PEOPLE EX REL. K.C. V. K.C.: ICWA IS FOR ALL NATIVE CHILDREN

ABSTRACT

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) to address a national issue—child welfare agencies were removing American Indian and Alaska Native children from their homes and placing them in non-Native homes at alarming rates. Systemic bias against Native cultures fueled these removals, which resulted in Native children being stripped of their identities and tribes struggling to pass on their histories and traditions with a dwindling number of Native children in the community. Under ICWA, however, courts must apply certain procedural safeguards in cases involving families with "Indian children."

In *People ex rel. K.C. v. K.C.*, the Colorado Supreme Court held that child welfare agencies are not required to help families tribally enroll eligible children, even if asked to do so by the tribe itself. The protections of ICWA only apply to "Indian children," which the law defines as those who have been tribally enrolled or those who are eligible for enrollment and have an enrolled parent. This Comment argues that the court in *K.C.* should have held that child welfare agencies are required to offer families education and assistance regarding tribal enrollment if a child is eligible. First, this Comment argues that the court should require caseworkers to offer enrollment education and assistance because it is simply a reasonable effort to reunify the family, as tribal enrollment materials are often highly accessible, and ICWA protections may help to increase the odds of family reunification. Next, this Comment argues that Colorado law already requires tribal enrollment education and assistance because Colorado's "reasonable efforts" statute requires caseworkers to offer families individual case plans and information about public and private assistance resources—two categories in which enrollment facilitation should be included. Lastly, this Comment argues that helping families tribally enroll children promotes reunification and is in the best interests of children, which are two primary focuses of child welfare agencies.

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INTRODUCTION

Native children are vessels of history, traditions, and beliefs—children connected to their tribes allow elements of tribal cultures to persist even when they starkly contrast the individualism and materialism of Euro-American culture.[1] But for hundreds of years, Native children have suffered great consequences from the United States' efforts to control and assimilate Native people.[2] One distinct struggle has been the separation of Native children from their families. From the earliest years of the United States until the early nineteenth century, the American military captured Native children to use them as leverage in negotiations with their tribes and sometimes enslaved or killed them.[3] In the late 1800s through the first half of the 1900s, the United States forced Native children into boarding

1. Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 155 (2007).
2. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 890–91 (2017).
3. *Id.* at 893, 895, 897–98, 902.

schools so they could learn English and the tenets of white America.[4] In the mid-twentieth century, American child welfare agencies began removing Native children from their homes and placing them into non-Native homes at alarming rates, often without justification.[5] Removing the children stole conduits of culture from tribes and traumatized the individual children, who then struggled to form positive self-identities.[6]

Congress finally addressed the separation of American Indian and Alaska Native children from their parents with the Indian Child Welfare Act of 1978 (ICWA).[7] ICWA offers Native children procedural safeguards to increase their chances of staying at home with their families or at least living with someone from their tribe.[8] However, ICWA only applies to "Indian children," defined as children either enrolled in their tribes or children who are eligible for enrollment and whose parent or parents are enrolled.[9] In *People ex rel. K.C. v. K.C.*,[10] the Colorado Supreme Court held that child welfare agencies are not required to assist families in enrolling eligible children in their tribes.[11] Thus, even if a tribe implores a child welfare agency to help facilitate tribal enrollment for a child, the agency is not required by law to do so. This lack of requirement leaves unenrolled Native children outside the umbrella of ICWA protections despite possessing the same essential ingredient possessed by ICWA-protected children—Native ancestry.

This Comment argues that the Colorado Supreme Court should have held that child welfare agencies are required by law to educate families about tribal enrollment and assist in enrollment if a family desires it. Part I offers a background of both federal and Colorado child welfare law, including a brief description of the procedural safeguards granted by ICWA. Part II summarizes the facts, procedural history, and majority and concurring opinions in *K.C*. Lastly, Part III argues that the court in *K.C.* should have held that the law requires child welfare agencies to offer tribal enrollment education and assistance because: (1) the general notion of reasonable efforts requires agencies to offer enrollment education and assistance; (2) Colorado law requires child welfare agencies to provide families with individual case plans and information regarding public and private avenues of assistance, categories in which tribal enrollment education and

4. *Id.* at 929; Danielle J. Mayberry, *The Origins and Evolution of the Indian Child Welfare Act*, 14 JUD. NOTICE 34, 37 (2019).

5. Fletcher & Singel, *supra* note 2, at 953–54.

6. Mayberry, *supra* note 4, at 43.

7. Miss. Band Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989) (discussing Congress's intent for enacting the Indian Child Welfare Act).

8. *Id.* at 36–37. This note intentionally minimizes the use of the term "Indian" because of the harmful history of colonization and stereotypes associated with the term. In light of the lack of consensus within Native communities regarding the use of "Indian" by non-Native people, this note only uses "Indian" when referring to the language of legislation using the term. The remainder of this note uses "Native" or "American Indian and Alaska Native" to refer to individuals of American Indian or Alaska Native descent.

9. 25 U.S.C. § 1903(4) (2018).

10. 487 P.3d 263 (Colo. 2021).

11. *Id.* at 274.

assistance should be placed; and (3) tribal enrollment education and assistance fulfill the goals of the Colorado child welfare system by promoting family reunification and serving the best interests of the child.

I. BACKGROUND

A. Dependency and Neglect Proceedings in Colorado

Child welfare systems function uniquely from state to state, but the focus of every system is to promote the well-being of children by assuring that they are living in safe and stable environments.[12] Similarly, every state defines "child maltreatment" differently, though generally, definitions encompass neglect and physical, emotional, and sexual abuse.[13] In Colorado, child abuse and neglect cases are titled "Dependency & Neglect (D&N) cases."[14] A court may consider a child dependent or neglected in a variety of circumstances, such as when a parent has abandoned, mistreated, abused, or failed to provide for the child; when a child's environment is injurious to their welfare; when a child is beyond the control of their parent; or when a child is born affected by drug or alcohol exposure and the child's health or welfare is threatened by substance use.[15]

In Colorado, dependency and neglect cases typically begin with the Department of Human Services (DHS) receiving a call reporting abuse or neglect.[16] If the call meets basic threshold criteria, DHS must then conduct an assessment and, based on that assessment, decide whether to remove the child and place them into protective custody or leave the child in the home.[17] If DHS removes the child, the court must hold a hearing within forty-eight to seventy-two hours, allowing parents to appear and present their own perspective of the circumstances.[18] Ultimately, the court will determine if continued placement of the child out of the home is in the child's best interest.[19] Next, an agency attorney files a petition in which they state facts supporting the allegations that the child is dependent or neglected.[20] Within sixty or ninety days after serving the petition, depending on the age of the child, the court must hold a hearing to determine the court's ongoing jurisdiction over the family.[21] At this hearing, the judge determines whether the allegations rise to the level of deeming the child "neglected or

12. CHILD.'S BUREAU, HOW THE CHILD WELFARE SYSTEM WORKS 2 (2020).
13. *Id.*
14. *Answers to Your Questions About Dependency & Neglect*, COLO. JUD. BRANCH (Mar. 2001), https://www.courts.state.co.us/userfiles/File/Self_Help/d_nweb.pdf.
15. COLO. REV. STAT. § 19-3-102(a), (c), (f), (g) (2020).
16. *Colorado Dependency and Neglect Case Flowchart*, OFF. RESPONDENT PARENTS' COUNS. (June 20, 2016), https://www.coloradoorpc.org/wp-content/uploads/2016/06/DN-Flowchart-with-statues.pdf.
17. *Id.*
18. COLO. REV. STAT. § 19-3-403(3.5) (2022).
19. *Id.*
20. COLO. REV. STAT. § 19-3-502(2) (2018).
21. COLO. REV. STAT. § 19-3-505(3) (2017).

dependent."[22] If not, the case is dismissed;[23] if so, the court then must hold a dispositional hearing.[24]

