

Qualified Expert Witnesses in Indian Child Welfare Cases

What Judges & Attorneys Need to Know

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Land Acknowledgment

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.

Objectives for This Training

Understand

Understand qualifications, requirements and selection of a QEW on an ICWA case;

Recognize

Recognize the purpose, scope and content of QEW testimony;

Understand

Understand what a QEW should be doing to develop their opinion;

Understand

The roles & responsibilities of the county, attorneys and the court in relation to QEW requirements and testimony;

Recognize

Recognize the legal rights of all children in dependency to maintain their cultural identity & social, cultural, political & familial connections; and

Understand

Understand and respect tribal sovereignty.

The Indian Child Welfare Act:

Background & Purpose

ICWA: What is it?

- ICWA stands for the *Indian Child Welfare Act* 25 U.S.C. § 1901 *et seq.*
- ICWA is a federal law enacted by Congress in 1978 in response to evidence of high rates of removals of Indian children from their families and communities.

ICWA'S Purposes

To protect the best interests of Indian children and

To promote the stability and security of Indian tribes

ICWA & Related Law

Federal

- 25 U.S.C. § 1901 et seq.
- 25 C.F.R. § 23.1 et seq.
- BIA Guidelines for State Courts
- Cases
 - U.S. Supreme Court (2)
 - 9th Circuit Court of Appeal

State Law

- 2018: AB 3176 (conforms WIC to 25 C.F.R. § 23.1 et seq.)
- 2010: AB 1325 (Tribal Customary Adoption)
- 2007: SB 678 (incorporates ICWA into Welf. & Inst. Code, Fam. Code, Prob. Code)
- California Rules of Court, rules 5.480-5.488
- Cases
 - CA Supreme Court (3)
 - Court of Appeal

Purpose & Legal Requirements of ICWA Qualified Expert Witness Testimony

Purpose of QEW Requirement:

- ▶ ICWA is a remedial statute
- ▶ Congress found:
 - ▶ That an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies
 - ▶ That state courts have often failed to recognize the cultural and social standards prevailing in Indian communities and families
- ▶ ICWA established minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster and adoptive home which will reflect the unique values of Indian culture

Comment from the Court of Appeal:

" '[K]nowledge of tribal culture and childrearing practices will frequently be very valuable to the court' in determining the likely impact of parental custody under the standards of the ICWA because '[s]pecific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.' "

In re Brandon T. (2008) 164 Cal. App. 4th 1400, 1413.

Detriment
Finding for
Removal: 25
USC §
1912(e)

“No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, *including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

WIC §§ 361(c)(6) and 361.7(c)

Clear & Convincing Standard

“Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt.”

In re Isayah C. (1st Dist., 2004) 118 Cal. App. 4th 684, 695.

Detriment Finding for TPR: 25 USC § 1912(f)

“No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, *including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

WIC § 366(c)(2)(B)(ii); Rule 5.486(a)(2)

25 CFR §
23.121(a)
and (b)

- ▶ Restates 25 USC § 1912(e) and (f)
- ▶ Testimony of “one or more expert witnesses” is required
 - ▶ Consistent with former BIA Guidelines and *In re Brandon T.* (2008) 164 Cal. App. 4th 1400, 1411.

The ICWA Detriment Finding

- This finding is commonly referred to as the “ICWA detriment finding”
 - *In re M.B.* (2010) 182 Cal.App.4th 1496, 1502.
 - *In re N.S.* (2020) 55 Cal. App. 5th 816, 852.

Detriment Finding at Disposition: WIC § 361(c)(6)

A dependent Indian child shall not be taken from the physical custody of his/her parents or Indian custodian *with whom the child resides at the time the petition was initiated*, unless the court makes the necessary ICWA detriment finding supported by testimony of QEW.

... so ICWA applies even when child is placed with non-custodial or non-offending parent.

► Food for Thought:

When agency recommendation is for child to remain with the parent(s) or Indian custodian, consider:

A "child-custody proceeding" includes any action "that *may* culminate in" a foster care placement.

25 C.F.R § 23.2

Detriment Finding at Disposition (cont'd):

(A) Parents/Indian custodian/Tribe may waive requirement for evidence as to detriment only if the court is satisfied that the party has been fully advised of the requirements of ICWA and has knowingly, intelligently, and voluntarily waived them.

(B) Failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the general removal standards of section 361, will not support an order for removal in the absence of the ICWA detriment finding.

WIC §§ 361(c)(6)(A)-(B)

When considering removal of custody or TPR, court must:

(1) require that a QEW testify as to the detriment finding; and

(2) consider evidence concerning the prevailing social and cultural standards of the child's tribe, including that Tribe's family organization and child-rearing practices

WIC § 224.6(b)

Declaration in Lieu of Testimony:

The court may accept a declaration or affidavit from a QEW in lieu of testimony only if:

The parties have so stipulated in writing; and

The court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.

WIC § 224.6(e)



Examples of Court Forms (Rev'd 10/1/21)

JV-320, Orders Under
WIC 366.24, 366.26,
727.3, 727.31
(Mandatory)

JV-421, Dispositional
Attachment –
Removal from
Custodial Parent –
Placement With Non-
Parent (Optional)

Address ICWA
Detriment Findings

Detriment Finding at Review Hearings

At the 6-month review hearing and subsequent 12-, 18- and 24-month permanency hearings, the court *must* order return unless it finds “by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child” (§§ 366.21, 366.22, 366.25)

In case of an Indian child, shouldn't the ICWA detriment finding apply to continue foster care placement?

In re A.C. (2015) 239 Cal. App. 4th 641, 656 [Court of Appeal assumed ICWA detriment finding applied at 12-mo. review]

Causal Relationship Required:

25 CFR § 23.121(c)

“For a foster-care placement or termination of parental rights, the evidence must show a *causal relationship* between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.”

Insufficient Evidence:

25 CFR § 23.121(d)

“Without a causal relationship ... evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.”

What the Judicial Officer Should be Looking for Within the QEW Testimony to Make Legal Findings and Orders



REPORT
CONTENTS –
CHECKLIST



REQUIRED
TIMELINE



REQUIRED
FINDINGS AND
ORDERS



REQUESTS FOR
CONTINUANCE

Selecting & Qualifying the ICWA Qualified Expert Witness

Who May
Serve as a
QEW?

28

25 CFR §
23.122;
WIC § 224.6

Must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and

Must be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe

Who May Serve as a QEW? (cont'd)

Child's Tribe may designate a person as being qualified to testify to the prevailing social and cultural standards of the Tribe

Court or any party may ask child's Tribe or BIA for help locating a QEW

Employee of agency or person recommending foster care placement or TPR may not serve as QEW

Persons Most Likely to Meet Requirements for a QEW:

- (1) a person designated by the child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Tribe
- (2) a member of the child's Tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices
- (3) an expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the child's Tribe.

WIC § 224.6(c)

Contrast with Former Law:



Former BIA Guidelines recognized as QEW:

"A professional person having substantial education and experience in the area of his or her specialty."



Leading Court of Appeal to conclude that expertise in tribal culture and childrearing practices was not required of a QEW

In re Krystle D. (1994) 30 Cal. App. 4th 1778, 1802.

How to Locate QEW:

- ▶ Always check with the child's Tribe first
- ▶ Only the Tribe can verify that the person is familiar with the Tribe's cultural and social standards
- ▶ If Tribe does not have a designated QEW, Judicial Council provides a regional list at <https://www.courts.ca.gov/8105.htm>
 - ▶ Consult with Tribe before finalizing selection



Other Uses for QEW:

- ▶ Active efforts finding
- ▶ Finding that prevailing social and cultural standards of child's tribe have been applied in meeting placement preferences
- ▶ Finding of good cause to deviate from placement preferences
- ▶ Findings involving law or custom of child's Tribe
 - ▶ "extended family member"
 - ▶ legal custody ("Indian custodian) or adoption ("parent")

QEW Responsibilities

What the QEW Needs:

- ▶ Copies of petition, all agency reports and attachments, delivered service logs, findings and orders
- ▶ Sufficient time to review the materials and conduct interviews with social worker, Tribal representative, parents/Indian custodians, child and possibly providers
- ▶ Advance notice if declaration and/or live testimony will be required
- ▶ Service agreement and payment

Active Efforts Considerations:

- ▶ Is the likelihood of serious physical or emotional damage due to lack of active efforts?
- ▶ Active efforts require early and ongoing, meaningful collaboration and consultation with the child's Tribe, including selection of QEW and response to QEW's conclusions.

Ethical Problem:

- The QEW your agency retained concludes that continued custody by the parent is not likely to result in serious emotional or physical damage to the Indian child.
- Or QEW supports detriment finding but concludes active efforts not made.
- What is the appropriate response – for social worker, County Counsel, court?

Best Practice



Use Legal findings and orders chart as a guide



Clear documentation



Live testimony preferable to written declaration



The QEW should be looking at active efforts, placement and causal relationship



Departments should consider listing expectations of QEW (ie, information gathering, who to speak to etc)

Questions You Should Be Thinking About

- ▶ If the QEW doesn't really do an independent evaluation or investigation – what is the foundation for their opinion?
- ▶ What parents counsel should be asking – how many times has the expert testified on behalf of the county?
- ▶ Have they ever disagreed with the county's recommendation? How often?
- ▶ How much are they paid for their testimony?

Questions You Should Be Thinking About

- ▶ What did the QEW do in this specific case to reach their opinion?
- ▶ What documents did they review?
- ▶ What people did they speak to? How many drafts of their report?
- ▶ Were drafts reviewed by county counsel and/or the agency?
- ▶ Did their opinion/report change at all in response?
- ▶ How did the QEW come to their conclusion?

Conclusion

Thank you for attending today's webinar. If you have questions or comments, please contact:

Ann Gilmour: ann.gilmour@jud.ca.gov or

Vida Castaneda: vida.castaneda@jud.ca.gov

25 U.S.C. § 1912. Pending court proceedings

* * *

(e) Foster care placement orders; evidence; determination of damage to child No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

* * *

25 C.F.R. Part 23

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in [paragraph \(c\)](#) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

§ 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

Guidelines for Implementing the Indian Child Welfare Act **December 2016 : U.S. Department of the Interior Office of** **the Assistant Secretary – Indian Affairs Bureau of Indian** **Affairs**

G.2 Qualified expert witness

Guidelines: Qualified expert witnesses must have particular expertise. The rule requires that the qualified expert witness must be qualified to testify regarding whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. This requirement flows from the language of the statute requiring a determination, supported by evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.¹ Congress noted that “[t]he phrase ‘qualified expert witness’ is meant to apply to expertise beyond normal social worker qualifications.”²

Qualified expert witness should have knowledge of prevailing social and cultural standards of the Tribe. In addition, the qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Indian child’s Tribe. In passing ICWA, Congress wanted to make sure that Indian child-welfare determinations are not based on “a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.”³ Congress recognized that States have failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.⁴ Accordingly, expert testimony presented to State courts should reflect and be informed by those cultural and social standards. This ensures that relevant cultural information is provided to the court and that the expert testimony is contextualized within the Tribe’s social and cultural standards. Thus, the question of whether the continued custody of the child by the parent or Indian custodian is likely

¹ 25 U.S.C. 1912(e), (f).

² H.R. Rep. No. 95-1386, at 22.

³ Holyfield, 490 U.S. at 36 (citing H.R. Rep. No. 95-1386, at 24).

⁴ See 25 U.S.C. 1901(5).

to result in serious emotional or physical damage to the child is one that should be examined in the context of the prevailing cultural and social standards of the Indian child's Tribe.

The rule does not, however, strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. The rule recognizes that there may be certain circumstances where a qualified expert witness need not have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe in order to meet the statutory standard. For example, a leading expert on issues regarding sexual abuse of children may not need to know about specific Tribal social and cultural standards in order to testify as a qualified expert witness regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child. Thus, while a qualified expert witness should normally be required to have knowledge of Tribal social and cultural standards, that may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding. A more stringent standard may, of course, be set by State law.

Separate expert witnesses may be used to testify regarding potential emotional or physical damage to the child and the prevailing social and cultural standards of the Tribe.

A person testifying to the prevailing social and cultural standards of the Indian child's Tribe must be knowledgeable and experienced in the Tribe's society and culture. The Indian child's Tribe may designate a person as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

Assistance in locating a qualified expert witness. The rule encourages the court or any party to request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses. The rule also allows a Tribe to designate a person as being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

Social worker regularly assigned to the child. The qualified expert witness should be someone who can provide a culturally informed, outside opinion to the court regarding whether the continued custody by the parent is likely to result in serious emotional or physical harm to the child. By imposing the requirement for a qualified expert witness, Congress wanted to ensure that State courts heard from experts other than State social workers seeking the action before placing an Indian child in foster care or ordering the TPR. Therefore, the regulation provides that the social worker regularly assigned to the Indian child (i.e., the State agency seeking the action) may not serve as a qualified expert witness in child-custody proceedings concerning the child. If another social worker, Tribal or otherwise, serves as the qualified expert witness, that person must have expertise beyond the normal social worker qualifications.⁵

Citizen of Tribe. There is no requirement that the qualified expert witness be a citizen of the child's Tribe. The witness should be able to demonstrate knowledge of the prevailing social and cultural standards of the Indian child's Tribe or be designated by a Tribe as having such

⁵ See H.R. Rep. No. 95-1386, at 22

knowledge. In some instances, it may be appropriate to accept an expert with knowledge of the customs and standards of closely related Tribes. Parties may also contact the BIA for assistance.

