

Discretionary Tribal Participation in Juvenile Dependency and Delinquency Cases Involving Native American Children Transcript

VIDA CASTANEDA: Good afternoon and thank you for joining us today for our webinar discussing tribal participation in non-ICWA 300, 601 and 602 cases. I am Vida Castaneda senior analyst in the tribal state programs unit at the Judicial Council of California. We hope you enjoy today's presentation. I would like to now introduce our incredible panelists.

Judge Devon Lomayesva is currently the owner of Lomayesva law corporation P.C. where she primarily represents the Soboba Band of Luiseno Indians as well as other tribes in her commitment to preserving the rights of Indian tribes by the practice of tribal and federal Indian law. She is also the Chief Judge of the Intertribal Court of Southern California that serves 14 member tribes and numerous other tribes and tribal organizations throughout Southern California and beyond. She has held positions of lecturer for San Diego State University and Palomar college, in-house counsel and on tribal council for the Iipay Nation, and as Executive Director of California Indian Legal Services. She is co-founder of American Indian Recruitment programs and serves as a member of our Tribal Court-State Court Forum.

Judge Dean Stout retired in 2018 from the superior court of California, County of Inyo after serving 21 years on the bench. Since his retirement he has served in the Chief Justice's temporary assigned judges program sitting primarily in Inyo, Mono, Sacramento, Placer and El Dorado Counties. In September 2020 he was appointed as the Chief Judge of the Bishop Paiute tribal court. He is a former member of the Judicial Council of California, founding member of the Tribal Court-State Court Forum, Co-chair of the Judicial Council's Family and Juvenile Law Advisory Committee, member of the blue-ribbon commission on children foster care, domestic violence practice and procedures task force and chaired CJERs rural courts education committee.

Miss Pamela Villasenor is enrolled in the Fernandinho Tatavian Band of Mission Indians where she has worked tirelessly to help provide nation building efforts as executive advisor to the tribal press. Miss Villasenor manages tribal government initiatives including the development of the newly established health and social wellness department. As a passionate champion for native families Pamela Villasenor serves as the tribe's authorized representative for juvenile dependency cases. Additionally, she is part of the team that helped reform L.A. county training to include ICWA curriculum nearly a decade ago. Since that time, she has been an ICWA-trainer of county caseworkers.

At this time, we would like to acknowledge our presentation is brought to you today from the original and current lands of the Ohlone people in the San Francisco Bay Area where our Judicial Council of California office is currently located. We thank the Ohlone ancestors and present tribal communities.

ANN GILMOUR: Hi everyone, my name is Ann Gilmour, and I am an attorney with the Judicial Council in the tribal state programs unit focusing on Indian Child Welfare Act matters. Today we want to address some issues that have come up numerous times, which are that the Indian Child Welfare Act does not apply to all cases in the juvenile courts that involve Indian

and Native American children. Of the common situations where ICWA may not apply are where children and a family are affiliated with a tribe that is not federally recognized.

Could folks mute their audio if they're not talking? We're getting a little bit of feedback.

Also, in juvenile delinquency cases where the does not apply because the child's conduct would be a crime if it were committed by an adult. And also, where a child may not currently qualify for tribal membership, but the child and the family are Native American and part of the tribal community. In those cases, of course it's important to determine whether or not ICWA applies in each and every case. But determining that ICWA does not apply does not mean that the family's Native American or Indian status or the child's status is irrelevant. Today we are going to discuss the legal and practical reasons or why you need to still keep in mind the family's tribal connections. Next slide please Amanda.

So, our objective for today's training is that you understand that ICWA is not the only relevance of a child and family's tribal connection and native status. That you appreciate the importance of tribal and cultural connections for all Native American children and families, and that you recognize the legal rights of all children in foster care to maintain their cultural identity and tribal connections and understand the legal basis supporting tribal participation in all juvenile case types even if ICWA does not apply. And now I'm going to pass it over to our panelists.

PAMELLA VILLASENOR: Hi. Thank you. Can we advance to the next slide please? So, an important part of working in the child welfare sphere is understanding so many different elements at play. And one of the pieces to training child welfare workers in the state of California includes not only the micro social work for that direct practice that you all know they do as part of case planning in helping families but also the macro social work. Understanding how policies come to fruition. The review findings as to why they were justified and that historical context. And all that is very important in the field of social work, to understand what the best outcomes are in those direct practices. For ICWA and tribal communities the best outcome is talking about how do we move the needle to get better outcomes for tribal youth? And one of the ways we do that in working with staff involved in child welfare is understanding that historical context. So, in terms of here in California, tribal governments have been around for millennia. Have had their own way of knowing, their own forms of governance, and it's often very different than what we see in the American system. But before we go deeper into this place-based lens for California I wanted to just overview some of the historical context on a larger federal level of the United States. In terms of the United States there have been a number of policies and practices that specifically aimed to remove or to assimilate Native American families. And obviously this has a detrimental impact to family functioning. So, if we look at the very beginning, and this is only a very select discussion of a few different policies, there are many more - but if we start with the removal act and how Native Americans were removed from their lands we can start understanding where historical trauma really began. In this case it's the decimation of their food systems their family kinship systems. The - being isolated in their communities - not having the same form of allowable governance or child rearing. There are many different types of maladies that come along with these type of destruction policies. That led to things that some of you who may have already heard of such as the trail of tears.

