NO. 98003-9

SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Dependency of Z.J.G. and M.E.J.G., minor children,

STATE OF WASHINGTON,
Department of Children, Youth, and Families,

Respondent,

v.

S.G.,

Petitioner.

RESPONSE OF DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES TO AMICI CURIAE MEMORANDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Federal Regulations

Other Authorities

I. INTRODUCTION

The Department agrees with the legislative history and historical basis for passage of the Indian Child Welfare Act (ICWA) and the Washington Indian Child Welfare Act (WICWA) as expressed in the memoranda filed by Counsel for Amicus Dr. Margaret Jacobs (Jacobs) and by Amici American Indian Law & Policy and Fred T. Korematsu Center for Law and Equality (AILP). But the unquestionably significant policy reasons justifying the passage of the Acts are not implicated here, and this case does not present a question of whether it is important to adhere to the Acts' requirements. The Department's own policy acknowledges the need for the Department to act in conformity with ICWA and WICWA and to achieve early identification of a child's possible affiliation with a federally recognized tribe. The Court of Appeals opinion provided deference to the significance of ICWA's historical underpinnings. While valuable, the historical information and the ongoing need for compliance fail to support a basis for discretionary review under RAP 13.4(b).

The memorandum filed by Tlingit & Haida also fails to support discretionary review. Tlingit & Haida argues that a recent case decided by Division Three of the Court of Appeals, *In re Parental Rights to D.J.S.*, __ Wn. App. __, 456 P.3d 820 (2020), created a "split" in the divisions regarding ICWA and WICWA's application. Tlingit & Haida's strained

interpretation of *D.J.S.* provides no basis for distinguishing *D.J.S.* on the basis of the Acts' applicability. Application of the federal reason to know factors to the facts of *D.J.S.* results in *D.J.S.* being entirely consistent with the holding from the lower court. Lastly, Tlingit & Haida's argument that the lower court's decision is an outlier decision among the states is not supported by the cases Tlingit & Haida rely upon. These cases either do not address the 2016 regulations or are consistent with the lower court's ruling. The memoranda of Amici fail to demonstrate the need for further review.

II. STATEMENT OF THE CASE

The facts set forth in the Department's Answer in Opposition to Motion for Discretionary Review, filed February 4, 2020, are incorporated by reference.

III. AMICI DO NOT DEMONSTRATE THE NEED FOR FURTHER REVIEW

A. The Department Agrees with the Need to Act in Conformity with ICWA and WICWA

Amici present the legislative history and historical basis for passage of ICWA and WICWA in their memoranda supporting discretionary review. The memorandum filed by AILP sets forth the historical context and the core justifications for the enactment of the ICWA. AILP Mem. at 1. The memorandum filed by Dr. Jacobs similarly recites the "historical injustices that led to adoption of ICWA and how the Act's provisions grew

out of American Indian experience of family separation." Jacobs Mem. at v. The Department agrees with the historical context, historical injustices, and core justifications contained within these memoranda. The legislative history bearing on the decision of Congress to enact ICWA makes clear that a national remedy was necessary because many state and local agencies were undermining American Indian and Alaska Native culture, families, and tribes by unnecessarily removing Indian children from their homes and tribal communities. The Department agrees that it is important to adhere to the Acts' requirements. The Department's own policy expresses its dedication to acting in conformity with ICWA and WICWA and to achieving "[e]arly identification of possible affiliation with a federally recognized tribe. . . ." in dependency proceedings. ICW Practices and Procedures, Ch. 1.[1] The Department agrees that the historical context, historical injustices, and core justifications for ICWA and WICWA are important to keep in mind during any discussion of the Acts. But this importance does not provide a basis for this Court's review, especially as the Court of Appeals was mindful of ICWA's historical underpinnings when deciding the case below:

[1]The Department's policy manual on Indian child welfare is available at https://www.dcyf.wa.gov/indian-child-welfare-policies-and-procedures/1-initial-intake-icw-procedures-initial-contact

> Congress enacted ICWA in 1978 to address, the ""alarmingly high percentage of Indian families [that] are broken up by [ ] removal"" by setting minimum procedural and substantive standards.

Matter of Dependency of Z.J.G., 10 Wn. App.2d 446, 453 n. 25, 448 P.3d 175 (2019) (quoting *Bureau of Indian Affairs, U.S. Dep't of Interior, Guidelines for Implementing the Indian Child Welfare Act* 5 (Dec. 2016)). The historical arguments provided in the memoranda filed by AILP and Dr. Jacobs do not provide a basis for discretionary review under the criteria set forth in RAP 13.4(b).

