

Send Lawyers, Experts, and Active Efforts:

Recent Developments in Nebraska Case Law Interpreting the Indian Child Welfare Act

by Sarah Helvey & Hon. Patrick Runge

Introduction

The Indian Child Welfare Act ("ICWA") is a federal law enacted in 1978 to curb the practice of state child welfare agencies removing Native American children from their homes and placing them in non-Indian foster and adoptive homes. This practice had become so widespread that, at the time of ICWA's enactment, 25 to 35 percent of all Indian children had been removed from their tribes and families and placed in foster or adoptive homes, and about 90 percent of those adoptions were in non-Indian homes. *In re Interest of Elias L.*, 277 Neb. 1023, 1029 (2009) citing *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30 (1989). As a result, tribes began to fear for their very survival.

The Indian Child Welfare Act and Nebraska's state statutory counterpart, the Nebraska Indian Child Welfare Act ("NICWA"), were intended to address this crisis by providing distinct requirements in child custody proceedings involving Native American children. However, more than 30 years later, the problems that led to ICWA's enactment still persist and are particularly prevalent in Nebraska. According to a report by the National Indian Child Welfare Association and Pew Charitable Trusts, Nebraska is the eighth highest state in the country in terms of the percentage of children in foster care who were American Indian/Alaskan Native and the second highest state in the country in terms of the greatest disproportionality of American Indian/Alaskan Native children in foster



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INDIAN CHILD WELFARE ACT

care. Pew Charitable Trusts' Kids Are Waiting Campaign and the National Indian Child Welfare Association, *Time for Reform: A Matter of Justice for American Indian and Alaskan Native Children*, 5 (2007). Therefore, the application and enforcement of ICWA in Nebraska remains critically important for the well being of Native American children and tribes.

The Nebraska Court of Appeals and Supreme Court have issued several significant opinions interpreting the Indian Child Welfare Act in the past year. Together, these cases address a range of issues including who qualifies as a "qualified expert witness" under ICWA, the pleading requirements in ICWA cases, the circumstances under which a court may decline to transfer a case to tribal jurisdiction, the right of tribes to intervene and participate in state ICWA cases through a non-attorney representative, and the requirement that the state provide active efforts to try to rehabilitate and reunify families in ICWA cases. This article provides a short summary of relevant aspects of recent Nebraska appellate case law on ICWA along with the practical implications of these cases.

In re Interest of Shayla H.

17 Neb. App. 436 (2009).

In this case, the Nebraska Court of Appeals held that a caseworker, an 11-year employee of the Nebraska Department of Health and Human Services ("NDHHS" or "the Department"), with a bachelor's degree, and limited knowledge and experience with Native families, was not a qualified expert witness under ICWA. The court also held that the state's pleadings in ICWA cases must include ICWA-specific allegations.

Qualified Expert Witnesses Under ICWA

Among other things, ICWA requires qualified expert testimony on the issue of whether "the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child" prior to placing a child in foster care or terminating parental rights. Neb. Rev. Stat. § 43-1505; 25 USC 1912. In evaluating whether the expert in this case met the requirement for a qualified expert witness under ICWA as challenged by the appellant father, the Nebraska Court of Appeals referenced non-binding guidelines for expert witnesses set out by the Bureau of Indian Affairs ("BIA Guidelines") which list the following as qualified expert witnesses:

- (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing

social and cultural standards in childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,583, 67,593 (Nov. 26, 1979).

In this case, the Court of Appeals concluded that the NDHHS case worker - who had a bachelor's degree in human development, 11 years of employment at NDHHS, regular training offered through NDHHS, and some interaction with families of Native American heritage through her work at NDHHS - did not qualify as an expert witness under ICWA. While the Court of Appeals declined to address whether an NDHHS caseworker could ever qualify as an expert witness, the court concluded that the caseworker in this case did not have "either substantial experience in the delivery of . . . services to Indians or extensive knowledge of social and cultural standards in childrearing practices within the tribe." 17 Neb. App. 436, 450. Additionally, the court found the evidence did not "support a conclusion that [the caseworker] was a professional person with substantial education and experience in her specialty." *Id.* Therefore, the Court of Appeals held that the caseworker could not give "qualified expert testimony" as defined in ICWA, and that the juvenile court erred in relying on her testimony.