Number of expert witnesses. ICWA and the rule do not limit the number of expert witnesses that may testify. The court may accept expert testimony from any number of witnesses, including from multiple qualified expert witnesses.

Familiarity with the child. It is also recommended that the qualified expert witness be someone familiar with that particular child. If the expert makes contact with the parents, observes interactions between the parent(s) and child, and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court.

See 81 FR 38829-38832 (June 14, 2016) for additional information on qualified expert witnesses.

California Welfare and Institutions Code

§ 224.6. Testimony of qualified expert witnesses; qualifications; participation at hearings; written reports and recommendations

(a) When testimony of a "qualified expert witness" is required in an Indian child custody proceeding, a "qualified expert witness" shall be qualified to testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and shall be qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. A person may be designated by the child's tribe as qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. The individual may not be an employee of the person or agency recommending foster care placement or termination of parental rights.

(b) In considering whether to remove an Indian child from the custody of a parent or Indian custodian or to terminate the parental rights of the parent of an Indian child, the court shall do both of the following:

(1) Require that a qualified expert witness testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(2) Consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices.

(c) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(1) A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.

(2) A member or citizen of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.

(3) An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.

(d) The court or any party may request the assistance of the Indian child's tribe or Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

(e) The court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.

§ 361.31. Placement of Indian children; considerations; priority of placement in adoptions; departure from placement preferences; record of foster care

(f) The prevailing social and cultural standards of the Indian community in which the parent or extended family members of an Indian child reside, or with which the parent or extended family members maintain social and cultural ties, or the prevailing social and cultural standards of the Indian child's tribe shall be applied in meeting the placement preferences under this section. A determination of the applicable prevailing social and cultural standards may be confirmed by the Indian child's tribe or by the testimony or other documented support of a qualified expert witness, as defined in subdivision (c) of Section 224.6, who is knowledgeable regarding the social and cultural standards of the Indian community.

§ 361.7. Termination of parental rights or involuntary placement of Indian children; standards

* * *

(c) A foster care placement or guardianship shall not be ordered in the proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, as defined in Section 224.6, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

California Rules of Court

Rule 5.485. Placement of an Indian child

(a) Evidentiary burdens In any child custody proceeding listed in rule 5.480, the court may not order placement of an Indian child unless it finds by clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause the Indian child serious

emotional or physical damage and it considers evidence regarding prevailing social and cultural standards of the child's tribe, including that tribe's family organization and child-rearing practices.

(1) Testimony by a "qualified expert witness," as defined in Welfare and Institutions Code section 224.6, Family Code section 177(a), and Probate Code section 1459.5(b), is required before a court orders a child placed in foster care or terminates parental rights.

(2) Stipulation by the parent, Indian custodian, or tribe, or failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the person or tribe has been fully advised of the requirements of the Indian Child Welfare Act and has knowingly, intelligently, and voluntarily waived them. Any such stipulation must be agreed to in writing.

(3) Failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the removal standards of Welfare and Institutions Code section 361, will not support an order for placement absent the finding that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage.

CALIFORNIA JUDGES BENCHGUIDE

THE INDIAN CHILD WELFARE ACT



CALIFORNIA INDIAN LEGAL SERVICES

VIII. Evidentiary Requirements

A. Specific Evidence Required

The ICWA established two specific evidentiary requirements for both involuntary foster care placements and actions terminating parental rights:

- (1) A finding that “the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child,” supported by the testimony of a “qualified expert witness”; and,
- (2) Proof that “active efforts [were] made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts [were] unsuccessful.”¹

The ICWA does not define the phrase “continued custody.” However, one California court has held that its meaning is broader than simply physical custody, and that the ICWA’s requirements must be met even if the parent has no physical custody of the Indian child and only occasional contact with the child.²

The phrase “breakup of the Indian family” means “a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child’s emotional or physical health.”³

The ICWA applies these two requirements to all actions within its definition of “foster care placement” (placements in foster care homes or institutions, guardianships, and conservatorships,” when the parent or Indian custodian cannot have the child returned upon demand) and all actions “resulting in the termination of the parent-child relationship.”⁴ The rights afforded to parents under the ICWA extend to “any biological parent or parents [whether Indian or non-Indian] of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.”⁵

In order to ensure better compliance with the ICWA, California incorporated the above requirements for active efforts and expert witness testimony into state laws and Rules of Court addressing involuntary foster care placements, guardianships, custody awards to a non-parent when a parent objects, conservatorships and terminations of parental rights.⁶

¹ 25 U.S.C. §§ 1912(d)-(f).

² *In re Crystal K.* (1990) 226 Cal.App.3d 655, 667-668, *cert denied* (1991) 520 U.S. 862.

³ BIA Guidelines § D.2 Commentary; *see In re Crystal K.* (1990) 226 Cal.App.3d 655, 667.

⁴ 25 U.S.C. § 1903(1).

⁵ 25 U.S.C. § 1903(9); *In re Riva M.* (1991) 235 Cal.App.3d 403, 411, n.6.

⁶ Fam. Code §§ 177(a), 3041(e), and 7892.5; Prob. Code § 1459.5; Welf. & Inst. Code §§ 224.6(b), 361(d), 361.7, and 366.26(c)(2)(B); Cal. Rules of Court, rule 5.484(a).

B. Likelihood of Serious Emotional or Physical Damage to Child

1. Selection of an Expert Witness

The ICWA itself does not establish precise qualifications for an expert witness. California law provides a list of non-exclusive examples of persons who may qualify as expert witnesses: “a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder.”⁷ Subsection (c) of the same section also provides a list of the characteristics of those most likely to qualify as expert witnesses:

- (1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- (2) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- (3) A professional person having substantial education and experience in the area of his or her specialty.

The expert witness cannot be “an employee of the person or agency pursuing or recommending foster care placement or a termination of parental rights.”⁸ In other words, a county social worker is prohibited from acting as the expert witness. If there is difficulty in locating a qualified expert witness, the court or party responsible for arranging for such testimony is encouraged to consult with the Indian child’s tribe or the BIA office which services that tribe.⁹

While the exact wording of the ICWA calls for “qualified expert witnesses,” implying testimony by multiple expert witnesses, California courts have held that only one expert witness is required under federal rules of construction.¹⁰

Technically, the expert witness’ testimony is only required to address the question of whether “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”¹¹ Thus, some California courts have held that an expert witness does not necessarily need to possess special knowledge of or experience with the child’s Indian tribal customs and culture.¹²

⁷ Welf. & Inst. Code § 224.6(a).

⁸ Welf. & Inst. Code § 224.6(a).

⁹ Welf. & Inst. Code § 224.6(d); BIA Guidelines § D.4 and Commentary thereto.

¹⁰ 1 U.S.C. § 1 (“words importing the plural include the singular”); *In re Riva M.* (1991) 235 Cal.App.3d 403, 411; *In re Brandon T.* (2008)164 Cal.App.4th 1400, 1411-1412; BIA Guidelines § D.4.

¹¹ 25 U.S.C. § 1912(e), (f); Welf. & Inst. Code §§ 224.6(b)(1), 361.7(c).

¹² *In re Krystle D.* (1994) 30 Cal.App.4th 1778, 1801-1803 (expert witness is not required to have “expertise in Indian matters.” Note, however, that the appellate court also acknowledged that the trial court “had the benefit of testimony of experts in tribal customs and childrearing practices” from additional expert witnesses); *In re M.B.* (2010) 182 Cal.App.4th 1496, 1503-1505 (“The purpose of the Indian expert’s testimony is to offer a cultural perspective on a parent's conduct with his or her child, to prevent the unwarranted interference with the parent-child relationship due to cultural bias,” but such cultural perspective is not required where the parental behavior at issue

However, there are compelling reasons for the court to ensure that an expert witness does possess knowledge or experience specific to the Indian child's tribe. Foremost, perhaps, is the fact that an Indian child's connection to his or her tribal community and culture is a relationship which the ICWA was intended to protect, and which the State of California has firmly declared its own commitment to protecting.¹³

An Indian child's membership in a tribe (or eligibility for membership) typically depends upon the membership of the child's parent in that same tribe. When the parent-child relationship is severed, an Indian child often loses his or her right to membership, which in turn leads to further losses: for example, the loss of regular contact with the tribal community, of the ability to take part in cultural events, of access to tribal sources of knowledge about the tribe's history and traditions, of the right to vote in tribal elections, and of the right to participate in tribal government. These are equally as important as (if not more important than) access to economic, educational, and/or health benefits that an Indian child's tribe may provide to its members, which the child will also be at risk of losing with the loss of his or her right to membership.

Such barriers to an Indian child's ability to form a relationship with his or her tribe, and to understand and value his or her Indian heritage, are precisely why many Indian tribes prefer long-term foster care or guardianship to adoption. They are also why California provides its courts with the discretion to determine that termination of parental rights may not be in an Indian child's best interest if it would result in a substantial interference with the child's connection to or membership in his or her tribe, or when the child's tribe identifies guardianship, long-term foster care, or other permanent living arrangement as the preferred alternative to adoption.¹⁴ Use of an expert witness familiar with the Indian child's tribe can provide the court with valuable knowledge about the workings of the tribe, and what present or future losses the child may sustain if parental rights are terminated.

An expert witness with knowledge or experience specific to the Indian child's tribe also allows the court to satisfy the requirement of considering evidence of "the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices," which is mandatory in addition to the testimony of an expert witness.¹⁵

There are decisions in other states suggesting that if cultural bias issues exist, an expert witness must have special knowledge regarding the placement of Indian children, and failure of the court to inquire about such special knowledge may result in a reversal of the proceeding.¹⁶

(father's prior conviction for molestation of minor, and mother's subsequent exposure of child to father in spite of risk of sexual abuse) does not need to be placed in a cultural context in order to find a risk of serious harm).

¹³ 25 U.S.C. §§ 1901, 1902; Fam. Code § 175(a), (b); Prob. Code § 1459(a), (b); Welf. & Inst. Code § 224(a), (b); see *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 37 quoting House Report, at 23, U.S.Code Cong. & Admin.News 1978, at 7546 ("The ICWA thus, in the words of the House Report accompanying it, 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society'").

¹⁴ Welf. & Inst. Code § 366.26(c)(1)(B)(vi); Cal. Rules of Court, rule 5.485(b).

¹⁵ Welf. & Inst. Code § 224.6(b)(2); Cal. Rules of Court, Rule 5.484(a).

¹⁶ See, e.g., *In re D.S.* (Ind. 1991) 577 N.E.2d 572, 575-576; *In re N.L.* (Okla. 1988) 754 P.2d 863, 867-868.

Arguments against the requirement of a qualified expert witness with special knowledge of the Indian child's tribe are often based on the presentation of behavioral deficiencies (such as personality disorders, poor judgment, neglectful living circumstances, poor understanding and awareness, high child abuse potential, or limited parenting skills) as personality or functional problems that have nothing to do with cultural heritage. Similarly, a parent's lack of motivation towards remedial/rehabilitative services and/or negative perception of such services may be identified as problems unrelated to cultural bias.

However, it cannot be definitively said that characteristics such as personality disorder, poor judgment, neglectful living circumstances, lack of motivation, etc., have nothing to do with cultural heritage. Indeed, these conclusions are often largely driven by the cultural heritage of both the evaluator and the client.¹⁷ Unfamiliarity with culture and community standards can result in misdiagnosis and tragic losses of Indian children from their Indian families and tribes.¹⁸

The United States Supreme Court, quoting from testimony offered in support of the ICWA, has noted the following:

One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing. Many of the individuals who decide the fate of [Indian] children are at best ignorant of [tribal] cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.¹⁹

In the same vein, the BIA Guidelines state the following:

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were

¹⁷ See, McGoldrick, *Ethnicity and Family Therapy* (6th ed. 1986), 6. ("Problems (whether physical or mental) can be neither diagnosed nor treated without understanding the frame of reference of the person seeking help as well as that of the helper."). See, Sue, *Counseling the Culturally Diverse* (1981), 27-28 (Relative to appellant's noted disinterest in insight and unreceptiveness to counseling referrals) "Racial or ethnic factors may act as impediments to counseling. Misunderstandings that arise from cultural variations in communication may lead to alienation and/or inability to develop trust and rapport. . . . This may result in early termination of therapy." Minorities, including Native Americans, have been documented to terminate counseling after only one session at a rate of 50% as compared to a 30% rate for Anglos. "Counselors who believe that having clients obtain insight into their personality dynamics and who value verbal, emotional, and behavioral expressiveness as goals in counseling are transmitting their own cultural values. This generic characteristic of counseling is not only antagonistic to lower-class values, but also to different cultural ones." *Id.* at 38.

