



TEXAS
Department of Family
and Protective Services



2021 Texas ICWA Summit



SUPREME COURT OF TEXAS PERMANENT JUDICIAL
COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

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ICWA Case Law Update



ICWA Case Law Update

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Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019)

- ▶ Facts
- ▶ Trial Court Found...
- ▶ 5th Circuit Found...
- ▶ Now what?
 - ▶ Implications
 - ▶ Best practice

Indian Child





Who qualifies as an Indian Child?

- ▶ 25 USC 1903(4)
 - ▶ “Indian child” means 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
- ▶ Decided by THE TRIBE
 - ▶ NOT decided by:
 - ▶ State court
 - ▶ Caseworker
 - ▶ CASA
 - ▶ Parents



In re A.W. and M.W., 590 S.W.3d 68 (Tex. App.—Texarkana 2019, pet. denied)

- ▶ Father identifies Muskogee Creek and Cherokee ancestry
- ▶ Department sent notice to the Muskogee Creek and Cherokee
 - ▶ Letters received
- ▶ At trial, evidence regarding Mother's ancestors being listed on the Dawes Rolls
 - ▶ List of all the people who were a part of specific tribes as of 1887. Included in these were people who were emancipated slaves living on the reservation. Since then, some tribes have said descendants of those people listed on the rolls no longer qualify for membership



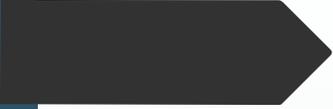
In re A.W. and M.W., 590 S.W.3d 68 (Tex. App.—Texarkana 2019, pet. denied)

- ▶ Trial court found the children were not Indian children and were not subject to ICWA
- ▶ Parents appealed, citing Dawes Rolls
- ▶ Appellate Court
 - ▶ BIA guidelines
 - ▶ Only the tribe gets to decide who qualifies

Notice Requirements



“See kids? This is a **LETTER**. A **LETTER**. Back when I was a kid, people would send these all the time. There was no such thing as e-mail.”



Notice Requirements

- ▶ Appeal problems
 - ▶ Mandatory
 - ▶ Know/reason to know
 - ▶ In a particular manner
 - ▶ To who



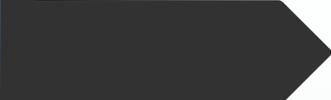
In re T.R., 491 S.W.3d 847 (Tex. App.— San Antonio 2016, no pet.)

- ▶ Reports from February 2012 to January 2015 – each report denied Native American status
- ▶ January 28, 2015 – great-grandmother indicates Cherokee heritage
 - ▶ Admits it is not a federally recognized tribe
- ▶ June 29, 2015 – Mother’s attorney asserts brother of the child has Native American heritage; child in this case received no similar designation
- ▶ Trial court decided ICWA did not apply



In re T.R., 491 S.W.3d 847 (Tex. App.—
San Antonio 2016, no pet.)

- ▶ “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43
- ▶ Only tribe identified did not fall under this definition, so the trial court did not err



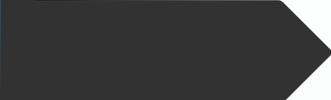
In re D.D., No. 12-15-00192-CV, 2016 WL 1082477 (Tex. App—Tyler Feb. 29, 2016, pet. denied.)

- ▶ Family group conference on 4/3/2014 – Mom told caseworker her father was Cherokee and Comanche
- ▶ Permanency plan – ticked box regarding Native American citizenship
 - ▶ Two subsequent plans got the same treatment
- ▶ Issues on appeal – sufficiency of the evidence
- ▶ Appellate court
 - ▶ Sua sponte raised notice issue
 - ▶ Reverse and remand for ICWA determination



In re A.E., No. 02-19-00173-CV, 2019 WL 4784419 (Tex. App.—Fort Worth Oct. 1, 2019, pet. denied) (mem. op.)

- ▶ 4/1/2019 – DFPS files a “Notice of Pending Custody Proceeding Involving Indian Child.”
 - ▶ Notice – sent to both parents, BIA, and a particular Cherokee representative
- ▶ Notice says it has two exhibits – additional family history in the Indian child family questionnaire and the petition
 - ▶ Neither exhibit is actually attached
 - ▶ Document was sent return receipt requested and no receipt appears in the record



In re A.E., No. 02-19-00173-CV, 2019 WL 4784419 (Tex. App.—Fort Worth Oct. 1, 2019, pet. denied) (mem. op.)

- ▶ Court of Appeals: finds that the notice did not strictly adhere to 1912(a) and CFR 23.111
 - ▶ Court recites 1912(a) and also CFR 23.111, including where the notices must be sent, and the contents, such as the names, birthdates, tribal enrollments of lineal ancestors, a copy of the petition, required statements, such as right to intervene
- ▶ Court notes that because this case involves termination of parental rights, strict compliance with the notice provisions is required and substantial compliance is not enough

Qualified Expert Witnesses

You aren't
an expert unless
I say so.



So say so.



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Qualified Expert Witness

- ▶ No ICWA definition – BIA guidelines, 25 CFR 23.122
 - ▶ **(a)** A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.
 - ▶ **(c)** The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.
- ▶ May need more than one expert



In re D.L.N.G., No. 05-19-00206-CV, 2019 WL 3214151 (Tex. App.—Dallas July 17, 2019, no pet.) (mem. op.)