At the dispositional hearing, the court determines whether it is in the best interests of the child to be placed out of the home.[25] DHS also introduces a family-specific treatment plan, which includes services such as visitation or counseling meant to address the original allegations that brought the family to DHS's attention.[26] Within ninety-one days of the dispositional hearing, the court must hold the first permanency planning hearing and is subsequently required to hold one every six months as long as the case is open.[27] At these hearings, the court determines whether the child can be reunified with their family.[28] Though the court prioritizes reunifying the child with the parent or parents when possible, it will consider other permanency goals, such as adoption or permanent placement with a relative or nonrelative, when reunification does not seem plausible.[29] If over time the parent or parents fail to make substantial progress in complying with the treatment plan, the county attorney or guardian *ad litem* may file a motion to terminate parental rights.[30] At the hearing on the motion, the court will decide whether the evidence supports the termination of the parent-child legal relationship.[31] If the court terminates parental rights, the child and parent no longer have any "legal rights, powers, privileges, immunities, duties, and obligations" regarding each other.[32]

B. Federal Child Welfare Legislation and the Reasonable Efforts Standard

Until 1980, child abuse and neglect proceedings did not primarily focus on keeping or reunifying children with their parents.[33] Instead, most child welfare agencies focused their efforts on removing children from unsafe home situations, not wanting to risk leaving a child in an abusive or neglectful situation.[34] In the 1970s, most states used the best interests of the child standard in deciding whether to remove a child, weighing whether the interests of the child would be better served by placement outside the home or remaining home.[35] Additionally, some jurisdictions

22. *Id.* § 19-3-505(7)(a).
23. *Id.* § 19-3-505(6).
24. *Id.* § 19-3-505(7)(b).
25. COLO. REV. STAT. § 19-3-507(1)(a) (2021).
26. *Id.* § 19-3-208(1), (2)(b)(II), (2)(b)(IV).
27. *Id.* § 19-3-702(1)(a).
28. *Id.* § 19-3-702(3).
29. *Id.* § 19-3-702(4)(a)(II), 4(a)(IV).
30. *Colorado Dependency and Neglect Case Flowchart*, *supra* note 16; COLO. REV. STAT. § 19-3-602(1) (2022).
31. COLO. REV. STAT. § 19-3-604(1) (2018).
32. COLO. REV. STAT. § 19-3-608(1) (2022).
33. H. Elenore Wade, Note, *Preserving the Families of Homeless and Housing-Insecure Parents*, 86 GEO. WASH. L. REV. 869, 886 (2018).
34. Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W.L. REV. 223, 254–55 (1990).
35. Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 L. & CONTEMP. PROBS. 221, 223 (2014).

simply gave judges the discretion to determine whether the child should be removed and placed outside of the home.[36] As Robert H. Mnookin argued in his 1975 article, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*,[37] applying both the best interests standard and allowing broad judicial discretion often tilted the odds in favor of removal.[38] The risks of leaving the child at home were known, Mnookin argued, while the risks of placing the child outside of their home were unknown and often not appropriately acknowledged.[39] Courts were not adequately considering the harms caused by removing a child from their home and placing them in the foster care system.[40]

Enter the Adoption Assistance and Child Welfare Act of 1980 (AACWA). Criticisms of the child welfare system from those like Mnookin inspired Congress to pass legislation that appeared to shift the entire equilibrium of the removal-centered child welfare system.[41] With AACWA, Congress intended to encourage state child welfare departments to focus on preserving families instead of placing children in foster care by conditioning federal funding on efforts toward keeping children at home.[42] States were required to make "reasonable efforts" both to prevent removal and to further efforts towards reunification should removal still be necessary.[43] In theory, this requirement would offer protection to parental rights and prioritize the preservation or reunification of families over foster care placement.[44] However, AACWA did not define reasonable efforts, leaving states to determine what practices met that standard.[45] Some states established definitions or examples of what would satisfy reasonable efforts, such as offering substance abuse treatment or food assistance, but others did not offer such clarity. [46] AACWA's lack of specificity led many courts to either ignore the reasonable efforts requirement or merely accept the state's assertion that it had made reasonable efforts.[47] This lack of guidance, together with Congress's and states' failures to sufficiently fund family preservation services, caused placements in foster care to increase instead of decline in the decades to follow.[48]

In 1997, nearly two decades after the passage of AACWA, Congress passed the Adoption and Safe Families Act (ASFA).[49] ASFA reiterated

36. *Id.*
37. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975).
38. *Id.* at 241 n.72, 268–69, 277.
39. *Id.* at 270–71.
40. Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 554–55 (2019).
41. Huntington, *supra* note 35, at 226–27.
42. Wade, *supra* note 33, at 886–87.
43. *Id.*
44. *Id.*
45. *Id.* at 887.
46. *Id.*
47. Huntington, *supra* note 35, at 228.
48. *Id.*
49. Trivedi, *supra* note 40, at 557.

that reasonable efforts should be made to promote family preservation and reunification, and it added that while making reasonable efforts, the agency must still prioritize the "child's health and safety" as a "paramount concern."[50] This statement still did little to clarify what constituted reasonable efforts.[51] Additionally, ASFA provided that in certain circumstances, child welfare departments would be excused from making reasonable efforts.[52] Some of the circumstances were straightforward, such as when a parent murdered another child or when a parent lost their parental rights to a sibling.[53] If an exception applied or reunification was no longer an appropriate permanency plan, ASFA stated that child welfare agencies must make reasonable efforts toward alternative permanency for the child.[54] Furthermore, Congress enacted ASFA during the height of the federal government's "War on Drugs,"[55] when parental drug use was a significant societal concern.[56] Widespread fear of parental drug use, which was seen as a threat to the health and safety of children, coupled with a continuing lack of guidance on the definition of reasonable efforts, caused a further increase in removal rates.[57]

The most significant federal legislation to address child welfare since ASFA, the Family First Prevention Services Act of 2018 (Family First), has the potential to significantly change the child welfare system in every state.[58] One of the primary focus areas of Family First is stopping foster care placement before it even occurs by shifting funding toward preventative services.[59] Family First encourages states to offer prevention services addressing mental health, substance abuse, and parenting skills to families at risk of child removal.[60] Though still lacking a detailed definition of reasonable efforts, Family First offers states an incentive to implement prevention services that could be interpreted as reasonable efforts if a case were to open.[61] Today, states still broadly vary as to what may satisfy the

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50. *Id.* at 558.

51. *Id.*

52. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUM. SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 3–4 (2020).

53. *Id.* at 3.

54. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(a)(C), 111 Stat. 2115 (1997) (codified as amended at 42 U.S.C. § 671 (2022)).

55. In the early 1970s, in an effort known as the "War on Drugs," the United States federal government began targeting illegal drug use by more vigorously prosecuting and penalizing drug offenses. *War on Drugs*, ENCYC. BRITANNICA, https://www.britannica.com/topic/war-on-drugs (last visited Nov. 26, 2022).

56. Trivedi, *supra* note 40, at 557–58.

57. *Id.* at 558.

58. *About the Law: Young People Involved in the Child Welfare System Do Best in Families*, FAMILYFIRSTACT.ORG, https://familyfirstact.org/about-law (last visited Nov. 26, 2022) ("The Family First Act provides a historic opportunity for stakeholders to re-envision the child welfare system and how it serves children and families.").

59. *Id.*

60. Anne Comstock, *Impact of Family First Prevention Services Act Will Be Felt Far Beyond Child Welfare*, CO4KIDS BLOG (Aug. 23, 2018), https://co4kids.org/community/impact-family-first-prevention-services-act-will-be-felt-far-beyond-child-welfare.

61. *See id.*

requirement for reasonable efforts to prevent family separation and facilitate reunification.[62] Though some states have embedded in their statutes the types of plans and services that satisfy reasonable efforts, others have only provided broad definitions that provide little additional clarity.[63]

C. The Indian Child Welfare Act

In 1978, Congress enacted the Indian Child Welfare Act in response to the inordinate amount of Native children removed from their families by child welfare agencies across the United States.[64] From 1974 to 1978, Congress gathered testimony from across the country confirming its suspicion: Native children were being disproportionately removed from their homes and placed with white families.[65] In the decade leading up to the passage of ICWA, between twenty-five and thirty-five percent of Native children were removed from their homes, and eighty-five percent of these children were placed with non-Native families.[66] Bias against tribal customs and culture fueled these removals.[67] For example, agencies interpreted a Native child being raised by extended family members as neglect or parents living in poverty as unfit.[68] As discussed during the passage of ICWA, the high rate of removal negatively impacted Native children's psychological development and self-esteem.[69] Long stays in placements outside the home during childhood correlated with increased alcohol abuse and suicide rates among Native individuals.[70] Moreover, the chance of survival for tribal cultures was diminishing, as placing Native children in white homes decreased the odds that they would be exposed to their tribal heritage.[71]

Thus, ICWA was born, providing Native families with new protections from unjustified child removals and clarifying when tribal courts would have jurisdiction over child custody matters.[72] Congress declared the policy behind ICWA as follows:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the

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62. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 52, at 5–58.