¹⁸ Jewelle Gibbs, *Children of Color: Psychological Interventions with Culturally Diverse Youth*, 61 (2003) (Studies of American Indian children during diagnostic interviews have identified behaviors that may negatively affect assessment outcome: nonassertive, non-spontaneous, and soft-spoken verbal interaction; limited eye contact; discomfort and decreased performance on timed tasks; and, selective performance of only those skills that contribute to the betterment of the group).

¹⁹ *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 34-35, quoting Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978).

removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be – without any testing of the implicit assumption that only a family that conformed to the stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress.

[K]nowledge of tribal culture and child rearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior – which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.²⁰

If personal appearance by an expert witness having knowledge of or experience with the Indian child's tribe is difficult, note that the court may also accept a declaration or affidavit from the witness in place of testimony, so long as all parties stipulate to such in writing, and so long as the court determines that the stipulations were made knowingly, intelligently, and voluntarily.²¹

While the expert witness requirement is not constitutionally compelled and therefore may be waived expressly or by failure to object at the trial court level, a stipulation or failure to object constitutes a waiver only if the court is satisfied that the party has been fully advised of the requirements of the ICWA, and has knowingly, intelligently and voluntarily waived them.²² Parents cannot waive the tribe's right to expert witness testimony, and the tribe cannot waive the parents' rights to the same.²³ Thus, where multiple parties are involved in an ICWA case, the requirement for expert witness testimony will remain unless all parties entitled thereto each make a knowing, intelligent, and voluntary waiver.

2. Two Standards of Proof

In support of a finding “that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child,” the Act requires that there must be clear and convincing evidence.²⁴ For all actions which result in termination of the parent-child relationship, the Act's standard of proof in support of the same determination is elevated to evidence beyond a reasonable doubt.²⁵

Again, California has incorporated these same standards into state laws addressing involuntary foster care placements, guardianships, conservatorships, custody placements with a non-parent over the objections of a parent, freeing a child from the custody and control of one or both parents, terminations of parental rights, and adoptive placements.²⁶

²⁰ BIA Guidelines §§ D.3 and D.4, Commentary.

²¹ Welf. & Inst. Code § 224.6(e).

²² Welf. & Inst. Code § 361(c)(6)(A); Cal. Rules of Court, rule 5.484(a)(2); *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707-708.

²³ *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 706-707.

²⁴ 25 U.S.C. § 1912(e).

²⁵ 25 U.S.C. §§ 1903(1), 1912(f).

²⁶ Fam. Code §§ 177, 3041(e), and 7892.5(b); Prob. Code § 1459.5; Welf. & Inst. Code §§ 361(c), 361.7(c), and 366.26(c)(2)(B)(ii); Cal. Rules of Court, rules 5.480, 5.484, 5.485.

The BIA Guidelines strongly suggest that the evidence justifying the removal of Indian children from their families must not be based on socio-economic conditions. Cognizant of the rationale and historical basis for the ICWA, the BIA Guidelines explain that evidence of “community or family poverty, crowded or inadequate housing, alcohol abuse or non-conforming social behavior” is insufficient to support foster care placement or termination of parental rights.²⁷

The ICWA provides that, where a state or federal law applicable to child custody proceedings applies “a higher standard of protection to the rights of the parent or Indian custodian of an Indian child” than the ICWA itself, courts shall apply that higher standard.²⁸ California law both echoes this provision and extends it further, applying any higher federal or state standard of protection not only to a child’s parent or Indian custodian, but also to the child’s tribe.²⁹ This addition demonstrates yet again the Legislature’s intent to protect the connection between an Indian child and his or her tribe.

C. Active Efforts

1. What Constitutes Active Efforts

The ICWA does not provide a definition of “active efforts.”³⁰ California law states that “active efforts shall be assessed on a case-by-case basis... active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe... [and] shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.”³¹ The California Rules of Court, in addition to the above, also state that “[e]fforts to provide services must include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for membership in a given tribe.”³²

California cases have made the following characterizations:

[T]imely and affirmative steps... taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services designed to remedy problems which might lead to severance of the parent-child relationship.³³

And,

“Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts ... [are] where the state caseworker takes the client through the steps of the plan rather than

²⁷ BIA Guidelines § D.3(c).

²⁸ 25 U.S.C. § 1921.

²⁹ Fam. Code § 175(d); Prob. Code § 1459(d); Welf. & Inst. Code § 224(d).

³⁰ 25 U.S.C. §§ 1903, 1912(d).

³¹ Welf. & Inst. Code § 361.7(b); *see* Cal. Rules of Court, Rule 5.484(c); *see* BIA Guidelines § D.2.

³² Cal. Rules of Court, Rule 5.484(c)(2).

³³ *Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016.

requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child.”³⁴

One could reasonably believe that the “active efforts” required by the ICWA are to some degree above and beyond the standard “reasonable services” offered in non-ICWA cases.³⁵ In passing the Act, Congress seemed to recognize that a higher level of services was called for, citing the “massive proportions” of the “Indian child welfare crisis” and the “cultural disorientation... sense of powerlessness, [and] loss of self-esteem” contributing to the crisis, arising largely from “long-established federal policy and from arbitrary acts of government.”³⁶

However, some recent California cases state that active efforts and reasonable services are effectively equivalent.³⁷ These cases trace back to a 1998 case, *In re Michael G.*, in which the court remarked that the two terms were “essentially undifferentiable” due to the importance that reunification services hold in the dependency system as a whole.³⁸ It should be remembered that *Michael G.* was decided long before SB 678, at a time when (as the *Michael G.* court acknowledged) “active efforts” did not mandatorily include application of the tribe’s social and cultural standards, nor the use of the tribe’s and extended family’s extended services.³⁹ At the time, those actions were merely advisory; as of 2006, they are now required by state law,⁴⁰ and the position that there is no difference between active efforts and reasonable services would seem to overlook that fact.

There is also a broader argument that active efforts should exceed reasonable services. Active efforts must be targeted at the underlying threat to the stability of the Indian family. It is well known that Indian tribes and families were subjected to hundreds of years of attempted genocide and assimilative practices such as boarding schools and forced relocations. Less well known are the ongoing effects of that systematic cultural destruction passed from one generation to the next. Some scholars have termed this “historical trauma” or “intergenerational trauma,” positing that “children [who] were bereft of culturally integrated behaviors that led to positive self-esteem, a sense of belonging to family and community and a solid American Indian identity... were ill-prepared for raising their own children” when they became adults.⁴¹ Put another way, the repeated harm to generation after generation of Indian families created a void that will require generations of healthy family practices to fill again. Congress appears to have

³⁴ *In re K.B.* (2009) 173 Cal.App.4th 1275, 1287, quoting *A.A. v. State* (Alaska 1999) 982 P.2d 256, 261 (emphasis added).

³⁵ See, e.g., All County Information Notice I-43-04 (p. 7) and All County Letter 08-02 (pp. 10-11) in Appendix E (noting a difference between active efforts and reasonable efforts).

³⁶ H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531 and 7534.

³⁷ *In re S.B.* (2005) 130 Cal.App.4th 1148; *In re Adoption of Hannah S.* (2006) 142 Cal.App.4th 988; *In re C.B.* (2010) 190 Cal.App.4th 102.

³⁸ *In re Michael G.* (1998) 63 Cal.App.4th 700, 714. The case was not decided upon these grounds.

³⁹ *Ibid.*

⁴⁰ Welf. & Inst. Code § 361.7(b).

⁴¹ Maria Yellow Horse Brave Heart, Ph.D. and Lemyra M. DeBruyn, Ph.D., *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 (n. 2) *American Indian and Alaska Native Mental Health Research* 60, 63-64 (1998).

acknowledged this at least to some extent when enacting the ICWA, finding that “federal boarding school and dormitory programs contribute to the destruction of Indian family and community life.”⁴²

2. Use of Tribal Services

Some cases state that the use of services available through a tribe or through Indian social service agencies would not have been any more successful than standard services in addressing the problems that led to the breakup of the Indian family.⁴³ However, courts should be aware of two things. The first is that the use of such services (where available) is now a mandatory component of proving that active efforts were made.⁴⁴ The second is that tribes often have access to services specifically oriented towards Indian cultural values and beliefs, which may be much more likely to reach a successful outcome than similar non-Indian services. After all, isn’t it reasonable to believe that sending a Christian person to a Christian-oriented rehabilitative program has a better chance of success than sending that person to a Buddhist-oriented program?

3. Standard of Proof

As the Act is silent on the particular standard of proof required for finding that active remedial and rehabilitative efforts were made and were unsuccessful, the standard is simply that of clear and convincing evidence, even in terminations of parental rights.⁴⁵

4. Other Active Efforts Requirements

SB 678 specified additional “active efforts” unrelated to the provision of remedial and rehabilitative services. These requirements include making (and documenting in the record) active efforts to comply with the ICWA’s placement preferences,⁴⁶ and, if there is no preferred placement available, making active efforts to place the child “with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe.”⁴⁷

Amendments to the California Rules of Court in 2008 further provide that “active efforts” require the party responsible for making those efforts to take all necessary steps towards enrolling a child in a tribe if the child is eligible for membership in that tribe.⁴⁸

5. Where Active Efforts Might Not Be Required

Active efforts must be made “[n]otwithstanding Section 361.5 [of the Welfare and Institutions Code].”⁴⁹ However, in certain extreme situations, some courts have ruled that active

⁴² H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531.

⁴³ See, e.g., *In re S.B.* (2005) 130 Cal.App.4th 1148, 1165.

⁴⁴ Welf. & Inst. Code § 361.7(b).

⁴⁵ Cal. Rules of Court, Rule 5.485(a)(1); *In re Michael G.* (1998) 63 Cal.App.4th 700, 709-712.

⁴⁶ Welf. & Inst. Code § 361.31(k).

⁴⁷ Welf. & Inst. Code § 361.31(i).

⁴⁸ Cal. Rules of Court, rules 5.482(c) and 5.484(c).

⁴⁹ Welf. & Inst. Code § 361.7(a).

efforts may not be required where a parent's behavior has clearly demonstrated that remedial services or rehabilitation would be fruitless. In one such case, the mother's extensive history of drug abuse and failure to correct her behavior despite substantial active efforts being provided during the prior dependencies of several of her children meant that further active efforts in the current case of another child "would be *nothing but* an idle act" not required by law.⁵⁰

In another such case, the father had a previous conviction for lewd and lascivious acts on a child. The mother had been provided with reunification services relating to drug abuse and parenting skills during a prior dependency case involving her four children, and had also been provided services regarding prevention of sexual abuse during the current case involving three of those same children. In spite of those services, in spite of the risk of further sexual abuse by the father, and in violation of the conditions of his parole, the mother allowed the father to move back in with the family. The father was then alleged to have molested the mother's 14-year-old daughter, and the mother, while denying that the abuse had occurred, apparently told her daughter to "'forget about' the abuse or to 'get over it and move on.'"⁵¹ The court found that "[the father's] history clearly demonstrate[d] the futility of offering reunification services,"⁵² and that the mother had failed to benefit from the active efforts made during the prior and current dependency proceedings.⁵³

Former California Rules of Court, rule 1439 provided conditions for a waiver of the active efforts requirement.⁵⁴ However, that rule (renumbered to 5.664 effective January 1, 2007) was repealed effective January 1, 2008. Neither the ICWA nor any current California law provides for a waiver of the active efforts requirement.

⁵⁰ *Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016 (emphasis in original).

⁵¹ *In re K.B.* (2009) 173 Cal.App.4th 1275, 1285.

⁵² *Id.* at 1284.

⁵³ *Id.* at 1288.

⁵⁴ *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 708.

INDIAN CHILD WELFARE ACT DESK REFERENCE



A Framework
and Quick
Reference
Resource
for the
Practitioner



- Active efforts must consider the prevailing social and cultural values and way of life of the Indian child's tribe.
- Active efforts must include the available resources of extended family members, the tribe, Indian social service agencies, and individual Indian caregivers.
- Active efforts must be documented in detail in the record.