- ▶ Trial record shows that the Department did not designate any expert witnesses
- ▶ Witnesses called at trial:
 - ▶ Grandmother
 - ▶ Caseworker
 - ▶ Tribal representative



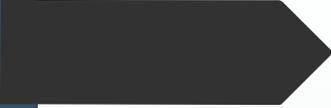
In re D.L.N.G., No. 05-19-00206-CV, 2019 WL 3214151 (Tex. App.—Dallas July 17, 2019, no pet.) (mem. op.)

- ▶ Tribal representative testimony:
 - ▶ Could not hear the question about tribal affiliation
 - ▶ Reviewed home study about Grandmother
 - ▶ Filthy home
 - ▶ Dogs
 - ▶ No facts that establish her as a qualified expert
 - ▶ Background, education, training, experience, position in the tribe, or even the name of the tribe itself



Compare...

- ▶ *N. M. v. Texas Dep't of Family and Protective Servs.*, No. 03-19-00240-CV, 2019 WL 2293578 (Tex. App.—Austin Sept. 26, 2019, no pet.) (mem. op.)
- ▶ *In re D.E.D.I.*, 568 S.W.3d 261 (Tex. App.—Eastland 2019, no pet.)



Termination of Parental Rights





Standard of Proof

- ▶ “Clear and Convincing” and “Beyond a Reasonable Doubt”
 - ▶ 161.001 versus 1912(f)
- ▶ Courts of Appeals handle it differently



In re K.S., 448 S.W.3d 521 (Tex. App.—Tyler 2014, pet. denied)

- ▶ Mother argues that it is not possible to comply with both the Family Code and ICWA
- ▶ The jury charge imposed a beyond-a-reasonable-doubt burden of proof as to both the Family Code findings and the ICWA grounds
- ▶ Does the Family Code serve as an obstacle to the accomplishment of the execution of the objectives of ICWA?



In re K.S., 448 S.W.3d 521 (Tex. App.—Tyler 2014, pet. denied)

- ▶ Both address similar interests when the child is removed from the home, seeking to address the child's best interest and preserving family stability
- ▶ Concurrent application provides additional protection because it requires that the Department prove both state *and* federal grounds
- ▶ The appellate court also concluded that the "family code is not preempted each time an Indian child is involved in a child custody proceeding in Texas, namely a suit involving the termination of the parent-child relationship. . . . Thus, when the ICWA applies, both the ICWA and the Texas Family Code grounds for termination must be satisfied."



Intervention





Intervention

- ▶ 1911(c)
 - ▶ **STATE COURT PROCEEDINGS; INTERVENTION** - In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding



In re J.J.T., 544 S.W.3d 874 (Tex. App.—El Paso 2017, no pet.)

- ▶ Child removed after hospital visit
- ▶ March 1, 2016 – notice given to the Navajo Nation and on August 3, 2016, Navajo Nation notified the Department that the child is eligible for membership
 - ▶ Nation gave name of social worker to coordinate with the Department
 - ▶ Did not formally intervene



In re J.J.T., 544 S.W.3d 874 (Tex. App.—
El Paso 2017, no pet.)

- ▶ June 12, 2017 – final hearing
 - ▶ Navajo representative present to testify and states she will be the representative of the tribe
 - ▶ Child's ad litem and parents' attorneys object to her remaining during other testimony
 - ▶ Social worker seeks to intervene; trial court says no, you are too late



In re J.J.T., 544 S.W.3d 874 (Tex. App.— El Paso 2017, no pet.)

- ▶ Court of Appeals

- ▶ Quotes 1911(c)

- ▶ “Giving effect to the plain language of the statute, we conclude that a request to intervene is not untimely even if it is made at the final hearing”

- ▶ 1911(c) preempts TRCP 60

- ▶ TRCP requires written pleading for request to intervene

- ▶ 1911(c) has no such requirement, and it controls

- ▶ Reversed and remanded for new trial



Texas cases in the last year

- ▶ *In re M.R., et al.* --- S.W.3d ---, 2020 WL 500783 (Tex. App.—Tyler Jan. 31, 2020, no pet.) - reason to know Indian children, no notice given or determination made, remanded for notice and determination
 - ▶ *Opinion after remand* – *In re L.W., et al.*, No. 12-19-00375-CV, 2020 WL 2078793 (Tex. App.—Tyler Apr. 30, 2020, no pet.) – children are not Indian children within the meaning of the statute
- ▶ *In re R.J.*, No. 12-20-00201-CV, 2020 WL 7042607 (Tex. App.—Tyler Nov. 30, 2020, no pet.) – previous determination that children were not subject to ICWA coupled with testimony that nothing had changed supported trial court’s decision that ICWA still did not apply



Texas cases in the last year

- ▶ *In re X.E.V.*, No. 08-20-00160-CV, 2020 WL 6867068 (Tex. App.—El Paso Nov. 23, 2020, no pet.) – Department concedes error where proper ICWA notices were not sent
- ▶ *In re M.D.*, No. 05-19-01122-CV, 2020 WL 831601 (Tex. App.—Dallas Feb. 20, 2020, no pet.) (mem. op.) – termination affirmed after remand determined children were not Indian children



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