63. *See id.* (comparing reasonable effort statutes across the fifty states). For example, compare Illinois's detailed "reasonable efforts statute," 23 ILL. COMP. STAT. 325/8.2 (West 2019), with Georgia's more vague reasonable efforts statute, GA. CODE ANN. § 15-11-202 (West 2020). CHILD WELFARE INFO. GATEWAY, *supra* note 52, at 16, 20.

64. Miss. Band Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).

65. *Id.* at 32–34.

66. Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 WM. MITCHELL L. REV. 811, 818 (2000).

67. Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 CAP. U. L. REV. 239, 243 (2008).

68. *Id.*

69. Wahl, *supra* note 66, at 819–20.

70. Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1290–91 (1980).

71. Wahl, *supra* note 66, at 820.

72. Miss. Band Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

> removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[73]

This declaration demonstrated the multilayered intent behind ICWA: Congress sought to not only prevent the unnecessary removal of Native children from their homes, but also to recognize the importance of the continued existence of tribes and tribal culture.[74] After years of allowing child welfare agencies to chip away at Native families, Congress finally acknowledged the tie between Native children remaining with their families and the longevity of tribal culture itself.[75]

To address the historical practice of Native removals, Congress included several protections in the provisions of ICWA, specifically focusing on issues of notice, jurisdiction, efforts made to prevent removal, standards of proof in removal and termination proceedings, and placement preferences.[76] Importantly, the provisions of ICWA only apply to "child custody proceeding[s]," or proceedings involving foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[77] The provisions of ICWA also only apply to proceedings involving an "Indian child," defined as "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."[78] Subsections 1–4 below outline the most significant provisions of ICWA.

1. Notice

In any involuntary child custody proceeding in state court, if the court knows or has reason to know that there might be an Indian child involved, the party seeking to place the child in foster care or terminate parental rights must notify the child's parent or Indian custodian and the child's tribe.[79] If the court cannot ascertain the identity of the parent, custodian, or tribe, notice must be sent to the Secretary of the Interior.[80] If the court identifies a tribe, the tribe has the right to intervene in the child custody proceeding at any point.[81]

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73. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 3, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. § 1902).
74. *Holyfield*, 490 U.S. at 37.
75. *See id.*
76. 25 U.S.C. §§ 1911, 1912(a), (d)–(f), & 1915.
77. *Id.* §§ 1903(1), 1911–23.
78. *Id.* § 1903(4).
79. *Id.* § 1912(a).
80. *Id.* §§ 1903(11), 1912(a).
81. *Id.* § 1911(c).

2. Jurisdiction

If an Indian child resides or is domiciled on their tribe's reservation or if the child is a ward of their tribal court, the child's tribe shall have exclusive jurisdiction over the child custody proceeding.[82] For Indian children who do not meet the above criteria, the state and tribe exercise concurrent jurisdiction, and ICWA still applies.[83] The state must transfer jurisdiction to the child's tribe at a parent's or the tribe's request.[84] In such a case, the state can only retain jurisdiction if either parent objects to a transfer, the tribe declines to exercise jurisdiction, or good cause is shown to deny the transfer.[85]

3. Active Efforts

Before a party can remove a child and place them out of the home or terminate parental rights, the party must show that they have made active but unsuccessful efforts to keep the family together.[86] Active efforts include providing "[r]emedial services and rehabilitative programs" intended to help prevent removal and promote reunification.[87] The statute does not define active efforts, but the Bureau of Indian Affairs provides examples such as actively assisting families in accessing appropriate services and diligently searching for extended family members who could offer support to the parents.[88]

4. Standards of Proof

To remove an Indian child from their home, the party seeking placement must show by clear and convincing evidence with testimony from an expert witness that continued custody with the parent would result in "serious emotional or physical damage to the child."[89] The same finding is necessary in a proceeding to terminate parental rights; however, the standard of proof is again elevated beyond that required in a non-ICWA case, as the party seeking termination must prove the finding beyond a reasonable doubt.[90]

5. Placement Preferences

To adopt an Indian child under state law, preference shall be given to the following placements in the absence of good cause to the contrary: "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[91] If an Indian child is removed

82. *Id.* § 1911(a).
83. *Id.* § 1911(b); *Holyfield*, 490 U.S. at 36.
84. 25 U.S.C. § 1911(b).
85. *Id.*
86. *Id.* § 1912(d).
87. *Id.*
88. 25 C.F.R. § 23.2 (2021).
89. 25 U.S.C. § 1912(e).
90. *Id.* § 1912(f).
91. *Id.* § 1915(a).

from their home, they must be placed in the "least restrictive setting which most approximates a family and in which [their] special needs, if any, may be met."[92] Within reason, the state should place the child geographically near their home.[93] Unless good cause can be shown otherwise, foster-care placement preference should be given to:

> (i) a member of the Indian child's extended family;
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> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
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> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[94]

II. *PEOPLE EX REL. K.C. V. K.C.*

A. Background Facts

K.C. and L.C. (the children), born twelve weeks premature, tested positive for marijuana at birth.[95] They both had to stay in the neonatal intensive care unit for a prolonged period due to their premature birth, and D.C. (Mother) visited them only twice during that time.[96] The Logan County Department of Human Services (the Department) filed for removal and temporary protective custody while the children were still in the hospital because it viewed Mother as a danger to the twins' lives, citing their positive marijuana tests, Mother's lack of employment, and her felony drug history.[97] The district court granted the Department's motion.[98] Mother then filled out a form stating that the children were not members of a Native tribe, that she had no reason to believe they were eligible for tribal membership, and that they had no biological family member with American Indian or Alaska Native heritage.[99] The Department then identified the children's father as T.B. (Father).[100] Next, the Department filed a dependency and neglect petition.[101] The district court adjudicated the children dependent or neglected and subsequently implemented treatment plans for both parents.[102]

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92. *Id.* § 1915(b).
93. *Id.*
94. *Id.*
95. People *ex rel.* K.C. v. K.C., 487 P.3d 263, 266 (Colo. 2021).
96. *Id.* at 266–67.
97. *Id.* at 267.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

After he was identified, Father indicated that he had Chickasaw heritage but was not an enrolled member.[103] Accordingly, the Department sent notice to the Chickasaw Nation (the Nation) and filed the notice with the court.[104] The Nation responded, stating that the children were not enrolled members but were eligible for membership through their paternal grandfather.[105] Additionally, the Nation stated that they had a "vested interest in the welfare of children who are eligible for citizenship with the Chickasaw Nation."[106] In the letter, the Nation implored the Department to advise the children's parent or custodian to apply for membership for the children by filling out the applications enclosed with the letter.[107] The Department did not advise Mother or Father as requested.[108]

Five and a half months later, the Department filed a motion to terminate the rights of both parents.[109] Mother had not complied with her treatment plan.[110] She failed to gain employment or stable housing, did not complete substance abuse or mental health treatment, missed over forty-three percent of scheduled visitations with the children, and was charged with three felonies.[111] At that time, the Department disclosed to Mother and Father the Nation's response to the ICWA notice.[112] Weeks later at a review hearing, the court advised Mother and Father that ICWA would not apply to the proceeding if neither Father nor the children were tribally enrolled, noting that the court could not enroll the children itself.[113] Father told the court he had not taken steps to enroll.[114]

B. Procedural History

At the hearing for termination of parental rights, Father confessed the motion to terminate his parental rights and reiterated that he had not enrolled himself or the children for tribal membership and that he did not have a desire to do so.[115] The court verified that Mother also had not enrolled the children.[116] The court ultimately terminated the rights of both parents and stated that ICWA did not apply because of the Nation's response and Father's lack of enrollment in the Nation.[117] Mother appealed the termination order, arguing, among other issues, that the Department had not taken steps to enroll the children in the tribe as the Nation