Understanding that there were many trails of tears for many different tribal nations. Then there's also the boarding schools. So, the first boarding school was Carlisle Indian School founded in 1879. This of course was not like the boarding schools today where the top one percent send their children. Very different. These boarding schools existed for the purpose of assimilating Native American children into mainstream white society. This is where there are many documentaries out there if you google them that talk about the different forms of abuse that happened in these places. The introduction of corporal discipline, disallowing tribal culture including disallowing ceremonies - and if you think about so many people around the world, they find healing within their religion, within their spirituality. So, if these little children are away from their family, they're isolated, they're being punished, they're being abused, and the way that they've been taught for healing is ceremony and that ceremony is prohibited, then we know that healing wasn't happening. And so, it was this cycle, this never-ending cycle, of historical trauma compounded in what we know today as complex traumas that just continue to fuel poor outcomes later in life.

If we fast forward to the 1950s and the relocation era this is why there are so many Native Americans in California who are not from California tribal nations. These individuals were sent by this U.S. federal policy, oftentimes promising jobs, and housing, but those weren't always the case. Here in Los Angeles where I am, we have the largest urban Native American population of any county in the United States, and a lot of it is due to relocation. But with relocation while there are so many beautiful and resilient things about the Los Angeles community, we also saw that there came with that a lot more increased poverty, lower educational attainment, higher contact with child welfare, largely because a lot of the support systems were not there, and assimilative policies didn't allow for the strength of those tribal communities in their ways of knowing.

And then there's the Indian adoption project. Today the Child Welfare League of America is seen as this premier organization to advocate on behalf of all children in foster care.

However, before they worked with the Bureau of Indian Affairs to purposely take Native American children and place them in non-native homes. To our knowledge - according to the data - more than 10,000 adoptions occurred during that era. But there was an apology in 2000 by the BIA and in 2001 by the Child Welfare League of America. But if we think about that in terms of time, it wasn't that long ago that these apologies occurred and when we know that people have these centuries worth of historical trauma, intergenerational trauma, cultural traumas, complex traumas, the very first thing we need to do is acknowledge that those traumas exist and then have the capacity to start addressing and moving the needle to heal those traumas.

Can we go to the next slide please? So that was just a broad overview but if we bring it home here to California and look and talk about what is the historical context in terms of California tribal nations, we know that from time immemorial they had their own government, their own ways of knowing and how they operated in their own societies. So, in addition to the U.S. policies, we just reviewed there's also the other forms of colonization that occurred through other colonizers. The U.S. was the third it is not the second or the first, so when we think about trauma, we have to understand that it for California natives came in waves. The first coming

along primarily with the Mission System in Southern California through central California and the way that the maladies that occurred in those Missions led to a number of cultural traumas, historical traumas, and intergenerational traumas. If you want to reference the University of California is currently undergoing the creation of critical Mission Studies to really give a better, in-depth analysis to how the Missions played an active role in California tribal communities. With the type of evidence and oral histories that provide a very different perspective to how those Mission systems negatively impacted California tribal nations.

In northern California those tribal nations were more impacted by the gold rush and the accompanying violence that came along with that gold rush. Here there are a few different types of negative impacts I really wanted to highlight. Number one obviously, being genocide. None of this is easy to talk about but the world over so many indigenous peoples have survived attempted genocide but there are long-standing historical traumas attributed with that. Here in California, Governor Newsom has apologized on behalf of the state to California tribal nations and there's currently a council working on a policy, potentially having recommendations about how do we move the needle to heal these tribal communities and the survivors like myself? You know I am the descendant of survivors California Indian genocide. We also hear survived enslavement most people think California came in as a free state, however they enslaved California Indians within the first three months of statehood. And also, the illegal extinguishment of aboriginal land title. So, these three factors are incredibly important to understanding why discretionary participation was necessary. It's because these three factors really, that contributed to the fact that California has so many non-recognized tribes. Non-recognized tribes meaning those tribes that do not have legally enforceable trust responsibility with the United States.

Now hopefully this gives you a better idea of why non-recognized tribes exist here in California. Now that we've talked a little bit about the type of impact that policies and practices have on a California tribal nation.

So, talking about that historical policy leads us to the spirit of ICWA. The reason why we're all here today. To understanding: what is discretionary participation? Why does it even exist? Well based upon that history I just shared with you is why there are so many non-recognized tribes here in California. And the state legislature years ago recognized that there was a gap. There were children from federally recognized tribes who were eligible for membership or members of tribes and so were able to have an ICWA finding in juvenile dependency court cases however there was this other cohort of children who were in fact from California tribal nations they just happen to be from nations that don't have federal acknowledgement or they didn't have eligibility for a federally recognized tribe And so, the state legislature passed a piece of legislation that we refer to today as the spirit of ICWA that does allow for some intervention by these non-recognized tribes for again going back to the whole purpose of this best outcomes for tribal youth. This legislation allowed for discretionary participation that we will talk about more in depth in a bit.

In terms of the background to ICWA. I think there are a lot of child welfare practices throughout the country that we are aware of that have these assimilated properties that led to the breakdown of these Indian families and their communities. And this of course with all upheld their findings

the American Indian Policy Review Commission in the 1970s had a number of task forces. One of them to uncover what was happening in child welfare across the country in terms of child welfare in the intersection of Native American tribal nations. And what they found was the need for a new piece of federal legislation. This one being called the Indian Child Welfare Act. And it really was created for two purposes according to congress. One to protect the best interests of Indian children and two to promote the stability and security of Indian tribes and families. If you recall back to the history we just reviewed, so much about federal policy was destabilizing tribal nations. And so, this piece of policy was conversed to that. It was allowing tribal nations to enact their own self-determination in a federal context, but through the court system throughout the country. And so, what ICWA did was set minimum standards regarding removal and placement. And also, provide assistance to tribes.

