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NC Supreme Court Addresses ICWA for the First Time

In August, the North Carolina Supreme Court published its first opinion addressing the Indian Child Welfare Act (ICWA): *In re E.J.B.*, 375 N.C. 95 (2020). Specifically, the supreme court examined the history and purpose behind Congress's enactment of ICWA and the notice requirements that apply when a trial court knows or has reason to know the child involved in the "child custody proceeding" is an "Indian child."

What is ICWA? Why the quotation marks? What does the opinion say? How does the opinion impact practice?

What Is ICWA?

The Indian Child Welfare Act is a federal law that was enacted in 1978 and establishes minimum federal standards addressing the removal of an "Indian child" that applies to certain "child custody proceedings" heard in a state court. *See* 25 U.S.C. 1902; 25 C.F.R. 23.101. The law is codified at 25 U.S.C. 1901 *et seq.* Effective for "child custody proceedings" commenced on or after December 12, 2016, binding regulations are found at 25 C.F.R. Part 23.

The purpose of ICWA is two-fold:

- to protect the best interests of Indian children and
- to promote the stability and security of Indian tribes and families.

25 U.S.C. 1902.

There are many components to ICWA. This blog post focuses only on the issues raised in *E.J.B.*, which were related to the requirement under ICWA that when the trial court knows or has reason to know the child is an "Indian child," proper notice of the proceeding must be sent to the appropriate federal Indian tribes and regional Bureau of Indian Affairs (BIA).

Why the Quotation Marks?

"Child custody proceeding" and "Indian child" are specifically defined terms under ICWA.

A "child custody proceeding" is an action that may result in one of the following:

1. A temporary foster care (including guardianship) placement, when a parent cannot have the child returned on demand, and where parental rights have not been terminated;
2. A termination of parental rights (TPR);
3. A temporary pre-adoptive placement, which occurs after a parent's rights are terminated but before the child is placed in a pre-adoptive placement; and

4. A permanent adoption placement.

25 U.S.C. 1903(1); 25 C.F.R. 23.2.

In North Carolina, the majority of the applicable child custody proceedings include abuse, neglect, or dependency actions; post-relinquishment reviews; TPR and post-TPR reviews; and adoptions of minors.

An "Indian child" is defined as an unmarried person younger than 18 years old who is

1. a member of a federally recognized Indian tribe (currently, there are 574 federally recognized tribes), or
2. eligible for membership in a federally recognized tribe and a biological parent of that child is a member of a federally recognized tribe.

25 U.S.C. 1903(4); 25 C.F.R. 23.2. *See* 85 FR 5462 (recognized tribes as of 1/30/2020).

What Happened in *E.J.B.*?

E.J.B. involves a father's appeal of a 2019 order that terminated his parental rights to his two children. He argued that the notice requirements of ICWA were not satisfied such that the trial court lacked jurisdiction, which should result in the TPR being vacated.

The TPR is a "child custody proceeding" under ICWA. The county department of social services (DSS) initiated the proceeding by filing a TPR motion in an underlying neglect and dependency proceeding. In both the underlying proceeding and the TPR proceeding, the father indicated that he was affiliated with the "Cherokee Indian tribe." After the TPR was granted and the appeal was pending, the trial court conducted post-TPR reviews under G.S. 7B-908. Post-TPR hearing notices were sent to the different Cherokee tribes. At a post-TPR hearing, the trial court found that ICWA was followed: DSS sent notices to the three federally recognized Cherokee tribes and the appropriate regional BIA director. Two of the three tribes responded to the notice and indicated that the children were not registered members or eligible to be registered as members of their respective tribe. The third tribe never responded to the notice, and the trial court determined that ICWA did not apply.

What Did *E.J.B.* Say?

The need for ICWA: The opinion discusses the reason behind the enactment of ICWA – "The Act was a product of growing awareness in the mid-1970s of abusive child welfare practices that led to an 'Indian child welfare crisis . . . of massive proportions.' " Sl.Op. at 5. That crisis resulted from the removal of 25–35% Indian children, the vast majority (90%) of whom were placed in non-Indian foster and adoptive homes or institutions. Congress recognized that the " ' wholesale separation

of Indian children from their families [primarily from state agencies and the courts] is perhaps the most tragic and destructive aspect of American Indian life today,' causing long term emotional harm for Native American children who lose their cultural identity, mass trauma for Native American families, and the erosion of tribal communities, heritage, and sovereignty.' " Sl.Op. at 6.

Despite the enactment of ICWA, "Native American children are still disproportionately likely to be removed from their homes and communities." Sl.Op. at 9. To address inconsistencies in the various states' interpretation and implementation of ICWA, the BIA adopted binding federal regulations in 2016. Those 2016 regulations include specific requirements about providing notice, including who must receive it, how it must be sent, and what it must contain.

Notice requirements and the role of the court:

Under the regulations, the state courts

- "bear the burden of ensuring compliance with the Act. . . [by asking] each participant in a child custody proceeding, on the record, whether that participant knows or has reason to know that the matter involves an Indian child" (Sl.Op. at 10; *see* 25 C.F.R. 23.107(a)) and
- is obligated to instruct the parties that if they learn of a reason to know the child is an Indian child, they have a duty to inform the court. 25 C.F.R. 23.107(a).

When there is reason to know a child is an Indian child but there is insufficient evidence to definitively know,

- The trial court must confirm on the record that the "agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership) . . . . 25 C.F.R. 23.107(b)(1)." Sl.OP. at 10–11.
- While this information is being sought from the tribe, who has sole jurisdiction to make that determination, the court must treat the child as an Indian child.
- If a tribe does not respond to multiple written requests, the court must seek assistance from the BIA. 25 C.F.R. 23.105(c).
- "State courts can only make their own determination as to a child's status if the tribe and [BIA] fail to respond to multiple requests." Sl.Op. at 11.