B. The Recent Decision From Division Three of the Court of Appeals Did Not Create a Split in the Divisions as To the Acts' Applicability

The Tlingit & Haida memorandum argues that a recent case decided by Division Three of the Court of Appeals, *In re D.J.S.*, __ Wn. App. __, 456 P.3d 820 (2020), creates a "split" in the divisions on the question of ICWA and WICWA's application. Tlingit & Haida Mem. at 7. Amicus argues that because the *D.J.S.* opinion contains "no indication that the Court ever received a determination from the Oglala Sioux Tribe that the child was in fact eligible for membership" and because ICWA and WICWA applied to the case, *D.J.S.* impliedly held that any uncertainty regarding the child's Indian status must be resolved in favor of applying the standards required by ICWA and WICWA. Tlingit & Haida Mem. at 8. This argument

is incorrect for two reasons.

First, *D.J.S.* is factually distinguishable and addressed different legal questions. *D.J.S.* never addressed the question presented here of whether a court had a reason to know that a child is an Indian child. Instead, the father's membership in the Oglala Sioux Tribe and the son's eligibility for membership are presented in the opinion as undisputed facts. *D.J.S.*, 456 P.3d at 826. *D.J.S.* addressed the entirely distinct legal issue of whether sufficient evidence supported the trial court's finding that the Department satisfied the Acts' requirement to make "active efforts" to prevent the breakup of an Indian family before terminating parental rights. *D.J.S.*, 456 P.3d at 834. Here, no "active efforts" finding was made by the trial court because the initial shelter care order was an emergency order that does not require such findings, whether or not a court has reason to know a child is an Indian child. *Z.J.G.* at 450 (holding the "heightened requirements of a 10-day notice to the tribe and active efforts to provide services have no application to an imminent harm 72-hour shelter care hearing because it is an emergency proceeding").

Second, the facts in *D.J.S.* also do not support the strained interpretation argued by Tlingit & Haida regarding the reason to know determination. The recitation of the facts in *D.J.S.* do not expressly state whether or not the Oglala Sioux Tribe responded that the child was eligible

for membership, but the facts do state that the child's father was a "member of the Oglala Sioux Tribe." *D.J.S.*, 456 P.3d at 826. This fact alone establishes a "reason to know" the child was an Indian child under 25 C.F.R. § 23.107(c)(6), the factor referencing the court being informed that the parent indicates membership in an Indian tribe. In *D.J.S.*, the Department conceded error in a prior appeal in 2017, when it failed to send formal legal notice to the Oglala Sioux Tribe. *D.J.S.* at 829. This concession was correct because when there is a "reason to know" a child is an Indian child, the requirement for formal legal notice is triggered under both RCW 13.34.070 and 25 U.S.C. § 1912(a). Under the 2016 regulations, the "reason to know" determination based upon the parent's membership report meant the child must be treated as an Indian child until it is determined that the child is not an Indian child. 25 C.F.R. § 23.107(b)(2).

In contrast to the facts in *D.J.S.*, here, the trial court had no information from either of the parents that they were members of a federally recognized tribe. The mother testified she was *not* a tribal member, and the father testified only as to tribal "heritage." RP 90, 67. Tlingit & Haida also reported the mother was not enrolled. RP 11. Both *D.J.S.* and *Z.J.G.* are consistent with applying the reason to know factors from federal BIA regulations to determine ICWA and WICWA's applicability. *D.J.S.* and the lower court's opinion here do not create a "split" in the divisions on the

question of ICWA and WICWA's application.

C. Tlingit & Haida Fail To Support the Claim Regarding Flawed Reasoning and Do Not Correctly Characterize the Robust Nature of the Department's Inquiry Process

Tlingit & Haida argue that the opinion below is flawed because it relied upon an "informal inquiry" process involving "just an inquiry phone call . . . ." Tlingit & Haida Mem. at 4-5. This claim fails to support review for two reasons. First, the position misrepresents the reasoning applied in the lower court's opinion. Second, the position incorrectly characterizes the informal inquiry process used by the Department.

To support its claim that the lower court improperly relied upon information from an "informal inquiry," Tlingit & Haida cite to page 457 of the lower court's decision. Tlingit & Haida mem. at 4. This page of the lower court's decision addresses the father's argument (since abandoned) that the doctrine of substantial compliance does not apply to ICWA and WICWA requirements. *Z.J.G.*, 10 Wn. App.2d at 457. The citation given does not refer to the supposed rationale argued by Tlingit & Haida. A more careful review of the opinion demonstrates the lower court did not permit the informal inquiry process to supplant the requirement for formal legal notice, as claimed. Under state and federal law, if the court has reason to know a child is an Indian child, then legal notice to the child's Indian tribe is required. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111; RCW 13.38.070(1).

Here, the lower court reinforced—not contradicted—its own earlier holding in *In re Dependency of T.L.G.*, 126 Wn. App. 181, 108 P.3d 156 (2005), regarding the importance of legal notice requirements under ICWA. *Z.J.G.*, 10 Wn.App.2d at 466. The lower court reiterated the significance of formal legal notice by citing approvingly to *T.L.G.*, noting that "failing to ensure notice of the termination proceeding" constitutes error. *Z.J.G.* at 466, n. 89 (citing *T.L.G.*, 126 Wn. App. at 192).