JUDGE LOMAYESVA: So, I shall continue on. Hello everyone and thank you Pamela for covering that. I wasn't used to this platform. So, as Pamela has indicated, with regard to the background to ICWA, there was a lot that went into the passage of the law. And there were commissions established by congress to essentially look I into the decades of removal of Indian children from their tribes and what was obviously found was a disproportionate amount of native children being taken without justification. I mean that's really what it boils down to. And based on the previous information as Pamela shared, you know this is based on federal policies of, you know extermination, assimilation and relocation all aimed at destroying the fabric of tribal communities. And so, when we finally get to the time of the child welfare hearings, the findings there were some general findings and some specific findings. But what it really revealed was this pattern. And as you can see here statistically you know they were finding about three times greater rate of removal than non-Indian children. 25 to 30 percent of all native children were removed and placed in foster or adoptive placements. And then in California it's much, much worse. And in California we're very unique. We have a different history than any state in the entire country. And here with over 100 federally recognized tribes and dozens and dozens of non-recognized tribes, we have very small tribal communities in comparison to other tribes around the country. And with that we saw eight times the likelihood of a child being removed to end up in adoptive placements. Two and a half times likely to end up in foster care and 90 percent non-Indian homes. So, when you finally get to ICWA, you can see that the statistics support the justification for the law.

And when you go more to the specific findings - on the next slide I believe they are - you know ICWA was to create a legal means to stop the removals. And so, the way that that was designed was to make the law apply to federally recognized tribes those tribes that have that government-to-government relationship, via the established tests for federal Indian law. And then when the law was finally passed. If you go to the next slide. please.

The basis for that was relying on these several specific findings. And one here is the U.S. as trustee responsibility to protect tribes and their resources. And then as you move on, the rest of these findings are more general to the effect it has on the children and the tribe from that removal. It doesn't keep focusing on the trust relationship. That was the foundational principle for the law, but when you get into these other findings you see, you know the point of protecting

Indian children so they can remain in their communities. The unwarranted removals, as well as specific mandates for the state courts and that's essentially what ICWA is its mandates on state courts. ICWA does not apply to tribes. Tribes make their own laws for children that come under their jurisdiction. And in the last finding that you see here it talks about the essential tribal relations of Indian people as well as cultural and social standards prevailing in Indian communities and families. Next slide please.

So, when you take the history of California which is our focus here. As Pamela alluded to you know there's the trauma that is the result of these types of activities over generations of removal. You know when I was growing up, no one ever used the term transgenerational trauma or generational trauma. I honestly don't even think that I heard any of these phrases or concepts until I was in the end of law school and looking into practicing federal Indian law. But today, you know these concepts that are now in being more and more introduced and integrated into trainings like this, that I'll tell you this is in many levels out of my league professionally. This is not something that you know I've written on. But I'll tell you it's something that I've lived. And that is the whole point of, for the purposes of what I'm talking about, what historical trauma is it's just that. Native people are a people of primarily oral histories. We hand down our stories - whether it's of creation our stories on, you know lessons for life. And that is the same way that this trauma is passed on. Because as families we share those things with each other. And when you have witnessed these governmental systems that only come to your community when they're there to do something like take you away or arrest your parent, to take away your sister. You know that becomes ingrained and that's just talking about the boarding schools and leading up to the findings for ICWA. We have hundreds of years of history that have been handed down. From the atrocities that have been committed against native people. So fast forward to, and we'll get to this more later, the point where tribes come in to participate, you have to have this background and understanding of why it's so important and why it's so vital for tribes to participate. And if you have any form of discretion whatsoever or any tool that's going to help you represent your client whether it's the child or the parent or if you're the judge that gets to make the decision why wouldn't you want every single resource that's available? So, understanding the background how these things have been passed down in our communities and that inherent mistrust of the system that many of our native people have. It doesn't matter if you're from a recognized tribe or not that's your history. That's part of who you are. And those cautionary tales, that protective instinct that's been passed down is alive and well today. So - next slide please. And I think this is where I will after this be turning it over to Judge Stout. There's the saying here about from Dr. Maria Yellowhorse Braveheart who really compiled what we've all known as native people but put it into more of a clinical context if you will. But this is really important to understand that historical trauma which is a cumulative emotional and psychological wounding over the lifespan and across generations emanating from massive group trauma experiences. That's really powerful and that's something that can really be you know something to reflect upon as those of you that have the ability and have the discretion to work with tribes. Think about that and that hopefully will guide you as to why these tribes you know we fight so hard to be succeeding. With that I will I believe turning it over to Judge Stout now.

JUDGE STOUT: There's many different theories on how intergenerational trauma is passed down. To be honest with you, it is out of my league as well, and to a certain extent I don't really care what that method of transmission or methods the transmission may be, because I accept the fact that it is real. There is no doubt in my mind about that. Some theories suggest it's handed down a few stories from generation to generation. There are many families that do not discuss the history of trauma and Native American people. There is one former judicial officer for the state of California a prominent tribal court judge who shares a story that she never heard about her mother and her aunt having been in the boarding school. She never heard anything about their physical and sexual abuse. She never heard about classmates or children in the assimilation process who actually died and subsequently were buried in unmark graves. She never heard any of the trauma. She heard a little intellectually about all the ninety percent of the Native American people were killed in genocide, but she didn't understand why she was doing certain things. She had a daughter who was kindergarten age and she found herself taking her daughter with her to work and not taking her to school. And she finally kind of had this epiphany one day and said why am I doing this? What's going on? And she ultimately said, this kind of crazy. And so, this sort of supports the theory that even if there isn't this handing down of experiences about generational trauma, there is a belief that it's kind of a complex post-traumatic stress disorder mechanism. And there's currently a lot of research being done and what's referred to as epigenetics. And this is somewhat what this former state judicial officer and chief judge experienced taking her daughter to kindergarten. That is passed down to the genes even without having the benefit of actually hearing the stories or sharing the experiences. A lot of that research is also going on with the descendants of holocaust survivors. And interesting areas. But again, for my purposes - we can have the next slide.