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103. *K.C.*, 487 P.3d at 267.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 267–68.
115. *Id.* at 268.
116. *Id.*
117. *Id.*

requested.[118] Mother argued that this inaction did not satisfy reasonable efforts and violated the Department's duty to secure ICWA protections when available.[119] The Colorado Court of Appeals vacated the termination, holding that when a tribe communicates a desire for children to be enrolled, the Department must deposit the response with the court as soon as possible.[120] Then, the court must hold a hearing to determine whether it is in the children's best interests to be enrolled.[121] The Department petitioned for certiorari, and the guardian *ad litem* cross-petitioned.[122] The Colorado Supreme Court granted the petitions.[123]

C. Majority Opinion

Justice Gabriel authored the majority opinion.[124] The court held that no court is required to hold an enrollment hearing when a child is eligible for tribal membership but not yet enrolled.[125] Additionally, the court held that neither federal nor Colorado law requires the Department to help with or facilitate a child's tribal enrollment.[126] Therefore, the termination of parental rights was reinstated.[127]

1. The Court Is Not Required to Hold an Enrollment Hearing

Regarding the enrollment hearing issue, Justice Gabriel first gave a brief history of ICWA.[128] He then detailed the specific protections afforded to a child when ICWA applies to a case.[129] Next, Justice Gabriel emphasized that neither Colorado nor federal law determines who is a member of a tribe because Native tribes retain the duty of deciding membership.[130] All a court must do, he stated, is determine whether a child is an Indian child; if a child is not, ICWA does not apply.[131] Not only did Justice Gabriel reject the notion that a court should hold an enrollment hearing, but he also stated that holding such an enrollment hearing infringes on a tribe's right to define its citizenship.[132]

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118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 265.
125. *Id.* at 274.
126. *Id.*
127. *Id.*
128. *Id.* at 269.
129. *Id.* at 269–70.
130. *Id.* at 270.
131. *Id.*
132. *Id.* at 271.

2. The Department Is Not Required to Assist with a Child's Tribal Enrollment

Next, Justice Gabriel explained why the Department had no obligation to help with the children's tribal enrollment.[133] Though the Department had asked the court to decide whether a court could order a child to be tribally enrolled despite the objection of a parent, the court declined to answer the question because neither parent had objected to the enrollment of the children.[134] However, the court found it legally significant to address whether a child welfare agency must assist eligible children in enrolling in their tribes despite this specific question not being granted certiorari review.[135] The majority held that the Department had no obligation to enroll the children because neither state nor federal law requires child welfare agencies to do so.[136]

a. Federal Law Does Not Require the Department to Assist with a Child's Tribal Enrollment

Justice Gabriel stated that federal law requires states to make active efforts to prevent removal or promote reunification when an Indian child is concerned.[137] He then provided examples of active efforts, such as "[i]dentifying appropriate services and helping the parents to overcome barriers" and "[m]onitoring progress and participation in services," as described in 25 C.F.R. § 23.2.[138] Justice Gabriel explained that because the children were not Indian children, the active efforts requirement did not apply.[139] Moreover, he stated that even if the children were Indian children, the federal regulations did not make enrollment assistance a category of active efforts, which was a conscious decision by the Bureau of Indian Affairs.[140]

b. Colorado Law Does Not Require the Department to Assist with a Child's Tribal Enrollment

Justice Gabriel then continued to show that Colorado law does not require the Department to assist eligible children in tribal enrollment.[141] Under Colorado Revised Statute (C.R.S.) section 19-1-126(2)(a), if the court has reason to know that a child is an Indian child but has no sufficient evidence to make this determination, the court must inquire whether the Department has used due diligence to identify and communicate with any tribe in which the child may be a member or eligible for membership.[142]

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133. *K.C.*, 487 P.3d at 271–275.
134. *Id.* at 271.
135. *Id.*
136. *Id.*
137. *Id.* at 272.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 273.
142. *Id.*

The Department must verify whether the child is a member of a tribe or if a biological parent of the child is a member and the child is eligible for membership.[143] Justice Gabriel explained that the Department satisfied due diligence by giving notice to the Nation and filing its response with the court.[144]

Next, and most relevant to this Comment, Justice Gabriel emphasized that the reasonable efforts requirement does not include helping a family enroll a child in a tribe.[145] Justice Gabriel acknowledged that in a non-ICWA case, before terminating parental rights, the court must find that the Department has made reasonable efforts to prevent out-of-home placement and facilitate reunification when appropriate.[146] He defined reasonable efforts per C.R.S. section 19-1-103(89), which states that reasonable efforts are "'the exercise of diligence and care throughout the state of Colorado for children who are in out-of-home placement, or are at imminent risk of out-of-home placement,' with the child's health and safety being the 'paramount concern.'"[147] Next, Justice Gabriel stated that services provided according to C.R.S. section 19-3-208, which include "screening, assessment, counseling, information and referral, visitation, and placement services," satisfy the reasonable efforts requirement.[148] He explained that per C.R.S. section 19-3-208(2)(a), these services are designed to (1) promote a child's "health, safety, and well-being"; (2) decrease the likelihood that a child will be maltreated again; (3) avoid unnecessary foster care placement; (4) quickly reunify families when appropriate; (5) ensure children are not "delayed nor denied" placement based on race, color, or national origin; and (6) "promote the best interests of the child."[149]

Justice Gabriel concluded that no Colorado statute regarding reasonable efforts required the Department to tribally enroll a child or help the family to do so.[150] In this case, he determined that the record supported the Department's assertion that they had made reasonable efforts to rehabilitate the family.[151] In his view, Congress or the Colorado General Assembly has the power to require child welfare agencies to assist children with tribal enrollment, but neither has chosen to do so.[152] Additionally, Justice Gabriel stated that Congress's stated policy in 25 U.S.C. § 1901(3) of "protecting Indian children who are members of or are eligible for membership in an Indian tribe" does not impose such an enrollment assistance requirement.[153] This policy, he explained, only extended to "Indian

143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 274.
151. *Id.*
152. *Id.* at 266.
153. *Id.* at 274.

children," who, if not enrolled themselves, must be both eligible for enrollment *and* the biological child of an enrolled member.[154]

Though Justice Gabriel and the majority held that the Department was under no obligation to facilitate the enrollment of the children, they stated that the Department would not have been precluded from offering such help if they desired to do so.[155] Justice Gabriel stated that enrollment assistance might even be the best practice in some child welfare cases.[156] However, the Court ultimately held that neither holding a hearing to determine whether enrollment is in the best interests of the child nor requiring the Department to help a child enroll is supported by law.[157] Thus, the Court reversed the decision of the court of appeals and reinstated the termination of parental rights.[158]

D. Concurring Opinion

Chief Justice Boatright authored the sole concurrence.[159] He agreed with the majority that holding an enrollment hearing was not required by law.[160] However, he wrote that the reasonable efforts requirement encompasses educating parents about the likely benefits of enrolling the child in their specific tribe and assisting with enrollment if the parents believe that it is in the child's best interests.[161] Chief Justice Boatright acknowledged the distinctiveness of every Native tribe, as every tribe offers different advantages.[162] He then briefly summarized the facts of the case before returning to his main point: Educating parents about tribal enrollment and assisting them with the enrollment process is more than a "best practice"—it is necessary to satisfy reasonable efforts.[163] Chief Justice Boatright argued that parents who are not familiar with the tribe and its potential benefits are unable to make an informed decision about whether to enroll their child on their own.[164]

Next, Chief Justice Boatright turned to the services described in C.R.S. section 19-3-208, highlighting two services mentioned in the statute: (1) creating and implementing "individual case plans" and (2) providing families with "information and referral services to available public and private assistance resources . . . ."[165] From Chief Justice Boatright's perspective, providing families with education about a tribe or with enrollment assistance should be part of a family's individual case plan, which

154. *K.C.*, 487 P.3d at 274.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* (Boatright, C.J., concurring).
160. *Id.*
161. *Id.* at 274–75.
162. *Id.* at 275.
163. *Id.*
164. *Id.*
165. *Id.* at 276.

should prioritize the needs of the family.[166] Doing so would be reasonable, he argued, especially due to the public policy interest espoused in ICWA and the reality that different tribes offer families different benefits and resources.[167]

Chief Justice Boatright acknowledged that during the termination hearing, neither parent argued that the Department had not satisfied the reasonable efforts requirement.[168] Thus, he agreed with the majority's decision to reinstate the terminations.[169] However, he emphasized that he believes offering education and assistance regarding tribal enrollment should be an obligation in fulfilling the reasonable efforts requirement.[170]