Not only did the lower court not supplant the formal legal notice requirement, but the Department's informal inquiry process is also much more robust than the solitary phone call referenced by Tlingit & Haida. Tlingit & Haida Mem. at 7. The Department's Indian Child Welfare Practices and Procedures, developed with participation from Washington State tribes, require the Department to send inquiry letters and ancestry charts three times to tribes located within Washington and twice to all other tribes. ICW Practices and Procedures, Ch. 3, Policy 4. Afterward, the social workers are instructed to continue ongoing efforts to obtain responses from the tribes in situations where potential tribes fail to respond. ICW Practices and Procedures, Ch. 3, Policy 6. If, while making its good faith efforts, the Department subsequently receives information that provides a "reason to know" the child is an Indian child, the Department is required to inform the court. 25 C.F.R. § 23.107(a); *see also* ICW Practices and Procedures, Ch. 3,

Policy 8. All of these processes were just beginning at the time the initial shelter care hearing took place and did not factor into the trial court's reason to know determination, later reviewed by the lower court. The trial court, subsequent to review being sought in the Court of Appeals, entered a dependency and dispositional order containing the full panoply of protections Tlingit & Haida claim were denied. Tlingit & Haida Mem. at 7; Appendix A to Respondent's Supplemental Brief (filed on March 29, 2019) at 2-3.3333

D. The Lower Court's Consideration of the Federal Reason to Know Factors Aids in Achieving the Goal of Uniformity in State Courts

The Department also shares the hope for "uniform application of the law" across the states, as expressed by Tlingit & Haida. Tlingit & Haida Mem. at 9. The federal regulations were adopted in part to address disparate applications of ICWA and to ensure "uniform minimum Federal standards" were applied in state courts. 81 Fed. Reg. 38,778 (June 14, 2016). The lower court correctly acknowledged this function of the federal regulations by citing to the Bureau of Indian Affairs Guidelines, which state that the "regulations provide a binding, consistent, nationwide interpretation of ICWA's minimum standards." *In re Dependency of Z.J.G.*, 10 Wn. App.2d at 461 n. 62. Similarly, the Court of Appeals of Virginia has cited specifically to the reason to know factors set forth at 25 C.F.R. § 23.107(c)

as one of the mechanisms employed by the regulations to ensure uniform application. *Geouge v. Traylor*, 68 Va. App. 343, 366-67, 808 S.E.2d 541 (2017). Accordingly, the lower court's correct consideration of the federal reason to know factors aids in achieving the goal of uniformity in state courts.

In addition, the Department does not dispute that the determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member "is solely within the jurisdiction and authority of the Tribe." 25 C.F.R. § 23.108(b). And, here, the lower court correctly recognized the right of tribes to determine membership:

> The federal regulations provide, "The determination by a [t]ribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the [t]ribe." Similarly, WICWA provides, "A written determination by an Indian tribe that a child is a member of or eligible for membership in that tribe, or testimony by the tribe attesting to such status shall be conclusive that the child is an Indian child."

Z.J.G., at 461-62, n. 65 and 66 (quoting 25 C.F.R. § 23.108(b) and RCW 13.38.070(3) respectively).

However, at the initial shelter care hearing for Z.J.G. and M.G., the trial court was not arbitrating the child's tribal membership, as Dr. Jacobs implies. *See* Jacobs Mem. at 7-8. Indeed, tribes—not the state court—make

membership determinations. 25 C.F.R. § 23.108. Here, instead, the trial court decided, consistent with the federal requirement, whether there was a reason to know the children were Indian children by applying the information provided from all of the parties (including the information Tlingit & Haida had informally provided to the Department at that time) to the reason to know factors. 25 C.F.R. § 23.107(c); CP 2. The lower court correctly noted that the reason to know determination, triggering the application of ICWA and WICWA, is a "question of law." *Z.J.G.*, at 460 n. 59 (citing *In re Adoption of T.A.W.*, 186 Wn.2d 828, 840, 383 P.3d 492 (2016)). Without citing to the federal regulations, Dr. Jacobs argues that courts should "defer to tribes" when making a reason to know determination. Jacobs Mem. at 8. In making this argument, Dr. Jacobs ignores the federal regulations set forth at 25 C.F.R. § 23.107(a), which specifically relies upon the "State court" to make the reason to know determination, and 25 C.F.R. § 23.108(c), which includes the information the state court may rely on in making this "judicial determination." Dr. Jacobs's argument regarding how the state court should defer to Tribes to make a "reason to know" determination at an initial shelter care hearing is contrary to the federal regulatory framework, and, as such, it fails to establish a basis for further review.

