Adoption of Uday, 91 Mass. App. Ct. 51 (2017)

Summary by Katy Krywonis, Esq., CAFL Training Unit

On appeal from a decree terminating his parental rights, the father argued, inter alia, that despite knowledge of Uday’s possible Cherokee ancestry, the Department failed to notify the tribe of the termination proceeding in violation of the Indian Child Welfare Act, 25 U.S.C. § 1912(a). The father further claimed that his attorney was ineffective for failing to assert an ICWA claim during the proceeding in the juvenile court. The Department filed a supplemental record appendix, in which it submitted letters from three federally recognized Cherokee tribes, all to the effect that Uday is not an “Indian child” as defined by the statute. The Appeals Court affirmed the decree terminating the father’s parental rights, on the grounds that these letters, dated within three months of a court investigator’s report first noting Uday’s possible Cherokee ancestry and over one year before the trial, demonstrated that the Department complied with ICWA’s notice requirements. The Appeals Court also noted that in the future, to comply with the new ICWA regulations (see practice note below), documentation of compliance with ICWA’s notice provisions must be filed with the court and made part of the trial court record.

The Appeals Court also rejected the father’s arguments that the Department’s failure to make reasonable efforts to reunite him with Uday undermines the finding of unfitness, and that the finding of unfitness is unsupported. The Court reminds us that a reasonable efforts claim must be raised in a timely manner. Here, the father did not raise the issue of the adequacy of the Department’s service efforts prior to trial.

Practice note: This situation, where the trial court record did not reflect notice to the tribe, has been addressed by the new ICWA regulations that went into effect on December 12, 2016. 25 C.F.R. § 23.111(a)(2) requires that an original or a copy of each notice is filed with the court, with any return receipts or other proof of service. All CAFL attorneys must be familiar with the new regulations, and vigilant about compliance with ICWA’s requirements, consistent with their client’s position.