Qualified Expert Witness (QEW) Testimony.⁴⁴

Many issues may arise in an Indian child custody proceeding where the testimony of an expert may be appropriate. Because the Act involves tribal law and Indian standards, not subjects within the common experience of most state court judges, any issue involving such matters may benefit from expert testimony. However, there are mandatory findings that must be made where expert testimony is particularly appropriate or required. These include the services requirements of section 1912 (d) of the Act (active efforts to provide services to prevent break-up of the Indian family), and the expert witness requirement of section 1912 (e) and (f) that support placement or termination of parental rights. To involuntarily order foster care or adoptive placement, guardianship or terminate parental rights, when the child is an Indian child or there is reason to know the child is an Indian child, the court must require testimony of a QEW regarding whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage. The QEW cannot be an employee of the person or agency seeking the foster care placement or termination of parental rights. For a more detailed discussion of QEW requirements, see [ACIN No. I-40-10, Requirement of the Use of an Expert Witness by the Indian Child Welfare Act.](#)

Amendments to California law that took effect in 2019 have further clarified qualifications for a QEW and for how the QEW's qualifications can be confirmed. (W.I.C. §224.6.)

Persons most likely to meet the requirements for a QEW are:

1. A person designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the tribe
2. A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices;
3. An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and

⁴⁴ 25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guidelines G.1 & G.2; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§224.6, 361.7(c); Rule 5.485(a)



cultural standards and child-rearing practices of the Indian child's tribe.

The court may accept a declaration or affidavit from a QEW in lieu of testimony only if the parties stipulate in writing and the court is satisfied that the stipulation is made knowingly, intelligently, and voluntarily.

Placement Preferences.⁴⁵ The following placement preferences and standards must be followed whenever there is reason to know the child is an Indian child and the child is removed from the physical custody of his or her parents or Indian custodian. The court must analyze the availability of placements within the preferences in descending order without skipping.

Foster Care, Guardianships, and Custody to Non-parent:

- The court must order the least restrictive setting that most approximates a family situation within reasonable proximity to the child's home and meets the child's special needs, if any.
- Preference must be given in the following order:
 1. A member of the child's extended family as defined in 25 U.S.C. §1903(2);
 2. A foster home licensed, approved, or specified by the Indian child's tribe;
 3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
 4. An institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

Adoptive Placements:

- Preference must be given in the following order:
 1. A member of the Indian child's extended family as defined in 25 U.S.C. §1903(2);
 2. Other members of the Indian child's tribe;
 3. Another Indian family. For both foster care and adoptive placements, the tribe may establish a different preference order by resolution. This order of preference must be followed if it provides for the least restrictive setting.

⁴⁵ 25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §361.31; Rule5.485(b)



- The standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.
- A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement. A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Burden of Proof and Qualified Expert Witness.⁴⁸ The burden of proof to place a child in foster care, appoint a guardian, and award custody to a non-parent is clear and convincing evidence, including testimony of a qualified expert witness establishing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The burden of proof to terminate parental rights is beyond a reasonable doubt, including testimony of a qualified expert witness establishing that continued custody of the child by the child's custodian is likely to result in serious emotional or physical damage to the child.

Adoption.⁴⁹ The court must provide the Secretary of the Interior a copy of the adoption order and other information needed to show: 1. the name and tribal affiliation of the Indian child; 2. the names and addresses of the biological parents; 3. the names and addresses of the adoptive parents; 4. the identity of any agency having files or information relating to such adoptive placement; 5. any confidential parent affidavits; and 6. any information relating to tribal membership or eligibility for tribal membership of the adopted child. At the request of an adopted Indian child over the age of 18, the court must provide information about the individual's tribal affiliation, biological parents, and other information as may be necessary to protect any rights flowing from the individual's relationship to the tribe.

Jurisdiction and Transfer.⁵⁰ Exclusive Jurisdiction: If an Indian child is a ward of the tribal court or resides or is domiciled on a reservation of a tribe that exercises exclusive jurisdiction, notice must be sent to the tribe by the next working day following removal. If the tribe determines that the child is under the exclusive jurisdiction of the tribe, the state court must dismiss the case and ensure that the tribal court is sent all information regarding the Indian child-custody proceeding, including the pleadings and any court record. Transfer to Tribal Jurisdiction: If the above exclusive jurisdiction does not apply, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good

⁴⁸ 25 U.S.C. §1912(e), (f); 25 C.F.R. §23.121; Guideline G.1; Fam. Code, §§3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361.7(c), 366.26(c)(2)(B); Rule 5.484(a)

⁴⁹ 25 U.S.C. §§1917, 1951; 25 C.F.R. §23.140; Guideline J.2; Fam. Code, §9208; Rule 5.487

⁵⁰ 25 U.S.C. §1911(a), (b); 25 C.F.R. §23.110; Guidelines F.1-F.6; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §305.5 Rule 5.483



"Indian tribe" means an Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska native village as defined in 43 USC 1602c.

"Indian foster home" means a foster home or resource family home where one or more of the licensed or approved foster parents is an "Indian" as defined in 25 U.S.C. 1903(3).

"Involuntary proceeding" means an Indian child custody proceeding in which the parent does not consent of his or her free will to the foster care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster care, preadoptive, or adoptive placement under threat of removal of the Indian child by a state court or agency and where the parent cannot regain custody of the Indian child upon demand.

"Non-federally recognized tribe(s)" means an Indian tribe, band, nation, or other organized group or community of Indians that is not recognized by the Secretary of the Interior as eligible for the federal services provided to Indians.

"Qualified expert witness" means a person required to testify in an Indian child custody proceeding on whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. A qualified expert witness shall have knowledge of the prevailing social and cultural standards of the Indian child's tribe and may be a person designated by the child's tribe as having such knowledge. A qualified expert witness should have one of the characteristics described in Section 31-135.

MPP, Division 31 Section 31-135.421 sets out requirements applicable to a qualified expert witness as follows:

- **Qualified Expert Witness.** *A qualified expert witness must have sufficient expertise to testify as to the likelihood of serious emotional or physical damage if the Indian child remains in the custody of his or her parent(s), guardian(s) or Indian custodian and as to the prevailing social and cultural standards of the Indian child's tribe. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness:*
 - (a) *A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.*
 - (b) *A member or citizen of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.*
 - (c) *An expert witness having substantial experience in the delivery of child and family*

DISCLAIMER: This section was drafted during the revision of applicable regulations in the Child Welfare Services portion (Division 31) of the CDSS Manual of Policies and Procedures. The material provided herein is for background information only and does not create a basis for action or obligation unless otherwise required by state or federal statute or regulation or other authorized written instruction issued by the CDSS. Readers are cautioned that this section is in unofficial draft form and will be updated after the publication, and consistent with the requirements, of the final regulations



services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.

- *A qualified expert witness cannot be an employee of the person or agency recommending a foster care placement or termination of parental rights.*
- *The social worker may request the assistance of the Indian child's tribe or the BIA agency serving the Indian child's tribe in locating persons qualified to serve as an expert witness.*

"Relative" means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "step," "great," "great-great," or "grand," or the spouse of any of these persons even if the marriage was terminated by death or dissolution. For the purposes of preferential consideration for placement of a child, "relative" means an adult who is a grandparent, aunt, uncle, or sibling of the child.

For the purposes of federal Kin-GAP only, "relative" also means any of the adults specified in Welfare and Institutions Code sections 11391(c) and (c)(2) through (c)(4).

This includes an adult who is either a member of the Indian child's tribe, or an Indian custodian, as defined in Section 1903(6) of Title 25 of the United States Code. It also includes an adult who is the current foster parent of a child under the juvenile court's jurisdiction, who has established a significant and family-like relationship with the child, and the child and the county child welfare agency, probation department, Indian tribe, consortium of tribes, or tribal organization that has entered into an agreement pursuant to Section 10553.1 identify this adult as the child's permanent connection.

"Reservation" means, in an Indian child custody proceeding, Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.

"Tribal agency," for purposes of Welfare and Institutions Code section 10553.12 background check certifications, means an entity designated by a federally recognized tribe as authorized to approve a home consistent with the ICWA, for the purpose of placement of an Indian child into foster or adoptive care, including the authority to conduct a criminal or child abuse background check of, and grant exemptions to, an individual who is a prospective foster parent or adoptive parent, an adult who resides or is employed in the home of an applicant for approval, any person who has a familial or intimate relationship with any person living in the home of an applicant, or an employee of a Tribal Agency who may have contact with a child.

"Tribal court" means a court with jurisdiction over child custody proceedings including a Court of Indian Offenses; a court established and operated under the code or custom



proceeding, and ensure that the tribal court is sent all information regarding the Indian child custody proceeding, including, but not limited to, the pleadings and any court record.”

If the child is in temporary custody following an involuntary removal, and the social worker determines that continued detention is necessary for the child's protection, the social worker shall proceed as set forth below if it is known or there is reason to know the child is an Indian child.

Standard of Proof for Detention of Indian Child. If it is known or there is reason to know the child is an Indian child, foster care placement and termination of parental rights must be supported by clear and convincing evidence and proof beyond a reasonable doubt, respectively, 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. The determination of emotional or physical damage to the child must be supported in court by the testimony of a qualified expert witness.

- **Qualified Expert Witness.** A qualified expert witness must have sufficient expertise to testify as to the likelihood of serious emotional or physical damage if the Indian child remains in the custody of his or her parent(s), guardian(s), or Indian custodian and as to the prevailing social and cultural standards of the Indian child's tribe. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness:
 - (d) A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.
 - (e) A member or citizen of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices.
 - (f) An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe.
- A qualified expert witness cannot be an employee of the person or agency recommending a foster care placement or termination of parental rights.
- The social worker may request the assistance of the Indian child's tribe or the BIA regional office serving the Indian child's tribe in locating persons qualified to serve as an expert witness.

The state court may accept the opinion of a qualified expert witness in writing in lieu of live testimony only when the parties to a child custody proceeding have stipulated so in



writing. If the state court is to accept the opinion in this manner, the written opinion must be in the form of an affidavit or declaration under penalty of perjury and the court must make a finding on the record that the stipulation was made knowingly, intelligently and voluntarily.

The BIA is organized into regions with offices within each region. The regional offices serve the tribes located within the region. The BIA's website is found at: <https://www.bia.gov/>, and may be used to help identify the correct region for purposes of seeking help in identifying a qualified expert witness.

Indian Social and Cultural Standards. The determination of emotional or physical damage to the child must consider the prevailing social and cultural standards and way of life of the Indian child's tribe, including that tribe's family organization and child rearing practices.

31-136 TRANSFER OF AN INDIAN CHILD

Transfer of an Indian Child to a Tribe. In the case of an Indian child under state court jurisdiction and where the exclusive jurisdiction of a tribe does not apply, the Indian child's parent(s), guardian(s), Indian custodian(s) or tribe may petition for the state court to transfer the child custody proceeding to the tribe's jurisdiction.

- When a petition for transfer has been filed, any party to the child custody proceeding shall have the opportunity to assert to the state court, either orally or in writing, whether good cause to deny a transfer exists and the reason(s) for that belief.
- When evaluating whether to assert a good cause opposition to transfer of jurisdiction, the child welfare services agency must recognize that the juvenile court may not consider any of the following circumstances when making its determination whether to deny a motion to transfer to tribal court:
 - (a) Whether the foster care or termination of parental rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or tribe did not receive notice of the child custody proceeding until an advanced state;
 - (b) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
 - (c) Whether transfer could affect the placement of the child;
 - (d) The Indian child's cultural connections with the tribe or its reservation; or



4. What are “active efforts” and when must they be provided?

One of the minimum federal standards imposed by the ICWA is that any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

- Active efforts means affirmative, active, thorough and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.
- Active efforts must involve assisting the parent(s) or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.
- Federal and state law provide detailed examples of activities that constitute active efforts.
- To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parent(s), extended family members, Indian custodian(s) and tribe.
- Active efforts must be tailored to the facts and circumstances of the case and may change depending upon the stage of government intervention and/or the court proceeding. (See, Desk Reference Section III, 31-102).

5. We have very few Indian cases, and therefore we have no readily available Qualified Expert Witnesses (QEW) as required by the ICWA. How do we determine who can qualify?

Many issues may arise in an Indian child custody proceeding where the testimony of an expert may be appropriate. Because the Act involves tribal law and Indian standards, not subjects within the common experience of most state court judges, any issue involving such matters may benefit from expert testimony. However, there are mandatory findings that must be made where expert testimony is particularly appropriate or required. These include the services requirements of section 1912 (d) of the Act (active efforts to provide services to prevent break-up of the Indian family), and the expert witness requirement of section 1912 (e) and (f) that support placement or termination of parental rights (expert testimony that continued custody is likely to result in serious emotional or physical damage to the child). For a general discussion of QEW requirements, see [ACIN No. I-40-10, Requirement of the Use of an Expert Witness by the Indian Child Welfare Act](#).



Amendments to California law that took effect in 2019 have further clarified qualifications for a QEW and for how the qualifications can be confirmed. (W.I.C. §224.6.) When testimony of a “qualified expert witness” is required in an Indian child custody proceeding, a “qualified expert witness” shall be qualified to testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and shall be qualified to testify to the prevailing social and cultural standards of the Indian child’s tribe. A person may be designated by the child’s tribe as qualified to testify to the prevailing social and cultural standards of the Indian child’s tribe. The individual may not be an employee of the person or agency recommending foster care placement or termination of parental rights.