E. The Lower Court's Opinion is Consistent with Opinions From Other States That Have Addressed 25 C.F.R. § 23.107(c)

Because the lower court's opinion is correctly decided and consistent with other courts in other states that have addressed 25 C.F.R. § 23.107(c), further review is not warranted. Tlingit & Haida's assertion that the lower court's opinion is an "outlier" opinion is not supported by the cases it relies upon. Tlingit & Haida mem. at 9. For example, in *Geouge v. Traylor*, 68 Va. App. 343, 366-67, 808 S.E.2d 541 (2017) (cited in Tlingit & Haida mem. at 11), the Court of Appeals of Virginia specifically examined 25 C.F.R. § 23.107(c)(1), which provides there is a reason to know a child is an Indian child if any participant "informs that the child is an Indian child." In *Geouge*, the mother reported that her child's father was "known by the family to be of Cherokee descent," but the mother did not claim specifically that the father was a member or that the child was an Indian child. *Id.* at 351. Like here, *Geouge* held the "reason to know" threshold at 25 C.F.R. § 23.107(c) was not met by a parent's report of Native American ancestry.

The lower court's opinion is also consistent with *In Matter of J.W.E.*, 2018 OK CIV APP 29, 419 P.3d 374 (2018) (cited in Tlingit and Haida Mem. at 9). In *J.W.E.*, the mother testified she was a member of the Cheyenne and Arapaho Tribes of Oklahoma and that her children were "in

the process of being enrolled" in the Choctaw Tribe. *J.W.E.*, 419 P.3d at 375. *J.W.E.* considered 25 C.F.R. § 23.107(c)(6), which provides there is "reason to know" when the "court is informed that either parent or the child possesses an identification card indicating membership in an Indian tribe." *J.W.E.* held that the mother's testimony that she was a member was sufficient to provide a reason to know that these were Indian children. *Id.* at 379. *J.W.E.* is consistent with the Court of Appeals decision here, as it was uncontroverted at the shelter care hearing for Z.J.G. and M.G. that both parents were not members of any federally recognized tribe.

Other states, such as Texas and Alabama, have addressed the reason to know regulations set forth at 25 C.F.R. § 23.107(c) and have issued opinions consistent with the Court of Appeals opinion. The Alabama Supreme Court considered 25 C.F.R. § 23.107(c) factors to conclude the reason to know standard had not been triggered, despite a parent's claim of ancestry through Cherokee and "Ojibwa-(Chippewa)" and in light of the Department's efforts to determine whether the child was an Indian child. *T.W. v. Shelby County Department of Human Resources*, Nos 2180005, 2180006, and 2180030, 2019 WL 1970066, (Alabama May 3, 2019) T.W., 2019 WL 1970066, at *8-9.[2] Similarly, the court in

[2] When last checked, Westlaw listed *T.W.* as "not yet released for publication," and it appears the opinion will soon be published. Alabama RAP 53(d) does not allow for

In re Interests of A.E., 2017 WL 4707488 (Tex. Ct. App. Oct. 20, 2017) held that 25 C.F.R. § 23.107(c)(2) was not satisfied by the mother's report of having ties with Cherokee, Choctaw, and Sioux in light of responses from the tribes following an inquiry by the Department case worker. *A.E.*, 2017 WL 4707488, at * 4-5.[3] The foregoing cases from other states illustrate that Tlingit & Haida's assertion that the lower court's opinion is an "outlier" is incorrect. Tlingit & Haida Mem. at 9.

The cases cited by Tlingit & Haida do not conflict with the opinion issued here, in that these cases address formal legal notice provisions and fail to address the 25 C.F.R. § 23.107(c) reason to know factors. For example, the "severance adjudication" addressed in *Michelle M. v. Dep't of Child Safety*, 401 P.3d 1013, (Ariz. Ct. App. 2017) took place "in December 2016," so the federal regulations were not yet applicable. *Michelle M.*, 401 P.3d at 1015. The 2016 regulations apply to petitions filed on or after December 12, 2016. 25 C.F.R. § 23.143. For this apparent reason, *Michelle M.* fails to mention or address the 25 C.F.R. § 23.107(c) factors. *Matter of L.A.G.*, 429 P.3d 629, 393 Mont. 146 2018 MT 255, like *Michelle M.*, also

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citation to "No Opinion" cases, and none of the language contained within *T.W.* indicates it is in the unpublished/"No Opinion" category.

[3] The *A.E.* case is listed in Westlaw as "Not Reported in S.W. Rptr." so it appears to be an unpublished opinion. However, a comment accompanying Texas RAP 47.7 states that "[a]ll opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value." Pursuant to GR 14.1(b), a copy of this decision is attached to this response as Appendix of Department.

fails to mention the 25 C.F.R. § 23.107(c) factors. Instead, *L.A.G.* relies upon a previous Montana case, issued before the promulgation of the federal regulations, stating:

> [t]he threshold questions of fact for district courts are (1) whether the court has reason to believe that a subject child may be an "Indian child" and (2) whether an Indian tribe has conclusively determined the child is a member or eligible for tribal membership.

