationship does not change the nature of the child's dual membership, and therefore, dual notice requirements under ICWA.

KCA compacts with Tlingit & Haida to provide an ICWA worker for the Tribe, and she is located on Prince of Wales Island, not at Tlingit & Haida government headquarters in Juneau. The federal register list of agents for service of ICWA notice lists Cynthia Mills as the designated agent for service for KCA. 84 Fed. Reg. 20387, 20396 (May 9, 2019). Barbara Dude is the designated agent for service for Tlingit & Haida. *Id*. at 20390. When a parent states she is associated with KCA and Tlingit & Haida, as happened in this case, *Z.J.G.* at 450, Tlingit & Haida expects notice to go to *both* Mills and Dude, not just an inquiry phone call to the Juneau headquarters, as happened in this case. *Id.* at 451.

Relying on that information for such an important determination would be as if someone contacted a person at DCYF and asked about their Indian Child Welfare policy, received an incorrect answer, and thereafter argued that "the state" told them what the policy was. In fact, the state takes this troubling argument one step further by arguing they should always be permitted rely on the information that results from such emergency phone calls, even knowing that they can yield incorrect results. This is precisely why there are requirements for formal written notice that must go to the designated tribal agents for service for notice.

The Tribe receives hundreds of notices from various state courts every year, and each one must be carefully considered and checked against membership rolls of both Tlingit & Haida and the family's local village. Identifying the appropriate local village may require tracking back three to five generations, on both sides of the family. This takes considerable time, assuming all of the information in the notice is correct. For a Tlingit & Haida child, this notice is vital to ensuring the child is connected to her tribe, her village, her clan, and her immediate family. This determination is invaluable for the child's future.

Congress considered this issue when passing ICWA and wrote: "[t]he constitutional and plenary power of Congress over Indians, Indian tribes and affairs cannot be made to hinge upon the cranking into

operation of a mechanical process under tribal law." H.R. Rep. No. 95-1386, at 17 (1978). In other words, the reason the standard for a court is "reason to know" is to ensure the child has ICWA's protections *before* Tlingit & Haida or any tribe makes the final determination of the membership or eligibility for membership of the child. While informal inquiries are helpful to ensure tribal representation at the earliest possible stage, the lower court decision denied the panoply of the protections of ICWA based on a phone call to one of the tribal social workers. This is not what Tlingit & Haida anticipates when it responds to one of those informal inquiries.

WICWA also ensures the sovereignty of the Tribe and the protection of its children by requiring state agencies to consult with the people who may have information about a child's relationship with a Tribe, RCW 13.38.050; then requiring the state to send notice to a Tribe whenever there is a reason to know the child is or *may be* an Indian Child RCW 13.38.070; and then ensuring ICWA is applied until the state receives the results of the Tribe's determination. 25 C.F.R. 23.107(b)(2).

II. THE LOWER COURT'S DECISION CREATES A SPLIT IN THE APPELLATE DIVISIONS AND IS CONTRARY TO SIMILAR CASES IN THE SISTER STATES

While this petition was pending, the third division of the Court of Appeals issued a decision on the ICWA and WICWA requirement of active efforts, and the futility doctrine. *In re Parental Rights to D.J.S*., No. 36423-2-III, 2020 WL 425062 (Wash. Ct. App. Jan. 28, 2020). In the opinion, there is no indication the Court ever received a determination from the Oglala Sioux Tribe that the child was in fact eligible for membership. *Id.* at *4. Therefore, in one division, a child who *may be* an Indian child received the full protections of ICWA, while the children in this case, who also *may be* Indian children, did not.

In addition, this decision is contrary to the *In re Dependency of T.L.G.*, 126 Wash.App. 181 (2005). Although the state's brief describes T.L.G. as "factually distinguishable," the state actually argues that it is distinguishable simply because the law changed with the passage of WICWA and 2016 federal regulations. It appears, therefore, that the state is arguing *T.L.G.* has been superseded by statute and federal regulations. However, both in *T.L.G.* and in this case, the lower courts construed the same language that has *not changed* in ICWA – "reason to know" – and reached opposite conclusions. Accordingly, the lower court decision is also in conflict with a prior decision, warranting review by this Court.