Persons with the following characteristics are most likely to meet the requirements for a QEW for purposes of Indian child custody proceedings:

- (1) A person designated by the Indian child’s tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child’s tribe.
- (2) A member or citizen of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.
- (3) An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child’s tribe.

The court or any party may request the assistance of the Indian child’s tribe or Bureau of Indian Affairs agency serving the Indian child’s tribe in locating persons qualified to serve as expert witnesses.

The court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.

G. Questions about Tribal Courts and Jurisdiction

1. What do I need to know about tribal court jurisdiction and the ICWA?

a. What is jurisdiction?

Jurisdiction is the power of a government to exercise authority over persons and things in a specified territory. When a government has jurisdictional authority, its laws or regulations will apply, and its courts may be the forum in which disputes are heard and where cases involving violations of the law are adjudicated.

Advanced Indian Child Welfare Act (ICWA): Active Efforts and Expert Witness V2.0

PARTICIPANT WORKBOOK

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SEGMENT 2

ICWA History, Overview and Key Components

TRAINING ACTIVITY 2A

Brief History of ICWA

How did the ICWA come about?

In the mid-1970's the United States Congress authorized the creation of the American Indian Policy Review Commission. The purpose of the commission, as the name suggests, was to review the history and current status of the government's policy for dealing with Indians and make recommendations for Congressional changes in that policy. Task Force Four dealt with the issues of federal, state, and Tribal jurisdictions. Within their final report to the Commission in 1976 was a section regarding child custody which outlined the need for what was to become the Indian Child Welfare Act.

The Task Force Report cites a frequently asked question: since both Indian and non-Indian systems act in the best interests of the child, what difference does it make as to who makes the decision about Indian children? The answer to the question is then set forth in the Report. The difference is that these decisions are inherently biased by the cultural setting of the decision maker... when decisions are made by non-Indian authorities. The Report indicates that up to that time estimates based upon the best available data indicated that 25-35% of all Indian children were raised at some time by non-Indians in homes and institutions. ***The Report further notes that it is a curious paradox that many early non-Indian commentators praised familial and Tribal devotion to their children. Yet now, after generations of contact and conflict with western "civilization," so many Indian families are perceived as incapable of child rearing.***

Congress, in passing the Indian Child Welfare Act of 1978, affirmatively stated, "...it is the policy of this Nation to protect the best interests of Indian children... by the establishment of minimum Federal standards for the 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..."

In the hearings which preceded passage of the Act, Congress found that: 1) Indian children are the most vital resource for the continued existence of Indian Tribes and therefore must be protected; 2) an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of children by public and private agencies and an alarmingly high percentage of such children are then placed in non-Indian homes and institutions; and 3) the States have failed to recognize the tribal, social, and cultural standards prevailing in Indian communities and families.

Guidelines to Help Identify and Document an Indian Case

Guidelines to help identify and document an Indian Case:

1. In all cases, at the initial intake, ask if the child may be of American Indian heritage (Division 31 regulations, 2016, Sec.31-125.223).
2. Ask again if the child is going to be placed in foster care.
3. If the answer is affirmative, immediately treat the case as Indian and follow the provisions of the ICWA.
4. Upon indication by the child (if old enough), the mother, father, grandparent or Indian custodian that the child may be Indian, obtain the information needed to develop a family tree.
5. Establish what Tribe the child may be and what reservation the family may be from.
6. Get enrollment numbers, Tribal telephone numbers and addresses. If the child is eligible for membership, but not yet a member of any Tribe, agencies should take the necessary steps to obtain Tribal membership for the child (ICWA guidelines, 2015, Sec. B.4.ii.F.iii).
7. If a child is in the adoption process and the records do not show the child is Indian or may be Indian, ask before proceeding with the adoption.

Inquiry, Noticing, and Placement

INQUIRY AND NOTICING¹

What do I need to ensure proper noticing? Notice must be given to each Tribe in which the child is a member or is eligible for membership. The BIA is required to publish annually in the Federal Register a list of Tribal entities recognized as eligible to receive services from the BIA. The list is provided on the BIA's website, which also has addresses for federally recognized Tribes and a listing of designated Tribal agents.

Who needs to be notified besides the Tribe? The other parties who must be notified are the parent(s) or Indian custodian and any agents for the Tribe who may be designated by the Tribe as agents, e.g. Indian organizations, etc. The noticing agents for Tribes are listed in the Federal Register every year. The March 2016 update of the Federal Register is accessible at: <https://www.bia.gov/cs/groups/xraca/documents/text/idc1-033456.pdf>.

Updates are also available through the Bureau of Indian Affairs at: <http://www.bia.gov/DocumentLibrary/index.htm>. Additionally, the California Department of Social Services (CDSS) maintains a regularly updated list of federally recognized Tribes to be used in conjunction with the BIA list: <http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf>.

How are they notified? They are to be notified by registered mail with return receipt requested. "No foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the Tribe or the Secretary: Provided, that the parent or Indian custodian or the Tribe shall upon request, be granted up to twenty additional days to prepare for such proceeding." (Title I, Sec 102). (Also see Division 31 regulations 2016, Sec. 31-125.7.)

If a determinative response to the notification has not been received within 60 days, a specific provision of the Welfare and Institutions Code applies:

If proper and adequate notice has been provided pursuant to Section 224.2, and neither a Tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) does not apply to the proceedings, provided that the court shall reverse its

¹ Orrantia, M., 1991, The Indian Child Welfare Act, A Handbook (pp. 77-78)

Native American Rights Fund, 2007, A Practical Guide to the Indian Child Welfare Act (p. 37)

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determination of the inapplicability of the Indian Child Welfare Act and apply the act prospectively if a Tribe or the Bureau of Indian Affairs subsequently confirms that the child is an Indian child (W&I Code Sec. 224.3(e)(3)).

Key practice “take- aways” for participants in this training:

- Participants should know to ask if this is an Indian child at every step of the case.
- Participants should understand the steps for proper noticing.
- Participants should review required local noticing forms that they are likely to use when working on an ICWA case.

PLACEMENT

Who is extended family?

“‘Extended family member’ shall be defined by the law or custom of the Indian child’s Tribe or, in the absence of such a law or custom, shall be a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin or stepparent...” (Sec 4 (2))

What is the order of preference for placement as described in the ICWA for a foster care or preadoptive placement?

“Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with:

- i. a member of the Indian child's extended family;
- ii. a foster home licensed, approved or specified by the Indian child's Tribe;
- 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.” (Sec.105 (b))

For an adoptive placement?

“In any adoptive placement of an Indian child under State law, a preference shall be given, in absence of good cause to the contrary, to a placement with:

- (1) a member of the child’s extended family;
- (2) other members of the Indian child’s Tribe; or
- (3) other Indian families.” (Sec 105(a))

Note that the stipulations of preferences for pre-adoptive and adoptive placements incorporate the phrase “*in absence of good cause to the contrary*” in the event that the specified preferences cannot be satisfied. In other words, in order for an Indian child to be placed in a non-Indian pre-adoptive or adoptive placement, good cause must be demonstrated.

Can a different order of placement be used? “In the case of a placement under subsection (a) or (b) of this section, if the Indian child’s Tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order...” (Sec 105 (c))

What standards are used in applying preference requirements? “The standards to be applied shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.” (Sec 105 (d))

When else do placement preferences apply? “Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed..” (Sec 106 (b))

What does the act say about emergency removal? “Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution under applicable State law, in order to prevent imminent physical damage or harm to the child.” (Sec 112)

When must an Indian child be returned who has been removed in an emergency? “The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian Tribe, or restore the child to the parent or Indian custodian, as may be appropriate.” (Sec 112)

Under what conditions may a child be placed in foster care or parental rights terminated? Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. (Title I, Sec 102 (d))

What are parent's rights when voluntarily consenting? A voluntary consent given by an Indian parent for foster care placement or termination of parental rights “shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.”

The court must certify that the consent was understood by the parent or custodian and that the consent was given in a language understood by such. Any consent given prior to, or within ten days after birth of the Indian child, shall not be valid.

Following the Spirit of ICWA



ADMINISTRATIVE OFFICE OF THE COURTS

CENTER FOR FAMILIES, CHILDREN
& THE COURTS

Following The Spirit of the Indian Child Welfare Act (ICWA)

A guide to understanding the benefits of providing culturally appropriate services to Native American families from non-federally recognized tribes within the juvenile dependency and delinquency systems¹

In an effort to ensure proper inquiry and noticing and to reduce the number of ICWA-related appeals in child welfare cases, this handout is intended to help social workers and others respond when they encounter children and families that report American Indian or Alaska Native ancestry yet find they are not from a federally recognized tribe. What is good social work practice in these cases, and how can courts support culturally centered practice that results in positive outcomes?

How to Provide “Spirit of the Law” ICWA Services

- Find out which tribes and Native American resources are in your area.
- Visit and establish connections with local tribes and Native American resources regardless of federal recognition status.
- Request ICWA training from tribal resources, California Department of Social Services training academies, or the Administrative Office of the Courts.
- Conduct a proper inquiry of possible Native American ancestry in every case at the front end and throughout the duration of the case if family members provide additional lineage information.
- Connect a child and family with their tribe and local Native American resources regardless of tribal affiliation.
- Assist the child or family with the tribal enrollment process but understand it is up to the tribe to determine who is or is not eligible for enrollment.
- Conduct placements consistent with ICWA placement preferences even though not technically required. In the case of non-federally recognized tribes, tribal members would likely meet requirements as nonrelated extended family members because tribal communities tend to be related or close-knit communities.
- Consider the child’s tribal members as viable options for holiday visits, tutors, mentors, Court Appointed Special Advocates, etc.

¹ This document was developed with the Fresno County Department of Social Services, Child Welfare Services, and Placer County System of Care as part of the American Indian Enhancement Team, an effort of the California Disproportionality Project, a Breakthrough Series Collaborative (BSC), resourced through the Annie E. Casey Foundation, The California Dept. of Social Services, Casey Family Programs, and the Stuart Foundation. In collaboration with the Child and Family Policy Institute of the California, the American Indian Caucus of the California ICWA Workgroup, California Social Work Education Center, and Tribal STAR.



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The Benefits of Providing “Spirit of the Law” ICWA Services

- If the child’s tribe is seeking federal recognition and is granted such recognition, formal ICWA case services, such as active efforts to prevent the breakup of the Indian family, will be required. If ICWA active efforts are attempted before the federal recognition, it is less disruptive for the child than having to change services and placement to make them in accordance with ICWA.
- Welfare and Institutions Code section 306.6 leaves the determination of services to individuals of non-recognized tribes to the discretion of the court that has jurisdiction.
- Even if individuals are not associated with a federally recognized tribe, they can still be part of an Indian community, which can serve as a strength and provide resources that enhance resilience factors for youth.
- Native American agencies that serve youth regardless of their tribe’s status can have youth groups that provide mental health and substance abuse services as well as fun trips, at no cost to the county.
- Many resources available to Native Americans do not require status in a federally recognized tribe (such as tribal Temporary Assistance for Needy Families (TANF), Native American health centers, and title VII Indian education programs).
- Some Native American health centers can access funding for residential treatment in and out of the state for children who are from non-federally recognized tribes.
- When culturally centered practice is provided as early as possible, it can result in positive outcomes for tribal youth.
- Linking a child to cultural resources that support his or her development into a healthy self-reliant adult can reduce the number of times the person may enter public systems.
- Culturally centered practice provided at the front end and throughout the lifespan of the case, regardless of the recognition status of the tribe, can reduce the public burden of cost over time.

Historical Background

- In 1848, gold was discovered in Coloma, California.
- In 1851 and 1852, representatives of the United States entered into 18 treaties with tribes throughout California that would have provided for more than 7.5 million acres of reserve land for the tribes’ use. These treaties were rejected by the U.S. Senate in secret session. The affected tribes were given no notice of the rejection for more than 50 years, and the promised reserve lands were never provided.
- In 1928, a census was conducted to determine the number of American Indians in California, resulting in the establishment of the 1933 California Indian Rolls (also referred to as the California Judgment Rolls). The purpose of the census and the rolls was

Data Collection and Its Impact on Indian Child Welfare Act Compliance Measures²

The integrity of data is essential to conducting a reliable analysis of disproportionality, and for the provision of culturally appropriate services to Indian children and families. Historically, data regarding the American Indian/Alaska Native population has been suspect by the Tribal community. For example, Child Welfare Services/Case Management (CWS/CMS) data has significantly undercounted the Tribal population throughout the country. Undercounting minimizes the need for resources, primarily in the area of funding to Indian Tribes and service providing agencies.

Why accurate data is critical to compliance and well-being outcomes

Agency improvement in ICWA-related outcomes is measured by assessing changes over time from baseline data. Consequently, the determination of accurate baseline data is fundamental to evaluating outcomes (e.g., entries, length of foster care stay), and for establishing the need for programs, services, and other resources. Collecting accurate data requires attention to the various areas in the CWS/CMS where data relevant to ICWA determinations are captured.