I just want to make the case that it is real. But an example we oftentimes see it is in domestic violence cases. I think we all know how difficult it can be for any victim of domestic violence to come forward and multiple reasons for that. But when you overlay historical trauma, I think it is much, much harder for a victim particularly if I'll be gender biased here it's a woman with a child how much more difficult it can be to disclose come forward and cooperate with for example law enforcement or prosecution. There's this ingrained fear through this historical trauma process that the government's here to help means CPS is here to break up your Indian family and remove your children on a CPS or 300 dependency theory a failure to protect the children from the domestic violence that the mother suffered. This lack of trust that the panelists have spoken to shows up in children. I have actually two adopted grandchildren with Native American heritage, and they were taught very young to distrust law enforcement and child protective services. Don't answer the door. Hide, escape, lie. And as the slide indicates in Yurok language the word police translates to one who takes not one who protects or serves. And I think you can see these behaviors with children in s.148.9 resisting delaying or obstructing cases, and false identification cases. Next slide please.

It has been mentioned that I think it is very important for native youth to learn how their great grandparents for example. How their own pain and suffering can still be impacting the youth today. We see much like from poverty and the ACEs study and the current California Surgeon General and the research that is being done there. A lot of these children have dysregulated

emotional responses. The adverse impact on the neurological development similar to what we see in children who are suffering, trauma from domestic violence.

To really give you kind of wrap this up here and to move on, I commend to you the video “The Wellbriety Journey to Forgiveness”. It's on the and the youtube site is there on the slide. It runs about an hour but even if you watch just the first five minutes, I think it will give you a very clear picture of what the panelists have been talking about uh today. With the boarding schools - and the segway here is the need to address this trauma particularly in our native youth. And it can certainly explain many of the reasons for their behaviors. And so, to best serve the best interests of these children. To help them in that process from trauma to healing. To help regulate their emotional responses. Early tribal participation in cases involving native youth, I believe is critical, and that's really what we want to talk about today. Is making sure that we're informed about and utilize practices where there can be discretionary tribal participation in cases involving native youth even though the Indian Child Welfare Act may not apply. Even though they may not be from a federally recognized tribe or they might be a lineal descendant who's not eligible for enrollment in a tribe but has a strong involvement with the tribal community. And - next slide please.

You'll see research is increasingly showing us that maintaining and building connections for all children and families in our juvenile court system is essential for improving outcomes. And it's certainly true for our native American youth and families. And what that translates to is, it means that connection and involvement with their tribes and their tribal culture and the resources that can be very valuable to those of us in the state court systems and otherwise. Next slide please.

The first steps here to involve tribal participation in these types of cases. You first have to identify whether you have an Indian child and I use that term loosely not necessarily an ICWA definition but a child with native American heritage. The tribes the tribe or tribes need to be identified and you have to have timely notice to the tribe. And so, what I'm suggesting here, is not necessarily formal ICWA notice or assuming ICWA does not apply. It can be informal notice again would not necessarily comply with the notice requirements of the Indian Child Welfare Act. It can be fax, email, text, telephone, letter, informal notice to the tribal chairperson and or the Indian Child Welfare Act representative for the tribe that the youth is involved in. And to make the identification of the tribes and then give them timely notice that makes the mandatory inquiry provisions of the Indian Child Welfare Act so vitally important. Could you have the next slide please?

As many of you know, whether it's section 300 dependency, status offense or delinquency general justice now case uh the court, the county welfare department and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under 300, 601 or 602 maybe or has been filed is or may be an Indian child. And the duty to inquire begins with that initial contact. And that's Welfare and Institutions Code section 224.2 and I need to note that effect of January 1, 2019 that statute was amended. I know a lot of folks thought well that inquiry isn't required unless there's a risk if the child is entering foster care or in foster care. That prerequisite the child be at risk of entering foster care is no longer applicable. The duty of inquiry under ICWA applies in all cases. And again, the duty to inquire

begins with the initial contact and that again applies even if this is a 602 juvenile justice case and as a result of conduct it would be considered a crime if the child were an adult. Probation on that initial contact still has affirmative and continuing duty to inquire. Next slide please.

And again, as I mentioned, it doesn't matter the child is enrolled or are eligible for enrollment. Whether any affiliated tribe is federally recognized, it's simply a matter of inquiring about Native American heritage. Many of you may be familiar with the Judicial Council form ICWA-010(A) often attached to your dependency or delinquency petitions. And I really want to stress that this needs to be a meaningful inquiry not just kind of oh I asked the kid. Kid didn't think so and check the box. This inquiry must involve not only the child or youth but the parents, Indian custodian, extended family. The court has the duty to inquire at the start of the proceedings and throughout and to remind social services and probation of their affirmative and continuing duty to inquire. The ICWA-020 form obviously can be used by parents and others to provide details regarding native American heritage. I really strongly encourage the state courts to continue that calendar item, just because we have a, ICWA-010(A) forms as oh, you know check the box no heritage. Continue that inquiry requires further investigation. Get the ICWA-020s and maybe a settlement conference or subsequent proceedings to make sure that there's further discussion regarding the sufficiency of the inquiry. Okay I think I'll (next slide please) turn it back over I think to Judge Lomayesva.