III. ANALYSIS

In *K.C.*, the Colorado Supreme Court based its holding on the fact that nowhere in federal or Colorado statute is tribal enrollment education and assistance enumerated as a reasonable effort.[171] However, this Comment argues that the lack of enumeration does not preclude enrollment education and assistance from being a reasonable effort the court should require. First, it argues that offering education and assistance regarding tribal enrollment is a reasonable effort because tribal information is often highly accessible to child welfare agencies, and enrollment promotes reunification or culturally appropriate permanency. Next, this Comment argues that enrollment education and assistance already fall into two categories enumerated in Colorado's reasonable efforts statute—individual case plans, and information and referrals to channels of assistance.[172] Lastly, this Comment argues that facilitating tribal enrollment aligns with the aims of child welfare agencies, namely promoting reunification, benefiting the child's well-being, and serving the best interests of the child.[173]

A. Failing to Inform Parents About Potential Tribal Enrollment and Assist in the Process if Requested Does Not Satisfy Reasonable Efforts

Chief Justice Boatright is correct—the Department should not be able to satisfy reasonable efforts without educating parents about the advantages of the specific tribe at hand and assisting them in enrolling their child, absent parental objection.[174] Such a practice is so intrinsic to the

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 272–73 (majority opinion).
172. *See* COLO. REV. STAT. § 19-3-208(2)(b)(I), (2)(b)(III) (2022).
173. *See id.* § 19-3-208(2)(a)(IV), (2)(a)(VI).
174. *See K.C.*, 487 P.3d at 276 (Boatright, C.J., concurring). The *K.C.* court did not address what the Department or court should do if parents object to tribal enrollment, even though appellants brought the question on appeal, since neither parent in *K.C.* objected to the tribal enrollment of the minor children. *Id.* at 271 (majority opinion). Furthermore, Chief Justice Boatright did not address parental objections in his concurrence but rather focused on the Department's obligation to educate

spirit of the reasonable efforts requirement that a failure to do so is a failure to make reasonable efforts.[175] Congress's intention in establishing the reasonable efforts requirement was to both ensure that child welfare agencies work to keep children in their homes and, if removal is ultimately necessary, work to reunify the family or pursue another permanency goal.[176] Thus, Congress intended child welfare agencies to try other viable, "reasonable" options prior to initiating separation and termination.[177] Enrolling a child in a tribe in which they are eligible for membership is a viable, reasonable option that increases the probability that the child will get to remain with their family, or at least find permanency with a family that shares cultural ties.[178]

First, tribal enrollment will deem the child an Indian child under the law, resulting in ICWA protection throughout the case.[179] These ICWA protections raise the standard of proof to "clear and convincing" for removal and "beyond a reasonable doubt" for termination, placing a higher burden on the Department to separate children from their parents.[180] Additionally, under ICWA, the Department would be required to obtain an expert witness to testify that staying with the parent would cause the child "serious emotional or physical damage."[181] Of course, these heightened standards would not guarantee a different result for every family—the trial court in *K.C.* stated that even if it had been required to apply the beyond a reasonable doubt standard, it would still have had sufficient evidence to terminate parental rights in the case before it.[182] But such a requirement could change the outcome for *some* families.[183] In some cases, the evidence satisfying one standard is not sufficient to satisfy the higher standard, making the application of the lower standard of proof a harmful error.[184] The mere chance that ICWA's higher evidentiary burden could help keep children with their families makes helping families pursue tribal enrollment—and obtaining ICWA protections—an entirely reasonable effort to promote reunification.

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families about tribal enrollment and assist in enrollment if parents chose to pursue it. *Id.* at 274–76 (Boatright, C.J., concurring). Because *K.C.* did not address the issue, and it would best be explored in a separate analysis that considers the substantial interests of every party involved, this Comment does not analyze the court's or child welfare agency's roles when an informed parent objects to the tribal enrollment of a child.

175. *See* 42 U.S.C. § 621 (2018) (discussing the purpose behind implementing the reasonable efforts requirement).

176. *Id.* § 621(3)–(4).

177. *Id.* § 671(a)(15)(B) (2018).

178. *See* 25 U.S.C. § 1912(d)–(f) (2018).

179. *Id.* § 1912(a).

180. *Id.* § 1912(e)–(f).

181. *Id.* § 1912(e).

182. People *ex rel.* K.C. v. K.C., 487 P.3d 263, 268 (Colo. 2021).

183. *See In re* S.M.H., 103 P.3d 976, 988 (Kan. Ct. App. 2005) (holding that applying lessened evidentiary standard is not harmless error); *In re* N.J., 221 P.3d 1255, 1263 (Nev. 2009) (affirming that child welfare department met clear and convincing standard, but not beyond a reasonable doubt standard).

184. *N.J.*, 221 P.3d at 1263.

Next, the application of ICWA to a case requires child welfare agencies to make "active efforts" to prevent removal or promote reunification, as opposed to reasonable efforts.[185] The Colorado Court of Appeals has recognized active efforts as efforts by which the Department takes a more hands-on role in helping parents develop the skills and obtain the resources necessary to adequately care for their children.[186] For example, a child welfare agency making active efforts to reunify a family and rehabilitate a parent may pay for the parent's substance abuse treatment, provide them with transportation to appointments and visitation, and help them apply for public assistance programs.[187] In contrast, an agency making reasonable efforts may simply create a plan with requirements and provide parents with referrals and contact information for them to access services on their own,[188] though agencies often also pay for certain services.[189]

Even if active efforts are not sufficient to reunify the family, ICWA protections still benefit the child through ICWA's placement preferences, which require child welfare agencies to seek placement with extended family or another Native family, especially from the child's tribe.[190] Thus, the application of ICWA to a case bolsters a child welfare agency's required efforts toward reunification and permanency and promotes the maintenance of cultural ties in any circumstance.

The need for legislation such as ICWA demonstrates that it is not enough to simply hope that child welfare agencies will do what they can to promote reunification or culturally appropriate permanency without bias.[191] If a child welfare agency could assist a child in obtaining tribal membership through enrollment, and thus allow the child to benefit from the protections of ICWA, the agency should be required to take such action. The court should require any reasonable action making continuing unification, reunification, or other culturally appropriate permanency options more likely, even if not specifically enumerated in federal or state law.[192]

Of course, some will disagree on the reasonableness of such a requirement.[193] This uncertainty around "reasonableness" is exacerbated by the lack of a federal definition in this area.[194] In Colorado, the services listed in C.R.S. section 19-3-208 help to provide some additional guidance

185. 25 U.S.C. § 1912(d) (2018).
186. People *ex rel.* A.R., 310 P.3d 1007, 1014–15 (Colo. App. 2012).
187. People *ex rel.* C.Z., 262 P.3d 895, 906 (Colo. App. 2010).
188. *A.R.*, 310 P.3d at 1015.
189. *See, e.g.*, People *ex rel.* S.N.-V., 300 P.3d 911, 919 (Colo. App. 2011).
190. 25 U.S.C. § 1915(a)–(b) (2018).
191. *See* Atwood, *supra* note 67, at 243.
192. *See generally* Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J.L. & PUB. POL'Y 100, 113 (2009) (discussing how courts often excuse "decidedly non-heroic efforts.").
193. *Id.* at 129.
194. Wade, *supra* note 33, at 887.

to caseworkers.[195] Not every state details such specific services, making Colorado better than most at delineating what constitutes reasonable efforts.[196] However, even though courts approve a case plan and ultimately determine whether a caseworker's efforts were reasonable, caseworkers still have initial discretion in developing and implementing case plans.[197] Moreover, C.R.S. section 19-1-103(114) provides that a caseworker who makes reasonable efforts exercises "diligence and care."[198] Again, although this description provides some guidance, "diligence and care" are open to interpretation.[199] Thus, caseworkers, parents, attorneys, and judges are still left to debate what efforts are "reasonable."[200]

The U.S. Child Welfare Information Gateway acknowledges that all states define reasonable efforts differently, but notes that "Generally, these efforts consist of accessible, available, and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children."[201] *Black's Law Dictionary* describes reasonable efforts as "[o]ne or more actions rationally calculated to achieve a . . . stated objective, but not necessarily with the expectation that all possibilities are to be exhausted."[202] Under the latter definition, one could argue that a caseworker who chooses not to inform and educate parents about their child's tribe could still exercise reasonable efforts, as they do not have to exhaust all efforts.