Efforts are currently underway at the state level to simplify the data entry process relevant to the ICWA. It is important for case workers to be aware of the multiple areas in CWS/CMS where ICWA-related data is required, and that all the fields of information related to the ICWA are updated on a routine basis.

What you can do to improve data accuracy

It is widely accepted that there are significant inaccuracies in the count of ICWA cases in the state determined by the CWS/CMS. One problem associated with an inaccurate count is that CWS/CMS has several fields of information that relate to the ICWA. Three CWS/CMS data items are particularly relevant to American Indian or Alaska Native status: race/ethnicity status, Tribal membership status, and status with respect to the Indian Child Welfare Act.

² This text was adapted from a document developed by the American Indian Enhancement Team, an effort of the California Disproportionality Project, a Breakthrough Series Collaborative (BSC) resourced through the Annie E. Casey Foundation, the California Department of Social Services, CalSWEC, Casey Family Programs, the Child and Family Policy Institute of California, the California Child Welfare Co-Investment Partnership, and the Stuart Foundation, in collaboration with the Administrative Office of the Courts, and TribalSTAR.

Race/Ethnicity Status

If a respondent indicates more than one ethnicity, only the one that the respondent selects as the primary identity is recorded. If the secondary ethnicity is Indian, that information is not available.

Tribal Membership Status

Tribal membership status may change over time pending verification received from one or more Tribes. Additionally, the space to report membership is limited to only one Tribe. If a child has membership in more than one Tribe, the selection of only one of the Tribes for inclusion in the CWS/CMS database is based on the strongest association. If the associations are equivalent, the choice is arbitrary. The data entry categories for Tribal Membership Status are: Member; Eligible; Pending Verification; Claims Membership; Not Eligible; and Missing.

Status with Respect to the Indian Child Welfare Act

Reporting this status is mandatory for all children in the CWS/CMS. The categories are: Eligible; Pending; Not Eligible; Not Asked/Unknown. As with Tribal membership status, ICWA status may change over time as responses are received from inquiries to one or more Tribes.

Better methods of identifying and counting Indian children in the CWS/CMS

Some counties have devised ways to achieve a more accurate count of the number of Indian children in the child welfare system. For example, in San Diego County one staff person implemented the running of data in three sets—first to establish if the child was identified as Indian, second to see if the mother was identified as Indian, and third to see if the father was identified as Indian. By running the data in this manner, the staff person was able to achieve greater precision with respect to the number of Indian children in the system, and then follow-up to determine if the children were ICWA eligible.

Alameda County established a protocol to review all cases to determine if proper inquiry had been made regarding Indian identity and to enter any new ICWA-related information in CWS/CMS. The protocol also insured that proper inquiry is made and documented at the outset. By implementing this new protocol, county staff discovered that there were many more Indian children in the system than had previously been tabulated. A county representative commented that the count had almost tripled.

The lesson to be learned by these examples is that it is vitally important to document accurately the number of American Indian/Alaska Native children that enter the child welfare system and those who are identified as ICWA eligible.

Tips for social workers to insure proper entry of ICWA-related data

- Enter data accurately and with consistency in all fields of CWS/CMS that pertain to Indian ancestry and ICWA-related status.
- Check with your supervisor or manager to ensure you are following the correct protocol. (Some counties have staff specifically designated to record ICWA cases and provide notice.)
- Properly document cases that have been identified as ICWA eligible.
- Revisit your cases and update ICWA-related data on a regular basis, especially when subsequent inquiry indicates that a case is under the purview of the ICWA.

Self-Assessment Quiz: “An Historical and Cultural Perspective on ICWA”

1. How many Tribal courts are there in U.S? Are there over:
 - a. 10
 - b. 50
 - c. 300
 - d. 500

2. In 1977 the American Indian Policy Review Commission conducted research regarding the number of Indian children more likely to be in foster care or adopted by non-Tribal families than their Caucasian counterparts. Which statement is correct:
 - a. 120% more likely to be adopted and 50% more likely to be in foster care
 - b. 240% more likely to be adopted and 100% more likely to be in foster care
 - c. 500% more likely to be adopted and 150% more likely to be in foster care
 - d. 840% more likely to be adopted and 270% more likely to be in foster care

3. In 1840 there were 200,000 Indians in California. In 1870 there were:
 - a. 12,000
 - b. 24,000
 - c. 85,000
 - d. 100,000

4. Membership in a Tribe is determined by:
 - a. The Federal Government
 - b. The Tribe
 - c. The individual person
 - d. The State Court

5. How many years after 1851, when 18 treaties were signed by the Indians of California and Federal Government reserving 7.5 million acres for the Indians, were the Tribes notified that the treaties had not been ratified?
 - a. Never
 - b. 10 years
 - c. 50 years
 - d. 100 years

6. Instead of receiving the 7.5 million acres reserved for the Indians in the 1851 treaties, how many acres did they receive?
- a. .5 million
 - b. 1.5 million
 - c. 4.5 million
 - d. 7.5 million
7. Which statement below does not describe the philosophy of the Bureau of Indian Affairs (when it was part of the war department)?
- a. Strip the Indian away and save the child
 - b. Tradition is the enemy of progress
 - c. You can be educated or Indian but you can't be both
 - d. Indian tradition should be preserved
8. The BIA relocated 60-70,000 Indians to San Francisco and Los Angeles. Now over what % of California's Indian population traces their native ancestry to Tribes outside of California?
- a. 10%
 - b. 30%
 - c. 50%
 - d. 70%
9. In 1870, the 15th Amendment to the U.S. Constitution affirmed voting rights for emancipated slaves. In what year was the passage of the Federal Citizenship Act that granted Indians the right to vote for the first time?
- a. 1870
 - b. 1900
 - c. 1924
 - d. 1963
10. There are over how many federally recognized Tribes in California?
- a. 60
 - b. 80
 - c. 100

Purpose and Intent of ICWA

Purpose of the ICWA

The purpose of ICWA is to protect the best interests of the Indian children and to promote the stability and security of Indian Tribes and families by establishing minimum federal standards for the removal of Indian children from their parents or Indian custodians. The ICWA also sets the priority for the placement of such children in foster or adoptive homes that reflect the unique values of Indian culture. The ICWA also provides some assistance to Indian Tribes in the operation of child and family service programs. (ICWA 1978)

The Intent of the ICWA

- Prevent the unwarranted breakup of American Indian families.
- Recognize Tribal jurisdiction to make custody decisions involving the removal of Indian children from their homes.
- Establish minimum federal standards that county and/or state courts must follow when Indian children are removed from their homes and placed in foster care or adoptive homes. (Orrantia, 1991)

Tribal Sovereignty and Child Welfare: Practice Tips³

Merriam Webster defines ‘Sovereignty’ as: (a) supreme power especially over a body politic; (b) freedom from external control: see autonomy; (c) controlling influence.

-- retrieved www.merriam-webster.com October 1, 2010

Why is there an act that specifically targets American Indian children in child welfare? Why aren't there other laws that address the needs of other groups such as African Americans or Hispanic/Latinos? Simply put, the United States has a government-to-government relationship with American Indian/Alaska Native Tribes. Being American Indian is not only a racial/ethnic distinction, it is also a political status. The fact that the U.S. and other countries have/had treaties with Indian Tribes demonstrates the historical status of Tribes as sovereign nations.

Social workers who have American Indian/Alaska Native children in their case load may be unaware of the sovereign status of the child's Tribe and how it can affect a child welfare/Indian Child Welfare Act case. Today, Tribes exercise their sovereignty in *many ways*, including how to define expert witness criteria, and during Tribal Customary Adoption (CA AB 1325).

Sovereignty is a word of many meanings. At the most basic level, the term refers to the inherent right or power to govern. Under the U.S. constitutional system, the right is inherent in the people and is exercised through their representative local, state, and federal governments. This is somewhat comparable to the inherent sovereignty of Indian people in the Tribal context (Canby, 1981; Deloria and Lytle, 1983).⁴

As active sovereign entities, Tribes have designated ICWA representatives for the process of receiving notice from state child welfare agencies and state courts in which an Indian child welfare case has been filed. The Tribe appoints an ICWA representative in order to ensure that the Tribe is informed and can respond to the notice.

³ This document was developed by the American Indian Enhancement team in collaboration with the National Resource Center for Tribes, and Tribal STAR with technical support from Hon. William Thorne. The American Indian Enhancement Team is an effort of the California Disproportionality Project, a Breakthrough Series Collaborative (BSC) resourced through the Annie E. Casey Foundation, California Department of Social Services, CalSWEC, Casey Family Program, Child and Family Policy Institute of California, and the Stuart Foundation.

⁴ Utter, Jack, *American Indians: Answers to Today's Questions: H-8s: Legal Status and Tribal Self-Government* 1993, Oklahoma Press.

Tips for Social Workers

1. Learn about the Tribe(s) in your county and state. You can obtain a copy of ICWA designated agents at <http://www.tribal-institute.org>. Be aware that when a Tribe intervenes in an ICWA case involving their child, the Tribe is then a party to the case and legally entitled to the same rights as all other parties to the case.
2. In cases where the child's Tribe is geographically too far to participate in the court process the Tribe may designate a representative to appear in court on the Tribe's behalf.
3. If the child's Tribe does not intervene in a case or assume jurisdiction, the case continues to maintain ICWA status and culturally appropriate active reunification services are still required.
4. Tribes exercise sovereign status in many ways, including during Tribal Customary Adoption, and to define criteria for expert witness.
5. Communicate with Tribes as though you were contacting the governor's office of a neighboring state. Show the same level of respect and adhere to appropriate protocols as you are dealing with representatives of a sovereign nation.
6. Respectfully consider what the Tribe has to say, otherwise the Tribe may decide to pursue legal avenues which could be timely and costly. If respect and courtesy is established early on in the relationship there is a greater potential for collaboration on case options. The more options, the better chances for positive outcomes for Indian children.
7. Attempt to resolve the case informally before having to resolve the case before a judge.

Sovereignty: An Historical Perspective

As declared by Congress, the Executive, and the Supreme Court; the present rights of Tribes to govern their members and remaining territories derive from a sovereignty that pre-dates European arrival. It was a sovereignty that once made them fully independent nations. That sovereignty has been limited, but not abolished, by the Tribes' inclusion within the territorial boundaries of the United States.

The principal attributes of Tribal sovereignty today can be generally summarized as follows: (1) Indian Tribes possess inherent governmental power over all internal affairs, (2) the states are precluded from interfering with the Tribes' self-government, and (3) Congress has plenary (i.e., near absolute) power to limit Tribal sovereignty and thereby limit the first two attributes (Canby, 1981). The federal policy of Tribal self-determination, with its beginnings in the 1930s and a renewal in the 1970s, has created opportunities for Tribes to retain their sovereignty and to overcome some of the restraints arbitrarily or improperly placed on that sovereignty over the past 150 years (Canby, 1981).

Today, one can see the visible results of Tribal sovereignty and self-determination in the areas of enterprise (e.g. gaming, agriculture, shopping malls, restaurants, and hotels), health care, ICWA, and Tribal Customary Adoption.

SEGMENT 3

Why Active Efforts and Expert Witness?

TRAINING ACTIVITY 3A

Connecting the Historical Context with the Need for Active Efforts and Expert Witness

The ICWA as a remedy supporting Tribal preservation

The historical origins of the ICWA are rooted in the need to support the survival and well-being of Indian Tribal groups and preserve the Indian way of life. The application of historical norms for removing Indian children from their homes and placing them in non-Indian adoptive homes at alarming rates led to more stringent legal requirements that were set forth in the ICWA, such as active efforts, expert witness, and higher standards of evidence.

Cultural responsiveness necessitates engagement

Inherent in the ICWA is the need for child welfare staff to honor and promote Tribal culture in their relationships with Indian children and families. This involves engaging with families from the very first contact and continues throughout the duration of the case. It starts with proper inquiry regarding Indian ancestry, contacting Tribes to determine membership status, and noticing Tribes regarding court hearings. However, engagement and cultural responsiveness do not end here. They continue through the active efforts and expert witness provisions of the ICWA.

The **active efforts** requirement is designed to promote reunification for Indian children in foster care. In order to prevent the breakup of Indian families, child welfare staff needs to engage with families to access available resources for rehabilitative and remedial services that are supportive of Indian cultural values and practices. Providing active efforts must therefore entail maximizing the use of available resources by developing relationships with the extended family, the Tribe, individual Indian caregivers, and Indian and Tribal service agencies. In the exercise of active efforts by child welfare staff, Indian Tribes should be considered as partners in the goal of serving the best interests of Indian children.