JUDGE LOMAYESVA: Thank you Judge Stout. So, kind of looking back at what tribal participation is, and what it can be. As we've stated, there are many instances where a child will not be an ICWA eligible child. The concept of lineal descendancy within federally recognized tribes, it varies greatly. Federal law says that tribes have the absolute ability to determine their own enrollment and sometimes that gets very, that gets put into the mix more than it needs to be. And you know some tribes, their enrollment is only open once a year. Maybe a couple times a year. Sometimes there's documents that aren't readily available at that time. So, there's a lot of reasons why a child may not get enrolled. There are some kids that are eligible, but some of the paperwork they probably will never get. So, there's a lot more to the question are they an Indian child then presents itself. And for the purposes here, you know the message is that we have a lot of children in our community that are not eligible for enrollment, but they have grown up on the reservation. That's where their family is. They've grown up in that tribal community and that's what they know and that's what they've learned and that's who they are. So, it's really vital that this discretionary participation is adhered to so that those children can be availed of the services that the tribe has to offer. Just because you're not enrolled in a tribe doesn't mean you don't benefit from the services that they provide to their community. And many times, you're not native at all and you still benefit from what that tribal community offers its residents. So, the tribe needs to be seen more as a resource. Having practiced ICWA primarily in southern California but also in other states on behalf of tribes, you know you really get a vast array of difference in how the tribe's received when you just when you come into the courtroom, and that really sets the tone for the relationship and for the exchange of information. You know, sometimes we come in and then we get kicked out. Sometimes we come in and you know they don't think that a tribal attorney is actually an attorney. There's a lot of hurdles to that participation and if someone comes in and says they're from the tribe you probably should just

take you know take their word for it. And take what you can to help your client like I was saying earlier to help the case. To help the department. To help probation. Because that's really what we're all supposed to be here for is the best interests of these children. So, tribes provide numerous, numerous services as governments. You know there's all the services that any government would provide to its citizens and those programs are based in the tribal culture. The tribal customs and traditions. And that's necessary, it's absolutely necessary to maintain that. Here there's some examples about why the participation's necessary you know what we talked about earlier you know the youth are being placed with family that aren't appropriate. You know the social workers can go out and they can interview the parents or the guardians whomever the child's being removed from. Or if the child got in trouble go talk to their parents. But you're not going to be able to go talk to all the aunts and uncles and all the grandparents. It's just it's not practical. But the tribes bring in that background. They work with these communities. We know who everybody is, and just because they can pass a background check doesn't mean they're the most appropriate place for that child. So, the tribes have much more insight and input to offer. As well as certain facilities you know we've had some that they don't let parents visit except for very distinct hours or they minimize extended family contact. And in our tribal communities that extended family contact can be vital to that youth's development and their ability to cope with what's going on. It could be your, you know 12th cousin three times removed I mean in our community we don't we don't look at it at that degree. It's a family member who provides something of value and emotionally to the child. And then of course there's other resources you know some tribes have more resources than others. But most tribes have something to provide as far as actual resources to their youth whether it's clothing school supplies what have you. And with the tribes I've worked for, you know that's vital we have children that have been in foster care for decades you know, and we see the same patterns where these kids are not getting what they need. And we understand resources is an issue across the board but if we can bring that in you know please understand that that's something that's there to help the child it's not, we're not here to be a hurdle we're here to be a partner. And I'm just going to talk real quick on this and then turn it over to Pamela to talk about tribal participation from her experiences but right now in San Diego, Judge Espana, presiding juvenile court judge, myself as well as Ann and Vida and some others have really started focusing on how as it says here, we can improve systems and collaboration between the tribes and the state and county who are our justice partners. Regardless of what tribes do whether it's with tribal courts or other resources that they develop on their reservations we're always going to be interacting with the state. And the state's going to be interacting with the tribes. So, we're trying to bring together you know child welfare and probation tribal in in non-tribal law enforcement and all those partners to see really where we can nail it down, so we cover every base and uncover every resource possible. So, it's really exciting project and we're looking forward to that growing so with that I'm going to turn it back over to Pamela.

PAMELA VILLESÉNOR: Thank you judge. And I just want to point out back to one of the slides from Judge Stout, and really highlight the fact that tribal participation is important to our communities. And it's measurable. So, we can prove it because research shows that cultural connections result in positive outcomes for tribal youth including resilience and self-reliance as

an adult. So, throughout the many different ways that tribes can participate at the end it always is about moving that needle for these youth involved in child welfare. Let's move on to the next slide.

JUDGE STOUT: I can jump in here and indicate what's been saying I think is critical that when we have tribal representatives in the courtroom, obviously, they need to be treated with dignity and respect. And I know for many people have been concerns about when ICWA applies dotting your "I"'s crossing your "t"'s all the technicalities which really, I think has been overstated and not that complex. But the idea here is it's not a burden. And whether we have formal tribal participation through ICWA or through discretionary participation and non-ICWA cases, it is an incredible benefit not only to the youth but to social services probation counsel and the court. All make much more informed decision making as I think we'll discuss briefly in the future here, it's much like court appointed special advocates the CASA volunteers bring to the court. They come with a unique and different perspective and of course here the tribal representatives it's like having an ICWA expert, a cultural expert in your courtroom. To provide input and really be prepared to fully address the tribal culture and to assist in maintaining that the child maintains their political, cultural, and social relationship with the tribe and tribal community. The relations the state has indicated in the slide there is committed to protecting. The foster care bill of rights I think now again as an argument supporting my belief the public policy favors tribal involvement. The foster care bill of rights protects the rights of all children in foster care to cultural connections and rights specifically protecting the rights of Indian children to access their tribes and tribal representatives regardless whether they're in foster care through dependency or delinquency. And again, these are cases drawing from these so-called foster care cases that draw, in my view, on public policy favoring tribal involvement. Sections 727.1 of the welfare and institutions code, again in the context when their child is at risk of entering foster care. There's a duty in the part of probation social services they're mandated to integrate into the case plan input from the child, child's family, and the child's identified tribe whether the Indian Child Welfare Act applies or not.