ICWA Pleading Standards

ICWA also includes additional allegations that must be pled in the course of an ICWA case. In this case, the appellant father argued in the context of a motion to dismiss that the motion for temporary custody and the juvenile court petition failed to allege such facts as set forth in Neb. Rev. Stat. § 43-1505 which states in relevant part:

- (4) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
- (5) No foster care placement may be ordered in such proceedings in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- (6) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

INDIAN CHILD WELFARE ACT

In analyzing this assignment of error, the Court of Appeals outlined previous case law in which Nebraska appellate courts reversed and remanded a termination of parental rights where the state failed to include the relevant ICWA language in its motion (even where "the juvenile court specifically found that the state had proved the relevant ICWA requirements") and reversed and remanded an abuse/neglect adjudication where the state failed to include ICWA language in its petition (where the juvenile court made no ICWA findings although the court was informed of the applicability of ICWA). 17 Neb. App. at 446; *In re Interest of Sabrienia B.*, 9 Neb. App. 888 (2001); *In re Interest of Dakota L. et al.*, 14 Neb. App. 559 (2006). In the present case, the juvenile court made ICWA findings in its adjudication order, but nevertheless, the Court of Appeals concluded that the ICWA allegations were required in the petition and motion for temporary custody and therefore, the juvenile court erred in overturning the motion to dismiss and reversed and remanded on this point.

Practical Implications

In considering the practical implications of *Shayla H.*, it is clear that the state must plead the standards required under ICWA, regardless of whether the court makes the required findings and regardless of whether such an error is capable of being cured by an amendment to the pleadings. In addition, this case provides some additional clarification on the characteristics of a qualified expert witness under ICWA. Knowledge of tribal customs and standards is a critical component of ICWA cases and expert testimony, although it is not required in all cases by the BIA Guidelines or Nebraska appellate case law. Accordingly, the Nebraska ICWA Coalition, a group of local tribal representatives and other advocates working to improve ICWA compliance in Nebraska, has begun to identify, recruit, and train expert witnesses knowledgeable in tribal customs to be available as a resource in ICWA cases across the state. Practitioners are strongly encouraged to seek expert witnesses with knowledge of tribal customs and standards and to consult tribes to identify such individuals.

In re Interest of Elias L.

272 Neb. 1023 (2009).

In this case, the Nebraska Supreme Court affirmed the right of Indian tribes to intervene in child welfare cases involving Native American children by a non-attorney ICWA Specialist. In a unanimous decision, the Nebraska Supreme Court reversed and remanded a decision by a county court judge which refused to allow the Ponca Tribe of Nebraska to intervene in a case involving two children who are members of the Tribe and held that the federal ICWA preempts Nebraska law regulating the unauthorized practice of law.

Federal Preemption

The ICWA provides that the child's tribe has a right to intervene at any point in state court proceedings for the foster care placement of or termination of parental rights to an Indian child. Neb. Rev. Stat. § 43-1504(3); 25 USC 1911. Although no other parties in the case objected, the county court cited the state's unauthorized practice of law statute and refused the Tribe's motion to intervene because it was signed by the Tribe's Department of Social Services ICWA Specialist, who is not an attorney. The Tribe retained a lawyer and appealed, arguing that the provision of federal ICWA that provides tribes with a right to intervene preempts the state's unauthorized practice of law statute in an ICWA case.

In its preemption analysis, the Nebraska Supreme Court first determined that requiring the Tribe to appear with legal counsel interferes with the Tribe's right to intervene. If tribes are not able to intervene, the court reasoned, Indian children would be without the advocacy of their tribe and the tribe's interest as well as key interests of the children would go unrepresented. The court went on to determine that the state's interest in requiring groups to be represented by an attorney, while legitimate, is outweighed by the tribe's interests in ICWA proceedings and protecting its children. Moreover, in this context, the state's interest is not necessarily compromised because the Tribe's representative, a trained ICWA Specialist, was familiar with applicable law and procedure and was authorized to speak on behalf of the Tribe.

Practical Implications

This case is significant for tribes, as well as Native children and families, in that the participation of tribes in child welfare cases is an important means of protecting the best interests of Native American children and preserving Indian culture. The case will also enable more Indian children to have the advocacy and expertise of their tribe in such cases. Ideally, the involvement of the tribe in ICWA cases may go beyond the motion to intervene and should include the right of tribal representatives to fully participate in ICWA cases in state court.