When we think about active efforts, a quote from Sitting Bull is particularly relevant: *“Let us put our minds together and see what kind of life we can make for our children.”*

The **expert witness** provisions of the ICWA complement the requirements for active efforts. The expert witness can provide an assessment regarding the adequacy of efforts to prevent removal or termination of parental rights, as well as testimony (or a written declaration) that addresses if the child is likely to suffer serious emotional or physical harm in the custody

of the parent or Indian custodian. The expert witness can also educate the child welfare staff and the court regarding customary Tribal values, particularly those related to child-rearing. In this manner, the expert witness serves as an additional check against unwarranted removal and adoption of Indian children.

Excerpts from ICWA: Active Efforts, Expert Witness, and Standards of Evidence

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (Indian Child Welfare Act of 1978, § 1912 (d) - (f))

Division 31 regulations (2016) provides the following definition for QUALIFIED EXPERT WITNESS

“Qualified expert witness” means a person required to testify in an Indian child custody proceeding on whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. A qualified expert witness should have specific knowledge of the Indian Tribe's culture and customs. A qualified expert witness may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional Tribal therapist and healer, Tribal spiritual leader, Tribal historian, or Tribal elder, provided the individual is not an employee of the person or agency recommending foster care placement or termination of parental rights (Sec. 31-002 (q))

Link to California Courts (Judicial Council) List of Expert Witnesses:

<http://www.courts.ca.gov/8105.htm>

Legislative Updates

Division 31 regulations (2016), ICWA guidelines (2015) and Senate Bill (SB) 678:

Overview

The ICWA guidelines (2016) now also provide agencies with context and clearer directions of provisions, standards, procedures, requirements, and best practices for ICWA compliance.

The California MPP Division 31 regulations (2016) comprehensively incorporated requirements under Senate Bill (SB) 678, Chapter 838, Statutes of 2006 and language from the revised ICWA federal guidelines (2015) (ACIN No. 1-29-16, 2016; ACL No. 16-87).

Further Division 31 regulations (2016) provide clearer guidance in the application of Active Efforts (now with a spelled-out definition and examples of what these are), Inquiry, and Identifying Tribal Affiliation, Noticing, Placement Preferences, Tribally Approved Homes, and Tribal Customary Adoptions Child Welfare Service (CWS) agencies and Probation Departments in California.

Senate Bill (SB) 678 incorporated the federal Indian Child Welfare Act into California state law for the purpose of improving compliance with respect to the uniform application of the federal Indian Child Welfare Act in California. However, pursuant to prerogatives afforded to the states in the ICWA, certain provisions of SB 678 established higher standards of protection for Indian children than mandated by federal law.

Court standing possible for non-federally recognized Tribes

In some instances, SB 678 extends ICWA protections to Indian children who do not come within the definition of an Indian child for purposes of the Indian Child Welfare Act. Specifically, SB 678 allows the courts to have discretion for permitting participation of a **non**-federally recognized Tribe in dependency child custody proceedings. This change is significant since there are approximately 78 Tribes petitioning for recognition in California. In comparison, 107 Tribes in California are federally recognized (retrieved 10/26/11 from <http://www.courts.ca.gov/programs-tribal.htm>).

Exceptions for terminating parental rights

SB 678 adds two new exceptions specific to Indian children regarding the termination of parental rights (ACL No. 08-02). These exceptions provide for *compelling reasons* for

determining that termination of parental rights would not be in the best interest of an Indian child. Two examples of compelling reasons for not terminating parental rights are incorporated in W&I Code Section 366.26(b)(5)(B)(vi). These apply when:

“(I) termination of parental rights would substantially interfere with the child’s connection to his or her Tribal community or the child’s Tribal membership rights; or

(II) the child’s Tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.”

Improving compliance

Senate Bill 678 specifically addresses improved compliance for many of the important provisions of the ICWA. For more detail, refer to **ACL No. 08-02**.

Legislative Updates: Assembly Bill (AB) 1325 Tribal Customary Adoption

Overview

Assembly Bill (AB) 1325 provides for Tribal Customary Adoption (TCA), a type of adoption proceeding which occurs under the customs, laws or traditions of the child's Tribe. **A distinguishing feature of Tribal Customary Adoption is that it does not require termination of parental rights.** Under AB 1325, the Indian child's Tribe is invested with the authority to recommend Tribal Customary Adoption as the permanency option for the Indian child. Additionally:

- A Tribe is not required to choose TCA as a permanent plan, but AB 1325 provides TCA as an option that the Tribe can pursue.
- A Tribe does not need to formally intervene in a case in order to be entitled to recommend TCA or any other appropriate permanent plan.
- An Indian child who becomes an adoptee through Tribal Customary Adoption is eligible to participate in the Adoption Assistance Program.

AB 1325 has been in effect since July 1, 2010, and will sunset on January 1, 2014. It is encoded in Welfare and Institutions Code Section 366.24. The information presented here highlights some key points. For more detail, consult ACL 10-17, ACL 10-47, ACL -09-28, and W&I Code 366.24.

Background

Before the implementation of AB 1325, state law did not provide a culturally appropriate adoption option as a permanent plan for Indian children in the child welfare system. However, adoption in Indian Tribes has historically and traditionally been practiced through custom and ceremony, and has not involved termination of parental rights (National Indian Child Welfare Association, as stated in ACL No. 10-17).

Termination of parental rights "conflicts with many Tribal teachings and cultural values because it severs the child's Tribal family systems, connections to extended family members, and to the Tribe" in addition to depriving Indian children of benefits associated with Tribal membership (ACL No. 10-17, p. 2). Consequently, the CDSS ICWA Workgroup, which includes representatives from Tribes, counties and other stakeholders in Indian child welfare, advocated for the provisions of AB 1325.

Implications for Concurrent Planning and Adoption Proceedings

At the option of the child's Tribe, and pursuant to AB 1325, Tribal Customary Adoption may be recommended as an alternative permanent plan throughout the dependency process if family reunification cannot be achieved. Tribal Customary Adoption can become a permanency option at any time during the case. Consequently, Tribal Customary Adoption is closely connected with the goals, procedures, and practices of concurrent planning.

As noted in ACL No. 10-47, "The child welfare worker must provide the Tribe with information regarding Tribal Customary Adoption at every step throughout the case as part of concurrent planning." TCA can become a permanency option as early as the dispositional stage of a dependency case (W&IC Section 358.1), following the response of a federally recognized Tribe that affirms that the child is a member or eligible for membership in the Tribe (ACL No. 10-47).

Other rights that are afforded to Tribes in relation to adoption proceedings include petitioning to transfer jurisdiction and the ability to intervene before the finalization of an adoption:

- "A Tribe, parent, or Indian custodian may petition the court to transfer an Indian child's adoption proceeding to Tribal jurisdiction" (ACL No. 09-28).
- "The Indian child's Tribe, parents, and Indian custodian have the right to intervene at any point in adoption proceedings until finalization", either orally, in writing, or by submitting an ICWA-040 form to the court (ACL No. 09-28).

Note that the adoptive placement preferences specified in the ICWA also apply for Tribal Customary Adoption.

Discussions with the child's Tribe

The child welfare agency is charged with obtaining "all information from the child's Tribe that the Tribe considers relevant and any information which will assist the agency in clarifying particular issues for the child or adoptive applicant(s)" (ACL No. 10-47). As noted in ACL No. 10-47, some examples for discussion topics include:

- Tribal customs
- Laws
- Traditions
- Ceremonies/events
- Geography; and
- Significant history

Per ACL No. 10-47, Tribes seeking more information regarding Tribal Customary Adoption should be referred to:

Tribal STAR: <http://theacademy.sdsu.edu/TribalSTAR/index.htm> or the sponsors of AB 1325:

Nancy Currie
Director of Social Services
Soboba Tribal Social Services
Phone (951) 487-0283

Kimberly Cluff, Attorney
Forman & Associates
4340 Redwood Hwy Ste F228
San Rafael, CA 94903
Phone (415) 491-2310

Adoptive home study

The adoptive home study for a Tribal Customary Adoption is similar to a conventional adoption home study. However, there are some key differences:

- A Tribal customary adoptive home study is conducted by the child’s Tribe or the Tribe’s designee.
- If a Tribal designee is conducting the home study, the designee must do so in consultation with the Indian child’s Tribe.
- “The standard for the evaluation of the prospective adoptive parents’ home shall be the prevailing social and cultural standard of the child’s Tribe.”

(ACL No. 10-47; and W&I Code, Section 366.24(c)(1)(A) and (B)).

Out-of-state Tribes and prospective adoptive homes

A Tribal child from an out-of-state Tribe can be the subject of a Tribal Customary Adoption. Additionally, if an Indian child is placed in a prospective adoptive home out-of-state, ICPC obligations apply.

Tribal Customary Adoption Order (TCAO)

“The TCAO is an order completed by the Indian child’s Tribe that will represent the legal framework of the modified relationships of the child” (ACL No. 10-47).

The Welfare and Institution Code 366.24 stipulates:

“The Tribal customary adoption order shall include, but not be limited to, a description of (A) the modification of the legal relationship of the birth parents or Indian custodian and the child, including contact, if any, between the child and the birth parents or Indian custodian, responsibilities of the birth parents or Indian custodian, and the rights of inheritance of the child and (B) the child's legal relationship with the Tribe. The order shall not include any

child support obligation from the birth parents or Indian custodian. There shall be a conclusive presumption that any parental rights or obligations not specified in the Tribal customary adoption order shall vest in the Tribal customary adoptive parents” (W&I Code, Section 366.24)

“Prior consent to a permanent plan of Tribal customary adoption of an Indian child shall not be required of an Indian parent or Indian custodian whose parental relationship to the child will be modified by the Tribal customary adoption” (W&I Code, Section 366.24).

Rights of Biological Parents

As noted in the terms of the TCAO, the rights of the biological parents are modified during the Tribal Customary Adoption Order process by the Indian child’s Tribe.

New Forms Required

Noticing and compliance provisions of Senate Bill 678 necessitated changes in Judicial Council rules and forms related to ICWA. Failure to adhere to the revised rules and forms can be grounds for a petition to invalidate a proceeding for adoption, guardianship, or termination of parental rights submitted to the court by an Indian child, the child’s Tribe, a parent, or an Indian custodian from whose custody the child has been removed. More detail is available in the Appendix in ACL No. 09-28, including information on inquiry, noticing, relinquishment, and adoption.

Documentation and Court Reports

Discussions with the child’s Tribe pertaining to TCA and other permanency options “must be documented in the court report, the foster care and adoption case record, and/or in the case notes section of CWS/CMS. Once TCA is recommended, the agency must continue to provide a report to the court at each hearing thereafter as relevant to the individual case” (ACL No. 10-47).

Refer to ACL No. 10-47 and W&I Code 366.24 for additional details about what is required for each hearing and court report.

Judicial Council study and its relationship to accurate data entry in CWS/CMS

According to the statute, the Judicial Council is required to complete a study of the provisions of AB 1325 and report its findings to the legislature on or before January 1, 2013. (ACL No. 10-17). The Judicial Council study will in part depend on the data provided in CWS/CMS. Consequently, child welfare workers should be aware of the importance of maintaining accurate data for Native American children for the Judicial Council study, as well as for the study’s implications for the formulation of state policy. Refer to the Participant Workbook handout “How to Enter Data in CWS/CMS re Tribal Customary Adoption”.

Other Legislative Updates

Proper Inquiry Requires Ongoing Attention

A recent ACL (09-28) reiterated the duty to perform proper inquiry to establish Indian heritage and protection under ICWA:

- “There is an ***affirmative and continuing duty to inquire*** whether a child, who is the subject of a child custody proceeding is or may be an Indian child” (ACL No. 09-28; as italicized in the ACL).
- If a child welfare worker receives information suggesting that the child is a member of a Tribe or eligible for membership in a Tribe, or that any of the child’s parents (birth mother, presumed and alleged fathers), grandparents or great-grandparents are or were members of a Tribe, the worker is deemed to have “reason to know” that the child is, or may be, an Indian child (ACL No. 09-28).

Proper Placement Remains a Major Concern

Proper placement of Indian children is still a major issue, as 50% of Indian children in California are placed in non-Indian homes (ACL 08-02). Consequently, improved compliance with the ICWA is essential to realize the intent of the law, created more than 30 years ago, to protect the rights of Indian children to participate in their heritage and to preserve Indian culture.