And if we can go to the next slide, and this again is where we're talking about the mandatory the mandate to get input from the child's identified tribe. You never know when that may occur in the case. The case may take a turn where you wouldn't have anticipated at the outset the child will be at risk of foster care. Again, I think it's again the mandatory inquiry provisions that are applicable to all cases so critical and particularly if you get down the road and have a child that may be at risk for foster care. But again, I think some of these statutes and the rules of court really promote strong public policy in favor of tribal participation even discretionary participation.

All right if we can go to the next slide please. In this situation we're again talking about, even if the notice and the other substantive provisions in the ICWA do not apply. We think you're arguing here that there's legal authority for the court the state court to authorize access and participation in non-ICWA cases.

Go to the next slide please. The juvenile court has broad authority to allow participation for the benefit of the child and family in dependency cases when ICWA does not apply because the

child's tribe is not federally recognized as we've discussed. The court still has discretion to allow tribal participation. In fact, welfare and institutions code section 306.6 specifically allows participation of unrecognized tribes upon the tribe's request in dependency proceedings. And section 306.6 specifically sets forth in detail how tribal representatives may participate with the court's approval. In those dependency non-ICWA cases, again because it technically requires a request on behalf of the tribe. Again, I'm going back to the importance of timely inquiry and notice even informal notice to the child's identified tribe so they can make that request and participate in the proceedings.

Next slide please. And again, notwithstanding the confidentiality provisions. Welfare and Institutions code sections 346 and 676 expressly authorize the judge or referee to admit persons that he or she deems to have a direct and legitimate interest in the particular case of the work of the court. Again, it doesn't matter if the tribe is federally recognized the child may not be eligible for enrollment and is not at risk of entering foster care. Again, for the many benefits we have by tribal participation, the court can make a finding that the tribe has a direct and legitimate interest in the case of that particular youth. And allow for admission. And I would argue in the court's discretion also to allow participation in 601 or 602 cases. We have section 306.6 that we are just talking about in dependency cases, but I think some somewhat of a casual equal protection argument, I think the court has that discretion to allow participation akin to 306.6 in juvenile justice cases.

Can you go to the next slide please? There are different approaches to obtaining tribal access to and participation in non-ICWA cases in your handouts you'll see a 2009 order that I prepared and for notice, access, and participation under section 676. Now that was at a time and situation where the Inyo Superior Court was only dealing with federally recognized tribes, and it was somewhat of a limited application as a standing order. But I would encourage you to take a look at the draft order for discretionary tribal participation in non-ICWA cases in your handouts. It's much broader than the 2009 standing order. This is kind of a sample draft that you can work with as a local rule accord or standing order to provide for discretionary tribal participation in all cases that we've been talking about where ICWA does not apply. And again, you need to have that early identification and then formal notice to the tribe. Again, it would include children from non-federally recognized tribes and dependency, and I think that notice then helps the tribe request participation under 306.6. And I think by analogy so to speak, the court has that discretion to allow that participation in 601 and 602 cases. And again, including lineal descendants who are part of a tribal community but not eligible for enrollment.

Let me go to the next slide please. You know you can talk with your presiding juvenile court judges and explore the possibility whether a local rule of court or standing order may be applicable. I initiated it back in 2009 because I was not getting the outcomes that I wanted to get in 602 cases in particular for native youth. We were failing those youth in many respects and as soon as we got tribal participation the youth just felt so much better more confident somebody who knew them. Knew their history. Knew their trauma. Knew their culture was there supporting them much like a CASA does or well much more so I guess in a way than the CASA does. And they brought services to the table that really helped the court make better informed decisions. But

if the court is not inclined to create a local rule or standing order for presumption for access and participation and discretionary cases, it can be sought on an individual case-by-case basis. County Counsel, district attorney, child's counsel, parents' counsel, can request access under sections 346 or 676 in the individual case. That court, I contend to do it on its own motion. And again, granting access because of that direct and legitimate interest in the particular case. And then the court I would contend, respectfully argue, that the court can grant participation akin to providing that type of participation in the case as set forth to 306.6.

Next slide please. So, I'm going to turn it back over to the other experts and I said no I'm not an expert I'm going to turn it over to the experts.