In re Interest of Leslie S.

17 Neb. App. 828 (2009).

In this case, the Nebraska Court of Appeals affirmed a juvenile court's denial of a motion to transfer an ICWA case to the tribal court, finding no abuse of discretion in the juvenile court's determination of good cause not to transfer based upon the advanced stage of the proceeding and the fact that the state court still had jurisdiction over pending juvenile cases involving the children.

INDIAN CHILD WELFARE ACT

Motion to Transfer

The ICWA provides for mandatory transfer of jurisdiction from the state court to the jurisdiction of the tribe upon the petition of the parent, Indian custodian, or the Indian child's tribe unless good cause not to transfer is shown or either parent objects. Specifically, Neb. Rev. Stat. § 43-1504(2) provides:

(2) In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe. See also 25 USC 1911(b).

In this case, the father and the tribe sought to transfer the case from state court to tribal court. Shortly thereafter, the state filed a petition to terminate parental rights. A previous transfer motion had been filed by the tribe two years earlier, but was denied based upon the mother's objection. The Court of Appeals began its analysis of the instant transfer motion by noting that the party opposing the transfer has the burden of showing that good cause not to transfer exists. The Court of Appeals went on to state, however, that the ICWA statute does not define good cause. Therefore, the court looked to the Bureau of Indian Affairs' non-binding guidelines for assistance in determining whether good cause existed in this case. The guidelines state that good cause not to transfer may exist if "[t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979). Based in part on this information, the Court of Appeals found that the juvenile court's denial of the transfer motion was not an abuse of discretion. Specifically, the Court of Appeals noted that the father did not file the transfer motion until two years after the abuse/neglect petition was filed and that, during those two years, the father did very little to participate in the case. The Court of Appeals also noted that at the time of the hearing on the motion to transfer, a termination of parental rights petition had been filed. Finally, the Court of Appeals stated that the fact that there were other pending juvenile cases under the jurisdiction of the state court (a truancy, delinquency, and another juvenile petition) essentially presented a forum non conveniens issue, which is another basis for good cause to deny transfer to a tribal court.

Practical Implications

This case indicates that even when a tribe and a parent sup-

port a motion to transfer, a juvenile court may still find that good cause exists not to transfer when a case is at an advanced stage or other forum non conveniens issues are present. In general, however, practitioners are urged to keep in mind that the right to transfer cases to tribal court jurisdiction is important to effectuating the goals of ICWA. For instance, in this case, the father testified that he sought transfer so that his children could have greater involvement with his tribe and so that he could work with Native counselors, attorneys, and judges. Although the request was denied in this case, based in part on the father's prior lack of participation, the importance of these aspects of transfer should be respected and prioritized. In addition, practitioners should note that the BIA Guidelines supply limited instances of good cause.

In addition to those present in this case, the BIA Guidelines include the following examples of good cause:

- The Indian child is over twelve years of age and objects to the transfer;
- The evidence necessary to decide the case could not be adequately presented in tribal court without undue hardship on the parties or witnesses; and
- The parents of a child over five years of age are not available and the child has had little or no contact with the tribe or members of the tribe.
- The socio-economic conditions and the perceived adequacy of tribal or BIA social services or judicial systems may not be considered in a determination that good cause exists.

In re Interest of Louis S.

17 Neb. App. 867 (2009).

In this case, the Nebraska Court of Appeals affirmed a termination of parental rights, finding first that the juvenile court did not err in denying a motion to transfer to the tribe where the case had been before the state court for more than two and a half years. The Court of Appeals also found sufficient evidence to affirm on the statutory grounds for termination of parental rights and on best interests. ICWA adds two additional elements that the state must prove before terminating parental rights involving Indian children: 1) that "active efforts have been made . . . to prevent the breakup of the Indian family and that these efforts have proved unsuccessful," (§ 43-1505(4)) and 2) that "the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child" (§ 43-1505(6)). The "serious emotional or physical damage" element must be supported by evidence beyond a reasonable doubt and must include the testimony of a qualified expert witness. On this element, the Court of Appeals found that the juvenile court did not err in admitting the testimony of a qualified expert witness with substantial

INDIAN CHILD WELFARE ACT

education and experience where the witness had a law and master's degree, was a retired assistant professor, and had developed curriculum for training NDHHS caseworkers on various child welfare issues, including ICWA. The decision considered the issue of active efforts in some depth, noting that prior case law requires that some efforts be "culturally relevant" but seemed to conclude that culturally relevant efforts may be limited in certain circumstances. Ultimately, the court found sufficient evidence to affirm on active efforts. This summary focuses primarily on the active efforts analysis of this case.