L.A.G., 429 P.3d at 632.

The "reason to believe" language in *L.A.G.* is a reference to versions of the BIA guidelines that have since been superseded. The binding 2016 regulations provide "reason to know" factors to determine when there is reason to know a child is Indian and have replaced the "reason to believe" factors in the 2015 and 1979 guidelines. Compare 81 Fed. Reg. 38869 (June 14, 2016) and 25 C.F.R. § 23.107 (How should a State court determine if there is reason to know the child is an Indian child?) with 80 Fed. Reg. 10152 (Feb. 25, 2015) and 44 Fed. Reg. 67586 (November 26, 1979). The Montana case law relied upon by Tlingit & Haida failed to re-examine case law in light of the 2016 regulations, as the lower court properly did in regard to Washington law. *Z.J.G.*, at 185-866. The remainder of the cases cited by Tlingit & Haida clearly predate the effective date of the regulations, as none of the remaining cases were decided after effective date of December 2016.

IV. CONCLUSION

Based upon the argument set forth above and in the Department's Answer in Opposition to Petition for Review, the Department requests the Petition for Review be denied.

RESPECTFULLY SUBMITTED this 12th day of March, 2020.

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APPENDIX

OF

DEPARTMENT

2017 WL 4707488
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Dallas.

IN the INTEREST OF A.E., a Child

No. 05–17–00425–CV

Opinion Filed October 20, 2017

On Appeal from the 304th Judicial District Court, Dallas County, Texas, Trial Court Cause No. JC–16–433–W, The Honorable Andrea Martin, Judge

Attorneys and Law Firms

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April E. Smith, Attorney at Law, Mesquite, TX, Shannon Timberlake, Coppell, TX, for Jessika Browning.
Before Justices Bridges, Lang–Miers, and Evans

MEMORANDUM OPINION

Opinion by Justice Lang–Miers

*1 The mother of A.E. ("Mother") appeals the termination of her parental rights. In one issue, she contends the trial court erred by failing to apply the Indian Child Welfare Act when evidence was presented that A.E. was of Indian heritage. We affirm the trial court's judgment.

BACKGROUND

A.E. was born to Mother and an unknown father in March, 2016. On April 21, 2016, the Texas Department of Family and Protective Services (the "Department") received a referral alleging neglectful supervision of A.E. The following day, Mother was arrested during a traffic stop when methamphetamines were found in the vehicle. A.E. was in the vehicle at the time and was placed into foster care.

On April 25, 2016, the Department filed an original petition for protection of a child, for conservatorship, and for termination of Mother's parental rights to A.E. The petition was supported by the affidavit of Department caseworker Kimberly Bell. Bell's affidavit included allegations that A.E. tested positive for opiates at birth; Mother was investigated by the Department on numerous occasions before A.E.'s birth for neglectful supervision of her two older children; and Mother has a history of drug abuse and domestic violence. On April 26, 2016, the trial court rendered an ex parte order for emergency care of A.E. and temporary custody, appointing the Department as temporary managing conservator.

On May 18, 2016, A.E.'s maternal grandmother ("Grandmother") intervened in the suit and requested appointment as A.E.'s sole managing conservator. In her petition, Grandmother alleged that Mother "has a history or pattern of child neglect and use of controlled substance during the two-year period preceding the date of filing of this suit," and stated that Mother was currently incarcerated. Grandmother did not allege that Mother's parental rights should be terminated, but requested that Mother's visitation with A.E. be supervised. The Department conducted a "home assessment" to evaluate Grandmother's home as a possible placement for A.E., but concluded there were safety and well-being concerns that precluded A.E.'s placement there. Grandmother filed a motion for placement and request for hearing, challenging the Department's conclusions in its home assessment. None of Grandmother's pleadings or motions alleged that she, Mother, or A.E. were of Native American heritage.

On June 27, 2016, the Department filed a status report with the court. The report contained a box entitled "Native American Child Status," with four possible responses. The third possible response, "Child's American Indian child status denied by [Mother's name], mother" was checked. In a report by the Department entitled "Kinship Caregiver Home Assessment" of Grandmother's home, filed with the trial court on June 30, 2016, Grandmother gave her ethnicity as "Caucasian/White." The same assessment reported the

ethnicity of Grandmother's mother, another member of the household, as "Caucasian/White." Again in its "Permanency Report to the Court—Temporary Managing Conservatorship," filed on September 29, 2016, the Department reported that "Child's American Indian child status denied by [Mother's name], mother."

*2 On January 23, 2017, Mother, Grandmother, and the Department entered into a mediated settlement agreement ("MSA"). The parties agreed that Grandmother's motion for placement would be set for hearing by the trial court. If the trial court determined that A.E. should be placed with Grandmother, then the parties agreed that Grandmother would be appointed permanent managing conservator of the child, and Mother would be appointed permanent possessory conservator of A.E. If, at the conclusion of the hearing, A.E. was not placed in Grandmother's home, then Mother agreed that her parental rights would be terminated "on 'O' grounds for failure to complete court ordered services and best interest only."[1] The Department agreed "to forego any other grounds for termination, including endangerment grounds."