PAMELA VILLASENOR: Thank you judge. I really appreciate that thorough explanation of the different ways that discretionary participation works here in California. I'm just going to share a little bit of context for what it looks like to be from a tribe that lacks federal acknowledgement but who wants to participate in child welfare proceedings. So how I came to this work was my tribe hired me in 2018 to formally account for and monitor all of our tribal youth involved in child welfare. Up until that point we didn't have a specific system in place. It was more piecemeal together here and there. And what we uncovered was we had nearly three dozen children in dependency primarily in one county but some outside of that one county and this was eye-opening for us. Because for us for people who look at wellness as more than just this physical space. Wellness is also indicated by what's happening in our community. Talking about our social wellness. And when we know that we have these dozens of children in dependency and we're a small tribe. You know under a thousand people. That's a lot of children that we know of. That doesn't include all the children we don't know of. That doesn't include the juvenile justice involved youth. So, there are many other factors that we're looking at. But what we found was there wasn't this overarching way in which counties were dealing with children from non-recognized tribes. And it was also inconsistent across counties, between counties and how they were dealing with Native American youth who were from non-recognized tribes. But some of what that looks like in at least one county, is that without an ICWA finding our tribal children are not sent to a specialized social work ICWA unit, or ICWA specialist. And what that means in practice is that our children are receiving... and their families are receiving referrals and case work from child welfare workers who are largely unaware and inexperienced in working with tribal governments or working with Native American families. And so, there's not this same level of understanding of cultural connections or kinship practices or why we would want to make sure that children are attending tribal events going to ceremony and understanding who they are. But in terms of tribal participation ,you know it's a really heavy lift for tribes that lack acknowledgement. Because we lack acknowledgement, we don't receive the same type of federal funds or state funds that go to other tribes. We don't have the same rights to economic justice. In fact, the IRS doesn't even have a provision for us in tax code. We literally cannot legally exist within the United States legal paradigm. As a result, our tribes are often under-resourced, under-serviced, and we don't have the same type of people power to participate in all child welfare proceedings in all the ways that we would want to more effectively and efficiently. But in terms of how do we work with the system that we're in if 306.6 allows us to at least advocate? We want to know our children. We would like some type of notice, even if it's informal notice. Because

we still have to confirm our databases. Who are these children? Are they from our tribe? And at that point we find out what is it going to take to move the needle for best outcomes for this tribal youth. And in terms of reducing harm, you know staying connected to your kin is incredibly powerful. I have so many instances of how our children think it's important to them that they knew who they were. And I think we all see that with the rise of ancestry.com and 23andme there are hundreds of millions of dollars industries. People just want human connection. To know who they are. And tribes, we can give that to these children. We can tell them who they are. They can grow up with their identity. They can go to their coming-of-age ceremonies. There are no do-overs in our ceremonies. And so, having connection to the tribe is very important. And this is where I sometimes ask the judge or the referee to order that the children attend tribal events. That they go to ceremony. And so, even if they are put in foster care there's still this responsibility of them attending ceremony. They're learning songs. They're learning language. They're learning the other kind of cultural practices. It's something that they get then, that is irreplaceable for them. But in terms of policy and practice, opportunities like this to talk to all of you involved in the legal process is incredibly important. And it's also harm reduction. It's all of you understanding why tribes like ours want to participate and why that's important. But also understanding that it's a really uneven playing field for us. I would even argue that there are tremendous access to justice issues for non-recognized tribes. We don't have the type of funding to pay for attorneys to show up to court every day. That's incredibly burdensome. And you know, I've been totally yelled at. But Judge has certainly told me to go file some form. Okay, that's great. And I understand that exists. And that's necessary. However, when you're talking about tribes who as I've mentioned don't you can't even legally exist within the United States tax code, that we should just go file form. That means you need someone to go to the clerk's office, who has a bar card. And you have to have a bar card, you have to be an attorney. And for an attorney to do that for our tribe, I mean we have to pay them money. And we have to get that money somehow but so much about the story of non-recognized tribes is that we are not we do not have economic justice. We do not have access to the same level of financial resources here in California. And so, it is more helpful when judges are able to really uphold 306.6 and those provisions under it.

Let's go to that next slide. And so, I just want to show you these particular seven provisions. And I think they're incredibly important. And I feel that they're more powerful when the judge orders it. There have been moments where I have been, you know, present at a case and the judge of course lets us intervene and says if it doesn't explicitly say these seven provisions. And so then, when I ask for court reports or notices, if it's not on the minute order sometimes some child welfare workers or attorneys will interpret that as well, we don't have to give that to you. And so, this creates another layer of burden for non-recognized tribes to participate in these proceedings. And that really want to, because if we're there that means we've already jumped so many hurdles just to be in front of you, just to participate. Knowing that we have much fewer resources and often infrastructure but we're still making, you know, the effort to be there. So, an important part is one of course being present and addressing the court. I've never been kicked out of a proceeding, so I see that as a win. But also having notices, when are these hearings happening. We really like to have court reports because if we're being allowed to intervene and we want to

make recommendations for removal or regarding placement we should have all the facts of the case. And understand what's happening. And most importantly, we want to know about the wellness of our tribal youth. Whatever the allegations are, we want to know are they receiving services? Are they in individual counseling? How else can we support this child, or these children going through this turbulent time in their life? And we also want to make sure that we have other options to participate. As I mentioned, ensuring that the children are attending the ceremonies, or a big annual tribal event so that they understand who they are and have a connection to these families. I think what's one that's detrimental sometimes is these children turn 18 return to our communities, but people don't know them. And they don't know their responsibility back to the tribe. They don't know protocol. They don't know necessarily, what is responsible behavior at events. And so, learning your community responsibility as a child is incredibly important for native American people. And to our tribes who have a special connection to place and community.

Let's go to the next slide. There are so many benefits to tribal participation. And some of those are being able to have ceremony where you don't have any do-overs once you become an adult. In understanding who your people are. As has already been mentioned, you know, we don't use these European notions of third cousin twice removed. I don't even know how that works. We don't talk about that stuff. But we do talk about, "oh that's your cousin." Or "Go say hello that's your auntie", even though it may not be biologically their auntie in in the American sense. But it's important that these children understand their connections because it's also going to help them maneuver in the space of tribal politics of tribal governance should they ever want to go back. And of course, there are a number of youths from tribes throughout this, throughout the United States who were foster youth and grew up to become elected officials in their tribal government. And that's incredibly powerful, and that's the type of resilience we need to encourage, and we need to nurture as our children continue to move forward in child welfare proceedings and I know that judges wanted to contribute to this slide as well.

