Children's Commission

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

To: **Texas Judges Who Hear CPS Cases**

From: **The Honorable Robin Sage and The Honorable Dean Rucker, Jurists in Residence, Supreme Court Children's Commission**

Date: **January 8, 2016**

RE: **New Texas Case Law on Indian Child Welfare Act**

In May 2014, the Children's Commission published a JIR Letter entitled *Why It's Important to Consider the Indian Child Welfare Act (ICWA)*, which highlighted important aspects of ICWA, including the possibility that state court proceedings could be invalidated for failure to follow the federal law. Recently, the Eighth Court of Appeals in El Paso issued an opinion reversing a termination of parental rights due to a failure to comply with ICWA. Below is a discussion of what you need to know about the decision in *In the Interest of V.L.R., a Child (V.L.R.)*.[1]

Q: Why is this case significant to judges handling CPS cases?
A: This case demonstrates that even where facts may support termination, ICWA requires strict compliance with the law. In *V.L.R.*, the established facts were that the child's tribe had removed the child when she was two, the mother had not visited the child for 12 years, the mother did not participate in the child welfare case or engage in any reunification efforts, and a representative from the child's tribe expressed they would not be intervening in the termination.

Q: Why did the Court of Appeals overturn the termination order?
In *V.L.R.*, the trial court found beyond a reasonable doubt that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts had proved unsuccessful. The court also found that the continued custody of the child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the child. However, ICWA requires that the latter finding be supported by evidence beyond a reasonable doubt, including testimony of a qualified expert witness.[2]

The appellate court set aside the termination of parental rights, concluding that the court's finding on this issue was legally insufficient. Specifically:

- The testifying caseworker was not shown to possess the required knowledge or expertise;
- There was no evidence that the caseworker was a member of the child's tribe or another tribe, or that she was recognized by any tribe as having substantial experience in the delivery of child and family services to Indians;
- There was no evidence that the caseworker had knowledge of the prevailing social and cultural standards and childrearing practices within the tribe; and
- Even if the caseworker had been a qualified expert witness, she did not testify that continued custody of the child by the mother is likely to result in serious harm to the child.[3]

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[1] *In re V.L.R.*, No. 08-15-00250-CV (Tex. App. – El Paso Nov. 18, 2015).
[2] Indian Child Welfare Act, 25 U.S.C. § 1912(f).
[3] *In re V.L.R.* at 12.

Q: What else is important about this case?
A: The issue of continued custody was also argued. DFPS argued that because the child's mother did not have custody of the child at the time the petition was filed, Section 1912(f) did not apply, relying on the recent U.S. Supreme Court Case, *Baby Girl* (*Baby Veronica* case). The Eighth Court of Appeals held that *V.L.R.* is distinguishable from the *Baby Veronica* case because the mother in *V.L.R.*, at one time, had custody of the child and that the U.S. Supreme Court specified in the *Baby Veronica* case that Section 1912(f) applies in cases where a parent at one time had custody even if that custody was interrupted. Further, the Court of Appeals held that failure to apply Section 1912(f) because the mother did not have actual custody of her child at the time the petition was filed, would render Section 1912(f) applicable only where the Indian parent has legal custody of the child when the custody proceeding is initiated, thereby eviscerating the stated purpose of ICWA.

Q: Did the new BIA Guidelines impact the Court of Appeal's decision?
A: Yes, the appellate court followed the 2015 BIA ICWA Guidelines.[4] This is consistent with other appellate courts which have applied the former BIA ICWA Guidelines in the past.[5]

Q: Did *V.L.R.* involve a federally-recognized tribe in Texas?
A: No, it is important to note that the tribe in this case is not located in Texas. This is often the case because 78 percent of Native American people live outside of a reservation.[6] Courts cannot assume that there will not be Native American children involved in their child protection hearings because there is not a reservation nearby. Texas has the 4th largest Native American population in the U.S.[7]

Opinion can be found here:

http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=a7b84d1d-433d-459a-9f7c-9de3843a8d89&MediaID=5d24531d-fc5a-4af9-ab75-5752447bc50e&coa=%22%20+%20this.CurrentWebState.CurrentCourt%20+%20@%22&DT=Opinion

For more information, please also see:

- Texas Child Protection Law Bench Book, Indian Child Welfare Act
- Indian Child Welfare Act, 25 U.S.C. §§1901-63 ; 25 C.F.R. Part 23

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[4] The Bureau of Indian Affairs Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146 (February 25, 2015) *available at* http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-029637.pdf.
[5] *See In re K.S.*, 448 S.W.3d 521, 529 (Tex. App.--Tyler 2014, pet. denied) (utilizing the earlier version of the Guidelines); *In re J.J.C.*, 302 S.W.3d 896, 900 (Tex. App.--Waco 2009, no pet.)(same); *In re R.R.*, 294 S.W.3d at 217 (same); *see also Yavapai-Apache Tribe v. Mejia,* 906 S.W.2d 152, 163-64 (Tex. App.--Houston [14th Dist.] 1995, orig. proceeding).
[6] U.S. Census Bureau (2010, issued January 2012). *The American Indian and Alaska Native Population: 2010,* 12. Retrieved December 16, 2015, from http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.
[7] *Id*. at 6.