However, if one also applies the Child Welfare Information Gateway's description of reasonable efforts, failing to educate a family about a child's tribe does not seem to satisfy the standard.[203] Information about a tribe is often accessible and available to child welfare agencies because many tribes have websites detailing their history and the benefits of enrollment.[204] For some parents, a caseworker's assistance in accessing and interpreting information about tribal enrollment could be invaluable.[205] Furthermore, caseworkers can easily assist families with obtaining information necessary to apply for tribal membership, such as the birth certificate of the minor child, the death certificate of a deceased Native parent,

195. COLO. REV. STAT. § 19-3-100.5(5) (2022); *see also* COLO. REV. STAT. § 19-3-208 (2022).
196. *See supra* note 62 and accompanying text.
197. COLO. REV. STAT. § 19-3-208(2)(b) (2022).
198. *Id.* § 19-1-103(114).
199. *Id.*
200. *See, e.g.*, People *ex rel.* K.B., 369 P.3d 822, 827 (Colo. App. 2016).
201. CHILD WELFARE INFO. GATEWAY, *supra* note 52, at 2.
202. *Reasonable Efforts*, BLACK'S LAW DICTIONARY (11th ed. 2019).
203. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 52, at 2.
204. *See, e.g.*, CHICKASAW NATION, https://www.chickasaw.net/ (last visited Nov. 26, 2022); CHEROKEE NATION, https://www.cherokee.org/ (last visited Nov. 26, 2022); OGLALA LAKOTA NATION, http://oglalalakotanation.org/ (last visited Nov. 26, 2022).
205. *See The Digital Divide: Differences in Home Internet Access*, NAT. CTR. FOR EDU. STAT. (Oct. 31, 2018), https://nces.ed.gov/blogs/nces/post/the-digital-divide-differences-in-home-internet-access (presenting that in 2018, twenty-seven percent of Native American or Alaska Native students had either no internet access or only dial-up internet access at home).

and the child's social security number.[206] Though some parents may already have these important documents, others may have misplaced them or lost contact with the parent or person in possession of the documents. Child welfare agencies are well equipped to access tribal information and walk families through the steps of enrollment, which may seem intimidating to some families because of struggles with resources, literacy, behavioral health needs, cost, or time.[207]

For the children in *K.C.*, the tribe provided the Department with enrollment paperwork, and each packet of paperwork was only four pages.[208] Assisting in filling out two four-page packets is hardly burdensome, and helping families learn about and possibly enroll their children in a tribe is certainly culturally appropriate. As discussed more at length in Subsection C of this Part, tribal enrollment can provide children with a sense of belonging and connection to their culture.[209] Thus, even if the parent enrolling their child in a tribe is not themselves Native, providing enrollment education and assistance is culturally appropriate for the child, as it acknowledges part of their ancestry and connects them to their heritage.[210]

The ease with which a caseworker can access and share information about a child's tribe, coupled with tribal enrollment's potential to make reunification or culturally appropriate permanency more likely, make tribal enrollment education and assistance a reasonable effort. Tribal enrollment assistance is typically not costly or burdensome for a caseworker, as many tribes have websites with tribal information and downloadable PDFs that one must fill out and mail in to enroll.[211] In the case of the children in *K.C.*, the caseworkers could have simply filled out the four-page application packets and mailed them back.[212] However, despite the ease of enrollment, a substantial burden is eventually placed on a caseworker

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206. *See, e.g.*, *Tribal Enrollment Checklist*, CHICKASAW NATION, https://chickasaw.net/getattachment/164edd6d-ef8e-4066-9b5d-9547e2ad0837/.aspx (last visited Nov. 26, 2022) (requiring an original copy of the minor child's birth certificate and the death certificate of a deceased Native parent, if applicable); *CER Birth Eligibility*, COLORADO DEP'T PUB. HEALTH & ENV'T, https://drive.google.com/file/d/1Qauj-K6-WsmPPZCa3OOf8wYUQ5t0gp-y/view (last visited Nov. 26, 2022) (listing government agencies as entities allowed access to birth certificates); *CER Death Eligibility*, COLORADO DEP'T PUB. HEALTH & ENV'T, https://drive.google.com/file/d/1ruhYI8VxffdGjCGP-GAWHGdKFhOhIQrL/view (last visited Nov. 26 2022) (listing governmental agencies as entities allowed access to death certificates).

207. *See, e.g.*, CHICKASAW NATION, *supra* note 204.

208. Oral Argument at 55:44, People *ex rel* K.C. v. K.C., 487 P.3d 263 (Colo. 2021) (No. 20SC533), https://cojudicial.ompnetwork.org/sessions/165415?embedInPoint=1&embedOutPoint=5096&shareMethod=link.

209. *See* Roberto González, Brian Lickel, Manisha Gupta, Linda R. Tropp, Bernadette P. Luengo Kanacri, Eduardo Mora, Pablo De Tezanos-Pinto, Christian Berger, Daniel Valdenegro, Oscar Cayul, Daniel Miranda, Patricio Saavedra, & Michelle Bernardino, *Ethnic Identity Development and Acculturation Preferences Among Minority and Majority Youth: Norms and Contact*, 88 CHILD DEV. 743, 744–45 (2017).

210. *See id.* at 745.

211. *See, e.g.*, *CDIB/Membership Application*, CHOCTAW NATION, https://www.choctawnation.com/sites/default/files/CDIB-Membership-Packet-Aug2021-2.pdf (last visited Nov. 26, 2022); *Tribal Enrollment Checklist*, *supra* note 206.

212. Oral Argument, *supra* note 208, at 55:44.

tasked with helping a family enroll a child in a tribe.[213] If the family does decide to enroll their child, triggering application, the caseworker must provide active efforts and meet a higher evidentiary burden before removing the child or terminating parental rights.[214] Additionally, the caseworker will be required to apply the tribe's placement preferences.[215] These responsibilities are no small burdens for caseworkers, who are often overworked and faced with stressful decisions about the families they work with.[216] However, any burdensome aspect of ICWA enrollment does not justify the failure to educate a family about tribal enrollment and aid in the process. The policy behind ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ."[217] Implementing this policy involves placing additional responsibilities on caseworkers, even if these duties are difficult.

B. Educating Families About Tribal Enrollment and Assisting in Enrollment Are Already Duties Encapsulated in Colorado's Reasonable Efforts Statute

Providing tribal enrollment education and assistance in Colorado should be considered a reasonable effort because it fits into two of the enumerated services in C.R.S. section 19-3-208. Under C.R.S. section 19-3-208(2)(b), if a child is placed out of home, the child welfare agency must provide their family with an "individual case plan" and "[i]nformation and referral services to available public and private assistance resources . . . ."[218] Both of these services could include educating a family about tribal enrollment and facilitating enrollment.

1. Individual Case Plan

A child welfare agency must provide each family with an individual case plan, which is a plan constructed by the department with input from the family.[219] In designing the individual case plan, the department considers services such as those enumerated in C.R.S. section 19-3-208, which include: "screening; assessments; home-based family and crisis counseling; information and referral services to available public and private assistance resources; visitation services for parents with children in out-of-home placement; and placement services including foster care and emergency shelter."[220] The department and family should craft the case plan with the specific needs of the family at the forefront, as the case plan

213. *Id.* at 57:20.
214. 25 U.S.C. § 1912(d)–(f) (2018).
215. *Id.* § 1915(a)–(b).
216. Kaiser, *supra* note 192, at 128–29.
217. 25 U.S.C. § 1902 (2018).
218. COLO. REV. STAT. § 19-3-208(2)(b)(I), (2)(b)(III) (2020).
219. *Id.* § 19-3-209.
220. People *ex rel.* K.B., 369 P.3d 822, 827 (Colo. App. 2016).

should identify particular actions that could render the parent fit and address the safety needs of the child.[221]

Tailoring a case plan to the specific needs of a family is integral to its success.[222] In *Too Little, Too Late: Designing Family Support to Succeed*,[223] Margaret Beyer argues that, in designing a case plan, a child welfare department should intricately analyze the strengths and needs of a family with the input of many individuals who can help with such analysis.[224] For example, Beyer offers that individuals such as a family's caseworker, therapist, counselor, teacher, and health professional could be of great assistance in identifying a family's strengths and needs.[225] Involving prominent figures in families' lives could also alleviate some of the stress placed on the caseworkers and judges who are typically left to make the tough decisions about what services are appropriate for a family.[226] Additionally, case plans should be modified as needed based on the family. [227] Though it may be easy to assume that a family has not been compliant with its case plan due to conscious resistance or uncooperativeness, the caseworker and court should consider whether the case plan simply needs to be better tailored to the family's circumstances.[228]

When creating an individual case plan for a family in which a child is eligible for tribal enrollment, a natural consideration is whether enrollment would be a good fit for the family, as tribal enrollment can confer many benefits.[229] The caseworker should consider whether a child's tribal enrollment has the potential to help the parent become fit and could meet the child's needs in some way.[230] Many tribes offer services in various areas related to child-rearing, such as education and childcare, which could provide parents with resources they could not otherwise access or afford, including those from which they might benefit long after child welfare involvement concludes.[231] A child's association with their tribe can even offer non-tangible benefits, such as a sense of community and the opportunity to engage in cultural activities.[232]

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221. *Id.* at 826–27.