The trial court signed a "Permanency Hearing Order Before Final Order" dated February 3, 2017. The order recites that counsel for Mother appeared at the hearing and announced ready. Paragraph 2.8 of this order provided, "The Court has inquired whether the child or the child's family has Native American heritage and identified any Native American tribe with which the child may be associated."

The case proceeded to trial on March 29, 2017. The reporter's record reflects that Mother's counsel appeared and participated in the proceedings. Grandmother and others testified. The record does not reflect any argument, allegation, evidence, or mention of the family's Native American descent. The trial court denied placement with Grandmother, and set the case for a hearing on termination of Mother's parental rights.

On April 10, 2017, Mother moved for a continuance of the April 11 hearing date. Mother alleged:

> Respondent mother and maternal grandmother are of Native American descent. They have ties to the Choctaw, Cherokee, and Sioux tribes. They are attempting to find documentation of tribal membership. Movant is seeking additional time so the family obtain [sic] documents and contact the appropriate tribes. Under the Indian Child Welfare Act, the tribe must be given notice of such proceedings.

The hearing addressing termination of Mother's parental rights commenced on the following day. The trial court heard Mother's motion for continuance before hearing any evidence. The record reflects the following arguments and ruling:

> MS. TIMBERLAKE [Mother's counsel]: Your Honor, I—my client recently—I found out some information that there is some Indian heritage that the grandmother had indicated to [the Department] early on, but there was never any documentation provided. So when I found that out I let everybody know that this was an issue. This was after our placement hearing. They are in the process of trying to track down their documentation for the Indian heritage. There's actually possibly maternal and paternal side. However, they haven't been able to get that and that's why I filed a motion for continuance because I was trying to give them additional time to find that information so that we are in compliance with ICWA [the federal Indian Child Welfare Act].
>
> MR. MA [counsel for the Department]: May I respond, Your Honor?
>
> THE COURT: Yes.
>
> MR. MA: Based on my conversations with the caseworker and [the Department] I think grandmother and the mother indicated that they might have Indian blood some time last year. [The Department] asked for more information because just kind of a general statement like that doesn't help to indicate what tribe or if they are eligible for membership or if they are a member. And so we have waited I think since towards the end of last year and there still hasn't been any documentation received. There hasn't been any follow up received or given to those relatives or from the mother in this case. That's all the information we have, Judge, just that possibly there's Indian blood.
>
> *3 THE COURT: Mr. Herrera.
>
> MR. HERRERA [ad litem for A.E.]: Judge, the grandmother called me Friday after the placement hearing to inform me that she believed there was some Indian heritage. I asked her if they were registered members of any tribe and she said no, they weren't, but

they were going to look into it. That's the extent of the information I have.

MR. WYATT [Grandmother's counsel]: That is the extent of the information I have also, Your Honor.

THE COURT: All right. The motion for continuance is denied.

At the conclusion of the hearing, the trial court made findings supporting its ruling that Mother's parental rights should be terminated. The trial court rendered a final decree terminating Mother's parental rights on April 21, 2017. This appeal followed.

DISCUSSION

In her single issue, Mother contends that the trial court erred by failing to apply the protections of the Indian Child Welfare Act, 25 U.S.C. §§ 1901–63 (West, Westlaw through Pub. L. No. 115–61) ("ICWA") when terminating her parental rights. We review the trial court's application of the ICWA de novo. *In re T.R.*, 491 S.W.3d 847, 850 (Tex. App.–San Antonio 2016, no pet.).

In 1978, Congress passed the ICWA to address the " 'rising concern ... 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.' " *In re E.G.L.*, 378 S.W.3d 542, 545 (Tex. App.–Dallas 2012, pet. denied) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). The ICWA "articulates a federal policy that, where possible, an Indian child should remain in the Indian community." *In re T.R.*, 491 S.W.3d at 850 (citing *Miss. Band of Choctaw Indians*, 490 U.S. at 36–37). Under the ICWA, an Indian tribe is entitled to notice of a custody proceeding involving an Indian child. *In re D.D.*, No. 12–15–00192–CV, 2016 WL 1082477, at *7 (Tex. App.–Tyler Feb. 29, 2016, no pet.) (mem. op. & abatement order) (citing 25 U.S.C. § 1912(a)).

The ICWA applies to an involuntary child custody proceeding pending in state court when "the court knows or has reason to know that an Indian child is involved" in a child custody proceeding. 25 U.S.C. § 1921(a); *Doty–Jabbaar v. Dallas Cty. Child Protective Servs.*, 19 S.W.3d 870, 874 (Tex. App.–Dallas 2000, pet. denied). An "Indian child" is "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). "Reason to know," however, is not defined in the statute.