Active Efforts

The phrase "active efforts" refers to the state's requirement for providing services attempting to reunify and rehabilitate the family in ICWA cases. However, case law defining the active efforts requirement is somewhat limited. Previous case law has articulated that active efforts is a higher standard than reasonable efforts in non-ICWA cases. *In re Interest of Sabrienia B.*, 9 Neb. App. 888, 895 (2001); *In re Interest of Walter W.*, 247 Neb. 859, 865 (2008). In addition, the Nebraska Supreme Court articulated in a 2008 case that at least some active efforts should be culturally relevant. *In re Interest of Walter W.*, 247 Neb. at 865. The Court of Appeals in the *Louis S.* case noted, however, that "culturally relevant" is not defined in that case or other authority, although the Court of Appeals indicated that the "target" of culturally relevant active efforts should be an interest in protecting and preserving Indian culture. Thereafter, the court analyzed whether culturally relevant active efforts must be focused on the parents or the children and concluded that because the parents' core problems in this case (unsuitable living conditions, the mother's drug addiction, and the father's incarceration) could not be characterized as "cultural shortcomings," they could not be addressed by culturally relevant active efforts. The court then turned to the children and concluded that because the parents' shortcomings (and not the children's) led to the out-of-home placement, "[acquainting] the children with their Native heritage" would be "unlikely to prevent the breakup of the family." 17 Neb. App. 867, 879.

After having analyzed the concept of culturally relevant active efforts in general, the court went on to examine the efforts that were provided in this case. The court first noted case law in other states contrasting the concept of active efforts with passive efforts and indicated that in some states active efforts requires that, for example, the state caseworker actually take the client through the steps of the plan rather than just developing a plan and providing referrals. The court ultimately concluded that the efforts undertaken in this case - which included providing the parents with utility bill assistance, a

family support worker, a pretreatment assessment and follow up, psychological evaluations, chemical dependency evaluations, individual therapy, drug screenings, and bus tickets, as well as foster care placement and various educational services and referrals for the children - met the requirement of active efforts. The court noted that the caseworker's performance in this case was "less than ideal," but concluded that a better performance would not likely have made a difference in the outcome. With regard to the father, who was incarcerated approximately one year after the children's initial removal, the court noted that the father had access to services offered through the institution as well as the efforts undertaken prior to his incarceration and that this was sufficient to satisfy the active efforts requirement.

Practical Implications

As this decision indicates, clear direction and authority on what constitutes active efforts is limited in Nebraska. However, this case appears to indicate that culturally relevant efforts are not required unless the issue contributing to the potential breakup of the family is related to the family's Native culture. This analysis is concerning for several reasons. First, it is difficult to think of an example of an issue that would meet that standard of what a "culturally relevant" reason for a child's removal would be. In addition, many ICWA advocates believe that culturally relevant active efforts instead refers to making efforts as much as possible, throughout the rehabilitation and reunification process, to involve the tribe and extended family members, utilize tribal resources and services providers, and encourage and understand cultural traditions. For instance, culturally relevant active efforts might include, among other things, working with the tribe to develop the case plan, identifying culturally competent service providers, placing the children with extended family members, and creating a cultural plan for the children to maintain tribal connections. Practitioners are encouraged to advocate for these and other efforts, which represent best practices in ICWA cases and, in many circumstances, are more likely to be successful.

Conclusion

Appellate case law on the Indian Child Welfare Act is important to the interpretation and enforcement of ICWA in Nebraska. Perhaps most critical to the enforcement of ICWA, however, are the front line caseworkers, attorneys, and tribal representatives working with families every day in ICWA cases. Practitioners can make a difference in fulfilling the intent and spirit of ICWA by seeking to understand the distinct requirements of ICWA and by working closely with tribes in ICWA cases. 