222. *See* Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 317 (1996).

223. *Id.* at 318.

224. *Id.*

225. *Id.*

226. *See* Kaiser, *supra* note 192, at 129.

227. Beyer, *supra* note 222, at 317.

228. *Id.*

229. People *ex rel.* K.C. v. K.C., 487 P.3d 263, 275–76 (Colo. 2021) (Boatright, C.J., concurring).

230. *See* People *ex rel.* K.B., 369 P.3d 822, 826–27 (Colo. App. 2016).

231. *See, e.g.*, *Youth Services Clothing Grant*, CHICKASAW NATION, https://www.chickasaw.net/Services/Children-Youth/Youth-Services-Clothing-Grant.aspx (last visited Nov. 26, 2022); *Student School and Activity Fund (SSAF)*, CHOCTAW NATION, https://www.choctawnation.com/student-school-and-activity-fund-ssaf (last visited Nov. 26, 2022).

232. *See* DenYelle Baete Kenyon & Jessica S. Carter, *Ethnic Identity, Sense of Community, and Psychological Well-Being Among Northern Plains American Indian Youth*, 39 J. CMTY. PSYCH. 1, 6 (2011).

Because each tribe confers different benefits upon members,[233] and benefits may be contingent on where the family is geographically located,[234] tribal enrollment may be more beneficial for some than others. However, caseworkers should err on the side of caution by always exploring the possible benefits of tribal enrollment and discussing their findings with parents, especially if the caseworker is not Native. Congress passed ICWA precisely because white social workers were often neglectful of the importance of tribal association and culture and let their biases impact their decisions.[235] Considering the context of ICWA, caseworkers should craft a family's individual case plan under the assumption that a child's tribal enrollment could help rehabilitate the family and serve the needs of the child.[236]

2. Information and Referrals to Public and Private Assistance

Offering education about a child's tribe and enrollment assistance should also be considered a necessary reasonable effort because when a caseworker provides such a service, they are offering families "[i]nformation and referral services to available public and private assistance resources . . . ."[237] Just as caseworkers often provide families with information regarding housing and assistance in accessing public benefits,[238] they could provide families with information about the financial benefits of tribal enrollment. Tribal assistance could satisfy a need gap for some families who feel uncomfortable with government agencies[239] or who feel that accessing governmental benefits means sacrificing privacy.[240]

Public and private assistance are some of the most valuable resources for families with child welfare cases because child welfare agencies open most cases due to neglect—not abuse—and involve impoverished families.[241] When parents struggle with basic necessities such as housing, food, health care, and childcare, they are more likely to struggle with parenting goals in their treatment plans.[242] Thus, focusing on providing families with early access to concrete services that meet these needs is an essential part of an effective case plan.[243] A 2000 review of family reunification program

233. *K.C.*, 487 P.3d at 275 (Boatright, C.J., concurring).

234. *See, e.g.*, *Services*, CHICKASAW NATION, https://www.chickasaw.net/Services.aspx (last visited Nov. 26, 2022) (offering the option to filter services by service area); *Child Care Assistance*, MUSCOGEE NATION, https://www.muscogeenation.com/services/child-development/child-care-assistance/ (last visited Nov. 26, 2022) (describing the areas in which the Muscogee (Creek) Nation provides services).

235. Atwood, *supra* note 67, at 243–44.

236. *See* Trivedi, *supra* note 40, at 540.

237. COLO. REV. STAT. § 19-3-208(2)(b)(III) (2020).

238. People *ex rel.* J.C.R., 259 P.3d 1279, 1285 (Colo. App. 2011).

239. *See* Beyer, *supra* note 222, at 317.

240. Trivedi, *supra* note 40, at 537.

241. Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 389 (2000).

242. Beyer, *supra* note 222, at 317.

243. Kelly, *supra* note 241, at 380.

evaluations and family preservation program evaluations from across the United States found that the provision of concrete services led to greater rates of family preservation and reunification.[244] The reviewed programs were not uniform but included services such as "emergency cash, housing, medical care, food, transportation, assistance with gaining employment, and/or assistance with securing public assistance."[245] The study could not determine whether the services themselves directly affected family rehabilitation or if the services were a prerequisite to counseling and therapy rehabilitating a family.[246] Either way, the study confirmed that addressing poverty and a lack of resources is often the starting point for a successful family rehabilitation plan.[247] Concrete services can often rehabilitate a family before removal is even necessary.[248]

Even if certain tribal assistance services are only available for families whose children are placed at home, enrolling children in their tribes before reunification is still beneficial. First, a tribe may be willing to offer services to a non-Native parent that will continue even after the close of a child welfare case, such as addiction treatment and family counseling, to preserve families with Native children.[249] Second, enrollment can help encourage and assure parents that they will have adequate and immediate support once their children are returned.[250] Every tribe offers different benefits and programs, and parents can often easily access descriptions and applications for many of these resources on tribal websites.[251] The Chickasaw Nation, which is the tribe for which the children in *K.C.* were eligible, operates a website where one can browse through various benefits and programs available to Chickasaw Nation members by category type and service area.[252] For example, the Youth Services Clothing Grant offers $200 to eligible K–12 students for school clothes each year, and all Chickasaw Nation members are eligible.[253] Another program offers young Chickasaw Nation members, regardless of location, $150 annually for extracurricular activities.[254]

If only the child is a tribal member, not the custodial parent, benefits may be limited to those that specifically go toward child-centered costs,

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244. *Id.* at 381.
245. *Id.* at 380.
246. *Id.* at 381.
247. *Id.*
248. Trivedi, *supra* note 40, at 574.
249. *See, e.g.*, *In re* T.A.W., No. 52684-1-II, 2019 WL 6318163, at *2 (Wash. Ct. App. Nov. 22, 2019).
250. *See, e.g.*, *All Services*, CHEROKEE NATION, https://www.cherokee.org/all-services/ (last visited Nov. 26, 2022).
251. *See id.*
252. *Services*, *supra* note 234.
253. *Youth Services Clothing Grant*, *supra* note 231.
254. *Youth Support Reimbursement Program, High School Senior Expenses and Honor Cord*, CHICKASAW NATION, https://www.chickasaw.net/Services/Children-Youth/Youth-Support-Reimbursement-Program,-High-School-Senior-Expenses-and-Honor-Cord.aspx (last visited Nov. 26., 2022).

such as education and childcare.[255] Additionally, children living outside a particular tribal service area may not be eligible for as many services as children living within a tribal service area.[256] However, many tribes, such as the Chickasaw Nation, offer benefits to enrolled children living both within and outside of the service area.[257] Even just a few hundred dollars in clothing or education grants could make a difference for a family struggling with the grocery bill. Also, through the Indian Health Service, the federal government provides health care to all people enrolled in federally recognized tribes.[258] Though many low-income families receive healthcare assistance through Medicaid, Indian Health Services could help families who make just above the eligible income amount with healthcare expenses so they can allocate more of their income toward other necessities.[259]

The scope of the overall advantage to families may depend on whether others in the household are enrolled, the age of the children, the location of the family, and the tribe itself.[260] However, because it is possible that tribes will be able to provide families with concrete services to supplement other public and private assistance, the court should require child welfare agencies to make the reasonable effort of giving families detailed information regarding the resources available to those who are tribally enrolled. Any form of assistance can give families greater financial stability and allow them to focus on other aspects of their case plans.[261]

C. Offering Education and Assistance Regarding Tribal Enrollment Satisfies Multiple Purposes Behind Family Rehabilitation Services

Under C.R.S. section 19-3-208, the services offered to families with open child welfare cases are meant to accomplish certain goals related to family reunification; the safety, stability, and well-being of the child; the reduction of the risk of future maltreatment; and the overall promotion of the child's best interests.[262] Providing families with education about the child's tribe and assisting in enrollment align with many of these goals,

255. For example, a non-Indian parent could not likely qualify for a Section 184 Indian Home Loan. *Section 184 Home Loan Guarantee Program*, U.S. DEP'T HOUS. & URB. DEV'T, https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184 (last visited Nov. 26, 2022).