In 1979, 2015, and 2016, the federal Bureau of Indian Affairs ("BIA") published guidelines to assist state courts in their implementation of the ICWA. Texas courts have looked to these non-binding guidelines ("BIA Guidelines") in construing the ICWA. *See, e.g., In re R.R., Jr.*, 294 S.W.3d 213, 218–19 (Tex. App.–Fort Worth 2009, no pet.) (discussing courts' use of BIA Guidelines); *Doty–Jabbaar*, 19 S.W.3d at 876–77 (considering BIA Guidelines in determining qualifications of expert witness required by ICWA); *Yavapai–Apache Tribe v. Mejia*, 906 S.W.2d 152, 164 (Tex. App.–Houston [14th Dist.] 1995, orig. proceeding) (BIA Guidelines "not intended to have binding legislative effect" but "should be given important significance" in interpreting ICWA).[2] And recently, the Department of the Interior has promulgated regulations governing cases involving the ICWA. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,864 (June 14, 2016) (codified at 25 C.F.R. pt. 23) ("2016 Regulations").[3]

*4 The 2016 BIA Guidelines and 2016 Regulations discuss the phrase "reason to know" in section 1921(a) of the ICWA. Only one of the six factors listed in the 2016 Regulations is pertinent here:

> (c) A court ... has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if: ...
>
> > (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).[4] The 2016 BIA Guidelines advise that "State courts and agencies are encouraged to interpret these factors expansively. When in doubt, it is better to conduct further investigation into a child's status early in the case; this establishes which laws will apply to the case and minimizes the potential for delays or disrupted placements in the future." 2016 BIA Guidelines at 11. "A violation of the ICWA notice provisions may be cause for invalidation of the termination proceedings at some later, distant point in time." *In re D.D.*, 2016 WL 1082477, at *7 (citing 25 U.S.C. § 1914, providing, "Any Indian child who is the subject of any action for ... termination of parental rights under State Law, any parent or Indian

custodian from whose custody such child was removed, and the Indian child's tribe 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 this title.").

Because of Mother's denials of Indian heritage, however, no investigation was undertaken "early in the case" here. After the parties filed their briefs, on August 23, 2017, we abated this appeal for thirty days and ordered the Department to (1) investigate whether A.E. is an "Indian child" as defined by the ICWA, and (2) report the results of its investigation to the trial court. Further, we ordered the trial court to (1) consider the Department's report and conduct a hearing on A.E.'s status as an "Indian child," and (2) transmit to this Court a reporter's record of the hearing and a supplemental clerk's record containing the trial court's docket sheet, the trial court's written findings, and any supporting documentation.

The Department subsequently sought additional time to complete its investigation, informing the Court that "[t]here are a total of 20 tribes under the Federal Register that are affiliated" with the three Nations identified by Mother and Grandmother. In an Order dated September 12, 2017, we granted an additional 21 days to comply with our August 23, 2017 Order. In accordance with our Order, the Department completed its investigation, and the trial court held a hearing on October 4, 2017. A reporter's record of that hearing was filed in this Court on October 4, 2017, and a supplemental clerk's record was filed in this Court on October 12, 2017 (together, the "Supplemental Record"). We reinstated this appeal on October 13, 2107.

*5 The Supplemental Record reflects that the Department undertook an investigation to determine whether A.E. is an "Indian child." Chaisity Fridia–Caro, a Department caseworker, testified at the October 4 hearing that Mother indicated possible affiliations with the Cherokee, Choctaw, and Sioux Nations. Fridia–Caro testified that there are twenty recognized tribes listed in the Federal Register for these three nations. Fridia–Caro contacted each of the twenty tribes,[5] giving each tribe A.E.'s name and date of birth, Mother's name and date of birth, Grandmother's name and date of birth, and a paternal grandmother's name and date of birth. Fridia–Caro testified that in response to her inquiries, each of the twenty tribes informed her that A.E. was neither enrolled nor eligible to be enrolled as a member of the tribe.

The Supplemental Record also contains the notice sent by Willis Ma, Assistant District Attorney, to the twenty tribes by registered mail, return receipt requested, and the Department's October 4, 2017 report to the trial court that details the Department's contacts with each tribe. At the close of the hearing, the trial court found:

> The trial court—this Court has considered the Department's report, the hearing today, and makes a finding that the child is not an Indian child as defined by the Indian Child Welfare Act. The Court will make that finding on its docket sheet and—so that will be available for the clerk to the appeals court. In addition, the supporting documentation, the report from the Department as well as the files that are part of the Court's record showing that that Mr. Ma's letters were all to tribes should also be sent to the Court of Appeals as well as the court record.

The Supplemental Record reflects that the trial court did not know or have reason to know that A.E. is an Indian child. *See* 25 U.S.C. § 1921(a); *Doty–Jabbaar*, 19 S.W.3d at 874. Accordingly, the other provisions of the ICWA are not applicable. *See In re T.R.*, 491 S.W.3d at 852 (where court did not know or have reason to know that Indian child, as defined in ICWA, was involved in proceeding, ICWA's notice provisions were inapplicable).