Finally, as the leading case on ICWA states, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d

29 (1989), the Supreme Court was clear about the need for uniform application of the law across the several states. *Id.* at 46. The federal government reiterated this intent of uniformity with the publication of Federal Regulations governing ICWA in 2016. 25 C.F.R. pt. 23; 81 Fed. Reg. 38779 (June 14, 2016). *In re Z.J.G.* is an outlier decision.

The question of whether a court has "reason to know" a case may involve an Indian child is understood broadly by other states to ensure a court properly applies ICWA's protections. Otherwise, ICWA provides at least two serious remedies—the invalidation of proceedings under 25 U.S.C. 1914, or the denial of jurisdiction due to an improper removal under 25 U.S.C. 1920. See *In re Morris*, 815 N.W.2d 62, 75 (Mich. 2012); *In re A.L.C.* 8 Wn. App. 2d 864, 877 (2019).

Both prior to and after the passage of the Federal Regulations, state courts have treated the reason to know standard as a low bar. In 2012, the Michigan Supreme Court unanimously agreed that notice was so important that it must be sent with any "sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement." *In re Morris*, 815 N.W.2d at 64 (2012) *cited approvingly in Michelle M. v. Dep't of Child Safety*, 401 P.3d 1013, 1017 (Ariz. Ct. App. 2017); *see also In re J.W.E.*, 419 P.3d 374, 378

(Okla. Civ. App. 2018); *In re Junious M.*, 193 Cal.Rptr. 40 (Cal. Ct. App. 1983).

And a few years prior to the *Morris* decision, the Colorado Supreme Court wrestled with the same question and held,

> Precisely what constitutes "reason to know" or "reason to believe" in any particular set of circumstances will necessarily evade meaningful description. As in other contexts, reasonable grounds to believe must depend upon *the totality of the circumstances and include consideration of not only the nature and specificity of available information but also the credibility of the source of that information and the basis of the source's knowledge*.
>
> *B.H. v. People ex rel. X.H.*, 138 P.3d 299, 303 (Colo. 2006)

(emphasis added). Therefore, in Colorado, Michigan, Oklahoma, California, and Arizona, Tlingit & Haida and the child's local tribal village would have received legal notice of the on-going proceedings and the children would have received heightened 25 U.S.C. 1922 protections at the emergency hearing with that testimony. Under this decision, these same Tlingit & Haida children in Washington's Third Appellate District would not receive those protections.

And while the Regulations have an itemized list for what may constitute reason to know, 25 C.F.R. 23.107(c), there is nothing that indicates the Regulations should be read as repudiating the states' low bar for reason to know. The 2016 ICWA Guidelines state "The regulation lists

factors that indicate a 'reason to know' the child is an 'Indian child.' State courts and agencies are encouraged to interpret these factors *expansively*." Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act, B.1 (2016) (emphasis added).

A majority of courts interpreting the new Regulations have determined "[t]he recently adopted regulations implementing the Act also make clear that the 'reason to know' standard requires less than actual proof that the child meets the statutory definition of 'Indian child.'" *Geouge v. Traylor*, 808 S.E.2d 541, 551 (Va. Ct. App. 2017); *Matter of J.W.E.*, 419 P.3d at 378-380; *Matter of L.A.G.*, 429 P.3d 629, 632–33 (Mont. 2018). ICWA and WICWA do not require the status of the Indian child to be proven before providing protections; ICWA, WICWA, and the Regulations require only that the Court treat the child as an Indian child if it has *reason to know* the information *indicates* the child *may be* an Indian child. 25 U.S.C. 1912(a); 25 C.F.R. § 23.107(c)(2); RCW 13.38.070(1).

CONCLUSION

Because the court had reason to know the children may be Indian children at the shelter care hearing, and because this decision is contrary to other decisions in Washington and the sister states, , the Tribe respectfully asks this Court to review the Court of Appeals decision in this matter.

Respectfully submitted,

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