256. *See, e.g.*, *Services*, *supra* note 234 (offering the option to filter services by service area).

257. *See, e.g.*, *Youth Services Clothing Grant*, *supra* note 231; *Student School and Activity Fund (SSAF)*, *supra* note 231.

258. *About IHS*, INDIAN HEALTH SERV., https://www.ihs.gov/aboutihs/ (last visited Nov. 26, 2022).

259. *See Health Care*, INDIAN HEALTH SERV., https://www.ihs.gov/forpatients/healthcare/ (last visited Nov. 26, 2022) (providing examples of programs and services offered by Indian Health Service).

260. *See Youth Support Reimbursement Program, High School Senior Expenses and Honor Cord*, *supra* note 254 (providing an example of a program information page that clearly addresses eligibility criteria).

261. Beyer, *supra* note 222, at 317.

262. COLO. REV. STAT. § 19-3-208(2)(a) (2020).

namely the goals of facilitating speedy family reunification, supporting the well-being of the child, and promoting the best interests of the child.[263]

Education and assistance regarding tribal enrollment contribute to the goal of speedy reunification because the application of ICWA puts into place procedural safeguards intended to keep a greater number of Native children with their families, as discussed in Subsection A of this Part.[264] Additionally, keeping Native children connected to their culture and history is in the best interests of the child and positively contributes to their well-being.[265] A sense of ethnic identity is beneficial for the development of a child,[266] and Native children especially experience this benefit. When they identify with other Native individuals, they often see many positive results such as higher self-esteem, decreased likelihood of substance use, and better academic achievement.[267] However, children can only develop a sense of ethnic identity after they have "explored, accepted, and internalized their ethnicity."[268] Thus, if a Native child is not exposed to their culture or given a chance to explore it, they are less likely to see the benefits of developing a sense of ethnic identity.[269] Even if Native children are unable to socialize regularly with others in their specific tribe, they still may self-identify with members of other tribes, recognizing some of the culture and practices shared between tribes.[270]

Foster children often have difficulty finding a sense of belonging and understanding where they came from.[271] If a child welfare agency can give a child in out-of-home care a better chance at feeling a sense of belonging, it should.[272] Enrollment in their tribe may give a child not only the opportunity to relate to other Native students at daycare or school, but it also may give the child opportunities to further connect to their culture at local events. For example, the Southern Ute tribe hosts an annual tribal fair on the Southern Ute Indian reservation in Colorado.[273] If a child's specific tribe does not host any local events, the child can still attend multitribal events, such as the annual Denver March Powwow, where attendees can experience tribal dances, stories, art, and food.[274] Events such as these could give a Native child the opportunity to explore their roots and find

263. *See id.*
264. Miss. Band Choctaw Indians v. Holyfield, 490 U.S. 30, 36–38 (1989).
265. Trivedi, *supra* note 40, at 540.
266. González et al., *supra* note 209, at 743.
267. *Id.*
268. *Id.* at 745.
269. *See id.*
270. Carol A. Markstrom, *Identity Formation of American Indian Adolescents: Local, National, and Global Considerations*, 21 J. RSCH. ON ADOLESCENCE 519, 521 (2010).
271. Trivedi, *supra* note 40, at 534.
272. *See* González et al., *supra* note 209, at 743.
273. *Fair and Powwow*, S. UTE INDIAN TRIBE, https://www.southernute-nsn.gov/culture/fair-and-powwow/ (last visited Nov. 26, 2022).
274. *Denver March Powwow*, DENVER THE MILE HIGH CITY, https://www.denver.org/things-to-do/spring-summer/powwow/ (last visited Nov. 26, 2022).

community with others doing the same, increasing the child's chances of developing a stronger sense of self-identity.[275]

Lastly, if a Native child must be placed outside the home, ICWA's placement preferences promote the well-being and best interests of the child by prioritizing placing the child with a relative or in another Native home, hopefully of the same tribe as the child.[276] Kinship placement is widely recognized as the gold standard for out-of-home placement.[277] It results in greater stability, permanency, and cultural identity for a child while decreasing behavioral problems and mental health concerns.[278] Additionally, even if a child cannot be placed with kin, a child's placement with a family who shares a similar background correlates with fewer behavioral difficulties and fewer struggles with identity.[279] In passing ICWA, Congress recognized that many Native children placed in white homes developed "white" identities and did not connect with their tribal culture or identity, which caused social and psychological adjustment issues.[280] A small but more recent study reported that Native children adopted by non-Native families felt the loss of their tribal identity, "family, culture, and heritage."[281] This is not only harmful to the child but also harmful to the preservation of tribes, which Congress sought to protect when passing ICWA.[282]

Some Native children, like the children in *K.C.*, may not have ultimately grown up in environments embracing connection to their tribes had they stayed with their families.[283] Thus, for some children, being placed in a non-Native home may not be a large departure from lives with their birth families. However, developing a sense of Native identity, even if they would not have developed it had they stayed with their birth family, could help a child in out-of-home placement foster a sense of belonging.[284] Placing such a child in a Native home could bolster this feeling of belonging and help the child maintain a sense of family and heritage while they are placed out of home.[285] Overall, the tribal enrollment of a child and subsequent application of ICWA has the potential to help a child in the child welfare system more fully identify with their unique heritage and decrease

275. González et al., *supra* note 209, at 743.
276. 25 U.S.C. § 1915(a)–(b) (2018).
277. *See* Heidi Redlich Epstein, *Kinship Care Is Better for Children and Families*, A.B.A (July 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/.
278. *Id.*
279. *See* Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 335–36 (2008).
280. *Id.* at 335.
281. *Id.*
282. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 3, 92 Stat. 3069 (codified as amended at 25 U.S.C. § 1902).
283. People *ex rel.* K.C. v. K.C., 487 P.3d 263, 267–68 (Colo. 2021) (noting father was not an enrolled member of the Chickasaw Nation and took no steps to enroll the children).
284. González et al., *supra* note 209, at 743.
285. Maldonado, *supra* note 279, at 339.

their chances of experiencing mental and behavioral issues.[286] Achieving these outcomes is undoubtedly beneficial to a child's well-being and would further the best interests of the child.

CONCLUSION

Federal and state governments have separated Native children from their parents and tribes in various ways for hundreds of years. The relationship between the government and Native children has certainly improved with legislation such as ICWA, and state and federal governments place a higher value on cross-cultural competency than they did in the past.[287] However, the reasonable efforts requirement and ICWA protections have only existed for around forty years—making them younger than the right to interracial marriage and federal workplace discrimination law[288]—so courts must constantly reassess how they enforce these laws. Courts must not lose sight of the purpose behind modern child protection legislation, appropriately holding child welfare agencies responsible for taking reasonable steps to reunify families while promoting the best interests of the child.

Educating families about tribal enrollment and assisting them in the enrollment process, though not specifically enumerated in Colorado law, are reasonable efforts courts should require child welfare agencies to make. Providing families with such assistance increases the odds of family reunification or culturally appropriate permanency, gives families access to alternate forms of assistance, and bestows upon children the benefits of association with their Native tribes. Placing another responsibility on caseworkers may seem inappropriate, but the problem of overworked and under-resourced child welfare agencies is not solved by depriving children of the protections they deserve because of their ancestry. Native children are Native children, whether enrolled or not, and courts should protect these children and their ancestry when possible.

Katelyn Elrod[*]

286. *See id*. at 335–36; González et al., *supra* note 209, at 743.

287. Epstein, *supra* note 277.

288. Loving v. Virginia, 388 U.S. 1 (1967); Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255–57 (1964) (to be codified at 42 U.S.C. § 2000(e)).

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