Mother has not raised any issue challenging the trial court's judgment other than its failure to apply the ICWA. We have concluded the trial court did not err in failing to apply the ICWA to the termination of Mother's parental rights. We decide Mother's sole issue against her.

CONCLUSION

We affirm the trial court's judgment.

All Citations

Not Reported in S.W. Rptr., 2017 WL 4707488

Footnotes

1 *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O) (West Supp. 2016) (one of grounds for involuntary termination of parent-child relationship).

2 We reference the 2016 BIA Guidelines in this opinion. *See* Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* (Dec. 2016), https://perma.cc/3TCH-8HQM ("2016 BIA Guidelines"). Although Mother has attached the 2015 BIA Guidelines to her appellate brief, and this case was filed before the effective date of the 2016 BIA Guidelines, the 2016 BIA Guidelines updated and replaced the 2015 BIA Guidelines in an attempt to "promote the consistent application of ICWA across the United States." *See id.* at 4, 6. Because the BIA Guidelines are advisory and the status of the 2015 Guidelines is uncertain, we look to the 2016 Guidelines even though this case was filed before their effective date. *See, e.g., People ex rel. L.L.*, 395 P.3d 1209, 1212 (Colo. App. 2017) (discussing 2015 and 2016 BIA Guidelines).

3 Like the 2016 BIA Guidelines, the 2016 Regulations apply to proceedings initiated after December 12, 2016. *See* 25 C.F.R. § 23.143 (2016 Regulations apply to proceedings under State law for termination of parental rights proceedings initiated after December 12, 2016). Similarly, although the 2016 Regulations do not apply to this appeal, we refer to them for guidance.

4 None of the other factors is implicated in this case. *See id.* § 23.107(c)(1) (court is informed "that the child is an Indian child"); *id.* § 23.107(c)(3) (child gives court reason to know he or she is Indian child); *id.* § 23.107(c)(4) (child's, parent's, or Indian custodian's residence is on Indian reservation); *id.* § 23.107(c)(5) (child is or was ward of tribal court); *id.* § 23.107(c)(6) (parent or child possesses identification card indicating membership in Indian tribe).

5 Fridia–Caro testified that she contacted the following tribes affiliated with the Cherokee Nation: (1) Eastern Band of Cherokee Indians; (2) United Keetoowah Band of Cherokee Indians, Oklahoma; and (3) Cherokee Nation, Tahlequah, Oklahoma; the following tribes affiliated with the Choctaw Nation: (1) Jena Band of Choctaw Indians; (2) Choctaw Nation of Oklahoma; and (3) Mississippi Band of Choctaw Indians; and the following tribes affiliated with the Sioux Nation: (1) Cheyenne River Sioux Tribe; (2) Shakopee Mdewakanton Sioux Tribe; (3) Crow Creek Sioux Tribe; (4) Flandreau Santee Sioux Tribe; (5) Lower Brule Sioux Tribe; (6) Oglala Sioux Tribe; (7) Rosebud Sioux Tribe; (8) Santee Sioux Tribe; (9) Standing Rock Sioux Tribe; (10) Yankton Sioux Tribe; (11) Lower Sioux Tribe; (12) Prairie Island Sioux Tribe; (13) Upper Sioux Tribe, and (14) Fort Peck Assiniboine & Sioux Tribe.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Supreme Court of the State of Washington, under Case No. 98003-9, and a true copy was e-mailed or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses as listed below:

1. Tara Urs, The Defender Association, dependency.tdadocket@kingcounty.gov, and tara.urs@kingcounty.gov;

2. Kathleen Martin, Dependency CASA Program, casa.group@kingcounty.gov, and kathleen.martin@kingcounty.gov;

3. Jennifer Masako Yogi and Sarracina Littlebird, Northwest Justice Project, Jennifery@nwjustice.org; and cina.littlebird@nwjustice.org.

4. Colleen Shea-Brown, Legal Counsel for Youth and Children, colleenlcyc@gmail.com;

5. Kathryn Fort and Madeline Soboleff Levy, Central Counsel of the Tlingit and Haida Tribes of Alaska, fort@law.msu.edu; and msobolefflevy@ccthita-nsn.gov;

6. Ronald Whitener, Center of Indigenous Research and Justice, ronw@cirj.org;

7. Brooke Pinkham and Robert Chang, Center for Indian Law & Policy, Seattle University School of Law, pinkhamb@seattleu.edu; and changro@seattleu.edu; and

8. Diana Breaux, Summit Law Group, dbreaux@yarmuth.com.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of March, 2020, at Seattle, WA.

PATRICIA A. PROSSER
Legal Assistant
Office Identification #91016

ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE

March 12, 2020 - 3:39 PM

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