JUDGE LOMAYESVA: Thank you Pamela. I think I'll just add that, again it goes back to what is best for that child. And as has been mentioned, many native youths that spend a lot of time in the foster care system, that aren't surrounded by the benefits of the tribe or that are able to go to tribal events or to see their family. Despite all those hurdles and roadblocks that they go through while they're in the system, they still end up coming back at some point as adults. And they eventually find their roots. They find their heritage. And it's so, so hard for them to integrate back into the community. And this isn't just some, you know, idea. This is exactly what happened with all the children that were removed to boarding schools when the boarding school system first began. Those native youth were caught in between their societies and they still weren't accepted in the larger American society because they were native. But when they went back home, they didn't know how to do things that were part of who they are. So, they were made fun of for that. Oh, you're not even native anymore. You don't speak your language anymore. So, there is a lot to be said about looking down the road as to what's going to become of these youth if they don't have some level of tribal participation. And what we hope will be the case is that there's more discussion between I mean most of the discussion I mean this happens outside of the courtroom. All the work you know happens out there when the department goes on

visits invite the tribe. Ask what they know about what's going on with this family. Let the tribe take the youth maybe with their family to a tribal event. It doesn't all have to be falling on the department, or probation or whoever it may be. The tribe is here to help. And ultimately you know as Pamela was saying you know when these youth come back, and they know that the tribe was there for them they come back as a more a happier person a more grounded person more stable and more likely to succeed. And I mean I think that's what we all want for all foster youth. Is that they're going to be able to succeed out there. It's enough that they carry with them you know that experience of being in the system combined with the historical trauma we've talked about, but if we can do anything to prevent it then why would we not do that? So, you know the benefits of tribal participation go well beyond the youth during their time they're in the system. it's for a lifetime.

JUDGE STOUT: Absolutely. And I would also encourage consideration of involvement with the tribal courts and the programs they may offer. For example, the Inyo Superior Court and I know Judge Suzanne Rizo, is on the meeting here today. Along with the Bishop Paiute Tribal Court and the Inyo Superior Court, there's a, starting this month I think they have a great collaborative effort where youth coming to the state court's 602 delinquency proceedings will be required as a term of probation, if you will, to participate in the tribal court's juvenile healing the wellness court. And again, we are identifying these youth, whether it's from student attendance review boards, probation, informal intake, or as part of 601 or 602 process. Realizing that the tribal court program can provide services. Culturally competent services to these youth, native youth, and again hopefully have much better outcomes and there are many services that you'll see in the slide that just popped up that can be available to assist in producing better outcomes for these youth. The tribal court may have a diversion program that's native specific. We talked about the healing the wellness court and of course the mental health services, educational support, Indian health project. Many of these youth need trauma focus cognitive behavioral therapy and dealing with trauma grief and other issues. Alcohol and a drug treatment. And if placement is necessary, assisting in locating and perhaps obtaining funding for Native American residential treatment. Obviously, the outcomes for these youth that do need placement they do far better when we ensure that they're receiving treatment and services in the Native American program. Let me turn it back over here.

JUDGE LOMAYESVA: Yeah, and going back to, you know, some of the tribal programs that are available. There are many, many tribal courts in California today that were not here ten even five years ago. And certainly not on the level that we've seen. Across California there are many tribal courts engaging with counties on issues of joint jurisdiction, diversion programs, some great, great partnerships happening between our California county and our tribes and I can understand what Judge Stout was saying. You know let's be creative. Let's work together to do what's best for the youth. With the Intertribal Court we've been working very closely with the over a dozen tribes that we have to be able to divert our youth on the reservation into our youth peer court which is also a form of a wellness court. And eventually we hope to also divert youth just any from anywhere within the county. So, these courts are here. They provide a tremendous service. And there's so many ways that that we can work on those together. These programs have direct access to Indian health centers that offer all of the services that that were mentioned here.

And really are wrap around services involving the parents and the guardians as well. And so that's just something that I think all of our courts are going to see more and more often. As tribes really develop this area. So, it's really exciting and it's just going to do that much more to help in the partnership.

JUDGE STOUT: I know in the juvenile healing to wellness courts, the cooperation AND collaboration between the county probation officer and the tribal juvenile probation officer. They seem to be joined at the hip. It is working exceedingly well. Identifying native youth. And if they have substance abuse issues, addiction issues, are getting them into culturally appropriate, collaborative justice court or drug/alcohol court.

PAMELA VILLASENOR: And I just want to add as we look at all these types of tribal services and cultural activities that research also shows that participation in these types of activities reduces the numbers of re-entry into dependency and public health systems. And that's incredibly important, because we want to increase resiliency and self-reliance and what better way to then take advantage of the resources out there and for their tribes who are saying they want to stay connected with the youth.

VIDA CASTENADA: Yeah, you all did a fabulous job. Thank you. Thank you. There were some questions in the chat box about our San Diego tribal justice collaboration and feel free to reach out to Ann or myself or both of us for any follow-up questions you may have about some of the information in today's webinar. If you would like to reach out to our presenters let us know. Does anybody have any further comments or any more questions in the chat?

JUDGE STOUT: I just thank everybody for participating. I think it's tremendous to see this turn out and people are concerned and interested here and finding perhaps some new and different ways to promote better outcomes for our youth.

JUDGE LOMAYESVA: I agree thank you everyone. I look forward to any questions anyone has and just here as a resource and just working together in the counties that we serve so I really appreciate everyone's interest in this topic as well. Thank you.

VIDA CASTANEDA: Okay well I believe that concludes today's webinar. As I mentioned for any follow-up questions just reach out to Ann or myself and we'd be happy to help you. Thank you everyone.