

ICWA Cases

B.H. v. People ex. rel. X.H., 138 P.3d 299 (Colo. 2006).

The issue in this case is whether the trial court erred in terminating parental rights without following the provisions of ICWA when grandmother had informed the department several times of the family's Indian heritage.

The department was told by the grandmother on several occasions that she had been researching their Indian background for some time and that she was trying to register with the Cherokee tribe to which her ancestors belonged. Both the trial court and appellate court knew of this information but terminated parental rights without further inquiry. Both court concluded that because neither the child nor his mother were a registered member of an Indian tribe ICWA did not apply.

ICWA, passed in 1978, established minimum standards for the removal of Indian children from their families. 25 U.S.C. Section 1902. The policy of the Act is to place Indian children within the Indian community whenever possible. A state is required by the Act to provide notice to the child's or its parent's tribe, or the Bureau of Indian Affairs if the tribe cannot be identified or located, whenever the court knows or has reason to know that an Indian child is involved. 25 U.S.C. Section 1912(a).

By Colorado's implementing legislation, in every termination of parental rights proceeding, the petitioning party has an affirmative duty to make continuing inquiries to determine whether the child is an Indian child and to identify any particular tribal affiliation, Section 19-1-126(1)(a). Under the "reason to know" or "reason to believe" standards, the state's obligation to notify potentially concerned tribes or the BIA necessarily arises preliminary to an ultimate determination of the child's Indian status.

The Act defines an "Indian child" as any unmarried person under the age of eighteen, who is either a member of an Indian tribe or eligible for membership and the biological child of a member. Membership for purposes of the Act is left to the control of each individual tribe. Acquiring or establishing membership may or may not include some form of formal enrollment or registration. The tribes must have a meaningful opportunity to participate in determining whether the child is Indian, and to be heard on the issue of ICWA applicability.

Here, the department produced a report acknowledging the child's Indian ancestry through her mother and her grandmother. The petitioning party, the department, was clearly aware of the child's Indian ancestry, imposing upon it a duty of further inquiry and notice pursuant to the Act. Further, the court did not understand the requirements for membership in a tribe, as contemplated by the Act, and concluded that the child was not the member of a tribe and so the Act did not apply.

The termination of parental rights is reversed and the matter is remanded for notice to be given to the tribes in accordance the provisions of ICWA and the Colorado Children's Code.

People ex rel. J.A.S., 160 P.3d 257 (Colo. App. 2007).

The issue is whether the court erred in terminating parental rights when it found that ICWA was inapplicable because the tribes had determined the children were not enrolled or eligible for enrollment.

Tribal membership is not defined by the ICWA. Instead, each Indian tribe has the authority to determine its membership criteria and to decide who meets those criteria. A tribe's determination of membership or membership eligibility is conclusive and final.

Mother argues that she was not given sufficient notice of the tribes' determinations to permit her to independently ascertain their status as Indian children. However, the mother's determinations have no impact. The tribes' determinations are conclusive. Therefore, there was no error in the trial court's finding that ICWA did not apply because their determination was based on the conclusions of the tribes.

People ex rel. S.R.M., 153 P.3d 438 (Colo. App. 2006).

The issue is whether the trial court erred in terminating parental right when no notice of the termination proceeding was given to the Citizen Potawatomi Nation (the CPN) under ICWA.

The department provided notice to the CPN that a dependency and neglect proceeding had been filed on the child's behalf. When the department moved to terminate parental rights, however, no notice was then sent to the CPN.

Pursuant to 25 U.S.C. Section 1912(a), in any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify...the Indian child's tribe...of the pending proceedings and of their right to intervene.

The department argues that it had no duty to notify the CPN because the CPN did not respond to its earlier notice. The department is incorrect. In every termination of parental rights proceeding in Colorado, the petitioning party has an affirmative duty to make continuing inquiries to determine whether the subject child is an Indian child and to give notice in the manner prescribed by statute.

The department had to give notice when it sought to terminate parental rights. Also, a tribe does not waive its rights to intervene, and therefore its corresponding right to receive notice, unless it explicitly states that it will not intervene. Here, the tribe did not indicate that it was not going to intervene and thus still had the right to receive notice.

The judgment of termination of parental rights must be invalidated.

People ex rel. K.D., 155 P.3d 634 (Colo. App. 2007).

One of the several issues in this case is whether the trial court erred in terminating Father's parental rights because there was no expert testimony that continued custody of the child by him would likely result in serious emotional or physical damage to the child, as required by the ICWA.

To terminate parental rights, the ICWA requires a court to find beyond a reasonable doubt, including by the testimony of "qualified expert witnesses," that continued custody of the child is likely to result in serious emotional or physical damage to the child. 25 U.S.C. Section 1912(f).

Though ICWA does not define "qualified expert witness," the Guidelines for State Court, Indian Child Custody Proceedings, 44 Fed.Reg. 67,584 (Nov. 26, 1979), state that a person may be an expert if he or she is a professional person having substantial education and experience in the area of his or her specialty. Though the Guidelines are not binding, they are considered persuasive by state courts. B.H. v. People in Interest of X.H., 138 P.3d 299 (Colo. 2006).

The Guidelines suggest that persons most likely to meet the requirements would possess special knowledge of Indian culture and society. However, such special knowledge is not required if termination is based on parental unfitness unrelated to Indian culture or society.

Here, termination was based on Father's history of emotional illness, a problem that is culturally neutral. A parenting program therapist with a bachelor's and master's degree in counseling psychology and a Colorado professional counselor license testified at trial. The court found she was qualified as an expert in child development and family therapy.

Because the reason for termination was not related to Indian culture and the therapist who testified had substantial education and experience in her area of specialty, the provisions of the ICWA are satisfied and termination is affirmed.