Applying ICWA to the Facts: "[T]he record shows that the trial court had reason to know that an Indian child might be involved" based on multiple DSS court reports that the father indicated he had Cherokee Indian heritage. Sl.Op. at 12. There is no evidence in the TPR record that the court made the inquiry of participants about a reason to know whether the children were Indian children or that the court informed the parties of their duty to inform the court if they subsequently learn of information that there is reason to know the children may be an Indian children. Although DSS

attempted to rectify the failure to comply with the ICWA notice provisions by sending notices, certified mail, return receipt requested, to each Cherokee tribe and the regional BIA director, the notices were legally insufficient because they did not contain all the required information set forth in 25 U.S.C. 1912 and 25 C.F.R. 23.111(d). The post-TPR notice, therefore, did not cure the failure to comply with the Act at the TPR proceeding. Furthermore, even if the notices were legally sufficient, the trial court erred by determining that ICWA did not apply because the "courts can only make their own determination as to the child's status if the tribe and [BIA] fail to respond to multiple written requests." Sl.Op. at 11; *see* Sl.Op. at 17.

Remand: The TPR was reversed and remanded for the trial court to order DSS to send a legally sufficient notice to the Keetoowah Band of Cherokee Indians. If that tribe indicates that the children are not Indian children, the TPR shall be reaffirmed by the trial court. If the tribe indicates the children are Indian children, the trial court must proceed by applying the relevant provisions of ICWA.

How Does the Opinion Impact Practice?

Subject Matter Jurisdiction: Although *E.J.B.* does not expressly state the notice provisions do not impact a trial court's subject matter jurisdiction, both the remand instructions and the analysis about whether the notice deficiencies were cured in the post-TPR hearing indicate subject matter jurisdiction is not affected.

Reason to Know the Child Is an Indian Child: The opinion does not expressly analyze when there is "reason to know" the child is an Indian child. There appears to have been agreement by the parties and the trial court that there was reason to know. The regulations address "reason to know" at 25 C.F.R. 23.107(c), and the dissent in *E.J.B*. states "If the trial court has reason to suspect the children are Indian children through any of the avenues recognized in 25 C.F.R. 23.107(c), including an allegation of Indian heritage. . . ." Dissent at 4.

The court of appeals has held that a parent's assertion of Indian heritage with a federally recognized tribe is sufficient to give the court reason to know. *See In re A.P.*, 260 N.C. App. 540 (2018) and opinions cited therein. Although not binding in North Carolina, last month, the Washington Supreme Court analyzed the purposes of ICWA and held that a court has reason to know a child is an Indian child when a participant indicates tribal heritage. *See In re Z.J.G., M.E.J.G.*, 471 P.3d 853 (2020).

Notice: The petitioner or movant in a foster care or TPR proceeding must provide a legally sufficient notice to the tribe(s) and regional BIA director. To ensure compliance, review the provisions of both 25 C.F.R. 23.11 and 23.111. If a deficiency is discovered, send a new legally sufficient notice. An original or copy of each notice and proof of proper service of those notices must be filed with the court. 25 C.F.R. 23.111(a)(2).

Time Period for the Tribe and BIA to Respond: ICWA does not explicitly address time frames for when the tribe must respond. However, previous court of appeals decisions have by looking to the time requirements for when a hearing may be held. A hearing may not be held until 10 days after the ICWA notice is received, and a request to the court for an additional 20 days may be made. 25 U.S.C. 1912(a); 25 C.F.R. 23.112. Adding these time periods results in a 30-day period from when the notice is received. *See In re A.P.* and cases cited therein.

ICWA does address the time period for when the BIA must respond at 25 C.F.R. 23.11(c). The BIA has 15 days after receipt of the notice to notify the tribe and child's parent or Indian custodian and send a copy to the trial court or to inform the trial court that it needs more time. Given that this 15-day time period is shorter than the 30-day time period, applying the longer 30-day time period to the BIA would not cause a delay in the proceeding.

Multiple Written Requests: Neither the statute nor regulations require that a tribe or the BIA receive more than one legally sufficient notice that is sent by registered or certified mail, return receipt requested. Yet, *E.J.B.* refers to "multiple written requests." There are 2016 BIA Guidelines, and section B.7 refers to "multiple written requests." Although the Guidelines encourage tribes to promptly respond, B.7 states "if a Tribe fails to respond to multiple written requests for verification regarding whether a child is in fact [an Indian child]. . ., and the agency has sought the assistance of the [BIA] in contacting the Tribe, a court may make a determination regarding whether the child is an Indian child for purposes of the child-custody proceeding based on the information it has available." Further, "If new evidence later arises, the court will need to consider it and should alter the original judgment if appropriate.

The regulations state that *in addition to* the delivery of the notice by registered or certified mail, return receipt requested, notice may also be sent by personal or electronic delivery. 25 C.F.R. 23.111(c). Given this language, it appears that multiple written requests may be satisfied with the official delivery and follow-up emails or faxes to the Tribe and BIA. That issue has yet to be raised before our appellate courts.

CAUTION: Applicable Provisions When There Is Reason to Know: The NC appellate court opinions have focused on the issue of notice to the tribes and BIA when there is reason to know the child is an Indian child. However, that is not the sole requirement that must be followed under ICWA when the court has reason to know a child is an Indian child. 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 of an 'Indian child' ". 25 C.F.R. 23.107(b)(2). My reading of that language is that all the relevant provisions of ICWA apply, including but not limited to notice provisions, timing of hearings, standards for removal, and placement preferences. These requirements are discussed in Chapter 13.2 of the Abuse, Neglect, Dependency, and Termination of Parental Rights manual here.