An excerpt from All-County Letter No. 08-02 states:

“California’s Indian population now exceeds that of any other state, including Alaska. Recent data indicates that a large number of Indian children in the California child welfare system are still being placed in non-Indian homes. Data further indicates that **over 50 percent** of Indian children in California are placed with non-relative, non-Indian substitute caregivers. This reflects placement determinations made notwithstanding expressed congressional preferences in the ICWA on placement of Indian children in Indian homes. Further, these issues and others have been verbally expressed by Tribal members as part of California’s recently completed Children and Family Services Review Statewide Self-Assessment.” (From ACL 08-02, p. 2) (bold added)

The Need for Expert Witness Testimony Continues to be Critical

ACIN I-40-10, written as recently as 2010, explains why expert witness testimony remains critical for preserving the cultural integrity of Indian children and their Tribes:

“While the situation has improved since the ICWA was passed in 1978, Native American children continue to be removed from their homes at a proportionally higher rate than other children in California. Additionally, a large number of Indian children placed in out-of-home care are placed in non-relative, non-Indian homes, further aggravating the loss of ties to the child’s Tribe and heritage. Therefore, it is critical that the requirement of qualified expert witness testimony is met in every case involving an Indian child. It is not only required by law, but is essential in helping the California courts and child welfare agencies ensure that every effort has been made to assess the safety of the child in the context of the prevailing cultural and child rearing practices within the child’s Tribe.” (ACIN I-40-10, p. 2)

Governor’s Tribal Advisor

In September 2011, Governor Brown issued an Executive Order establishing the position of Governor’s Tribal Advisor in the Office of the Governor in order to facilitate communication and collaboration between California state government and Native American Tribes. “This position will serve as a direct link between the Governor’s Office and Tribal governments on matters including legislation, policy and regulation” (retrieved 10/18/11 from <http://gov.ca.gov/news.php?id=17222>).

Entering Data in CWS/CMS re: Tribal Customary Adoption Excerpts from ACL No. 10-47

19.1 How can information regarding TCA be entered into CWS/CMS?

The TCA Special Projects Code shall be selected on the Special Project tab of a case in CWS/CMS to indicate a child is being considered for Tribal Customary Adoption. Any case in which TCA is considered as a permanency option (regardless of whether or not TCA was actually selected as the permanency plan), must be identified with this TCA Special Projects Code in CWS/CMS. The Special Projects Code should be selected at the time TCA is considered. Once a case is identified with the TCA special projects code, the code should remain selected regardless of the case/permanency outcome. The Special Projects Code will assist in tracking cases for data collection to include in the study and report to Legislature, as aforementioned.

In order to identify a case in which TCA has been considered, use the following steps in CWS/CMS:

Step 1: In the Case Folder of the CWS/CMS, go to the, “Special Projects” tab. Select the Special Projects page tab and then the (+) button in the grid to enter a new Special Project for the focus child. Click the down (+) button to display the available list of Special Projects.

Step 2: Select the following code: **“S-Tribal Customary Adoption”**

The child is in out-of-home care, and reunification services have been ordered. The child has been determined to be ICWA eligible and Tribal Customary Adoption is an option to be discussed with the Tribe as a concurrent plan option should reunification be unsuccessful.

19.2 To enter adoptive placement information in CWS/CMS, a TPR date is currently required. Since TCA does not require TPR, which date do I enter to allow CWS/CMS to complete adoptive placement?

Until further notice directing you otherwise, enter the date the court afforded full faith and credit to the TCAO and note that in the case notes.

19.3 Since the case plan of TCA is not currently available, which case plan should be selected?

Until further notice directing you otherwise, select ADOPTION or ADOPTION WITH SIBLING(S).

Wakeem's Story: Finding Connection

Discussion Questions:

1. At what point did Phil stop being just a “good social worker” and become like family to Wakeem (“his stationary point”)?
2. How did Phil demonstrate “active efforts” as compared to “reasonable efforts”?
3. In what ways did Susan and Phil work to connect Wakeem with his culture?
4. Why was it important for Wakeem to be connected to services such as the Regional Center? How will this help in his future?

TRAINING ACTIVITY 4A

Maps of California Tribes⁵



⁵ California Indian Library Collections; http://www.mip.berkeley.edu/cilc_images/bibs/maps/Tribemap.gif

What Kind of Effort? Active Efforts vs. Reasonable Efforts

Active Efforts

Any party seeking an involuntary foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. This requirement applies regardless of whether the child's Tribe has intervened in the proceeding. The standard is higher than the finding of "reasonable efforts" needed for a non-Indian child.

The Bureau of Indian Affairs guidelines specify that the active remedial efforts must take into account the prevailing social and cultural conditions and way of life of the child's Tribe and must also involve and use the available resources of the child's extended family, the Tribe, Indian social service agencies, and individual Indian caregivers. The active remedial and rehabilitative efforts must be directed at remedying the basis for the parental removal proceedings; therefore, the type of services required depends on the facts of each case.

Active efforts include attempts to preserve the parent-child relationship regardless of the strength of the parent-child relationship or interaction. Active efforts must be aimed at remedying the basis for removal of the child or termination of parental rights. Following the intent of this law means including the Tribe at the earliest contact with the family and including them in all decisions. (*Adapted from "Bench Handbook: The Indian Child Welfare Act" Administrative Office of the Courts, 2008*)

Division 31 Regulations (2016) spells out the following definition for Active Efforts:

'Active Efforts' mean, in the case of an Indian child, those efforts intended primarily to maintain and reunite an Indian child with his or her family or Tribal community and includes all actions taken by a county to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. Active Efforts must take into account the prevailing social and cultural values, conditions, and way of life of the Indian child's [T]ribe and utilize the available resources of the child's extended family, [T]ribe, [T]ribal and other Indian social service agencies, and individual Indian caregiver service providers. (Sec. 31-002)

See ICWA regulations (2016) § 23.2 for the federal definition of Active Efforts.

Division 31 regulations (2016) provide the following examples of Active Efforts intended to prevent the breakup of the Indian family:

- a. Identify the child's Indian heritage in the assessment process.
- b. Take into account the prevailing social and cultural standards, and way of life of the Indian child's Tribe.
- c. Utilize Tribal resources to support Pre-Placement preventive efforts, including resources available from the child's extended family, Tribe, and Tribally based family preservation and reunification or other services when available; and non-Indian resources when Tribal resources are not available. (Sec. 31-135.23)⁷

Division 31 regulations (2016) reiterate the following 11 examples provided in the 2015 ICWA guidelines:

- a. Engaging the Indian child, the Indian child's parents, extended family members, custodian(s);
- b. Taking steps necessary to keep siblings together;
- c. Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents to obtain such services;
- d. Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate;
- e. Conducting or causing to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement;
- f. Taking into account the Indian child's Tribe's prevailing social and cultural conditions and way of life and requesting the assistance of representatives designated by the Indian child's Tribe with substantial knowledge of the prevailing social and cultural standards;
- g. Offering and employing all available and culturally appropriate family preservation strategies;
- h. Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal; notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;
- i. Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;
- j. Identifying community resources including housing financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;
- k. Monitoring progress and participation in services;

⁷ For more information on pre-removal "Active Efforts" see, California ICWA Compliance Taskforce (2016) pp. 18-24

- l. Providing consideration of alternative ways of addressing the needs of the Indian child’s parents or extended family, if services do not exist or if existing services are not available;
- m. Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and
- n. Providing post-reunification services and monitoring (Sec. 31.002).

Active Efforts vs. Reasonable Efforts

What are active efforts compared to reasonable efforts? The “active efforts” standard requires more effort than a “reasonable efforts” standard. An Alaska court cited an ICWA commentator who distinguished between active and passive efforts: “passive efforts entail merely drawing up a reunification plan and requiring the ‘client’ to use ‘his or her own resources to...bring...it to fruition.’” *A.M. v. State*, 945 P. 2nd 296, 306 (Alaska 1997).

A rule of thumb is that “active efforts” refers to engaging the family while “reasonable efforts” refers to providing referrals to the family, and leaving them on their own to seek out assistance.

Some courts require proof that all active efforts to provide parents with adequate rehabilitative services have been exhausted but others do not require an undertaking of futile or nonproductive efforts.

A state or private party cannot utilize the argument that it lacks resources to provide active efforts in order to refuse the mandate to provide active efforts. There are no exceptions in the ICWA to the mandate.

Generally, what constitutes “active efforts” is specific to the given situation, including the governing law and accepted social work standards, because such efforts are aimed at remedying the basis for the underlying proceedings, whether it relates to foster care placement or termination of parental rights. The types of required services and length of providing such services also depend on the facts of the case.

The best way to meet the needs of the child and family and to avoid unnecessary conflicts is to seriously consider whether one has met the “active efforts” requirement, as opposed to “reasonable efforts”, prior to filing a petition to terminate parental rights (Native American Rights Fund, 2007, *A Practical Guide to the Indian Child Welfare Act*, pp 93-94).

Examples of Active Efforts vs. Reasonable Efforts

| Examples of Reasonable Efforts: | Examples of Active Efforts: |
|---|---|
| Giving contact information to a parent for parenting classes they could sign up for. | Signing up a client for parenting classes at a local Native American health center or TANF agency and arranging transportation to/from their classes. |
| Referring a client to medical, dental and mental health services through county providers. | Referring the family to the local Native American health center for medical, dental and mental health services. |
| Referring a youth that is acting out violently to an anger management group with county providers. | Speaking with youth violence prevention coordinators or anger management providers at a local Native American health center, Native American agency or youth's Tribe and finding a group time/class that works with the youth's schedule. |
| Arranging general counseling once a week with county mental health providers. | Finding a therapist at a local Native American agency, arranging a session that meets the needs of the family's schedule and asking the family if they want the Native American agency or their Tribe to provide a traditional healer to work with. |
| Approving to occasionally attend family events, but not if potential for AWOL. | Asking the family if there are any important ceremonies or events in their family and/or Tribe the child would like to participate in, arrange transportation and if potential for AWOL, coming up with a plan with the family and Tribe for how the child will be supervised and avert potential for AWOL (tip: often it is the Tribe's ceremonies that are the key in healing a child(ren) and their family). |

| | |
|---|---|
| <p>Social worker/probation officer creating a case plan for the family for the next court hearing.</p> | <p>Social worker/probation officer inviting the Tribe/Tribe's ICWA rep (via phone or in person) and the family to create a culturally appropriate case plan that is based on the family's needs and Tribe's childrearing practices/belief systems.</p> |
| <p>If a child is in juvenile hall and will not be released soon, but is in need of substance abuse services, referral to participate in the hall's substance abuse services.</p> | <p>If a child is in juvenile hall and will not be released soon, but is in need of substance abuse services, asking the child and family if they would like a traditional healer to work with the child, asking the child's Tribe or local Native American agency to assist in providing a traditional healer to work with the child, asking a substance abuse counselor at a local Native American agency to come into juvenile hall to provide substance abuse services with the child and getting permission from the hall to allow these providers to work with the child, and additional permission for the ability of the providers to utilize ceremonial methods if necessary (i.e., burning sage/sweetgrass/cedar to create billows of smoke that can be a process of purifying before a session starts and/or throughout the session).</p> |
| <p>Providing materials on how the family can contact and sign up for TANF.</p> | <p>Helping a family sign up for California Native or Tribal TANF, finding out what services the TANF office the family will be a part of may have, signing up the family for the services through that office and keeping in regular phone/in-person contact with the Native TANF provider(s).</p> |

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⁸ Examples were provided courtesy of the Administrative Office of the Courts
Advanced Indian Child Welfare Act (ICWA): Active Efforts and Expert Witness | Participant Workbook
 Version 1.0, October 2011

Active Efforts
Case Plan Scenario: Maria L.⁹

Maria L. is 6 years old and lives with her mother in a rural area near a medium sized city. Her mother Carolyn L. is a member of an out-of-state Tribe. Maria has been detained based on a petition alleging that Maria is being neglected. Maria's kindergarten teacher reports that Maria's absences have become more and more frequent, and that Ms. L. has been inconsistent about picking her up on the days that she does attend. Maria's mother was recently laid off and received an eviction notice from her landlord due to failure to pay the rent. Ms. L. acknowledges that she has been depressed and has not taken Maria to school or picked her up because she cannot afford gas for her car. She has taken Maria with her to some temporary jobs. Maria describes being left alone frequently but has not been frightened because she knows that her aunt lives somewhere in the city and would help her.

At the detention hearing, the agency recommends continued detention based on the risk of serious neglect and the lack of means to protect her if she is returned home.

At the detention hearing, the agency recommends continued detention based on the risk of serious neglect and the lack of means to protect her if she is returned home. Notice to the Tribe has been prepared.

Have active efforts been made?

What could have been done?

What should have been done?

⁹ The case scenario was provided courtesy of the Administrative Office of the Courts
Advanced Indian Child Welfare Act (ICWA): Active Efforts and Expert Witness | Participant Workbook
Version 1.0, October 2011

TRAINING ACTIVITY 5A

Expert Witness as Related to Active Efforts, Standards of Evidence and Placement Preferences

Purpose

The purpose of the expert witness is to apprise the court about evidence concerning whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical harm, specifically in relation to the need for placement of an Indian child in foster care or with respect to the termination of parental rights.

Prevailing Social and Cultural Values

The Expert Witness must be qualified to ensure that decisions to remove a child or terminate parental rights are not based on ethnocentric biases, particularly those involving cultural practices related to childrearing and family organization.

Provision of Active Efforts

The expert witness can also provide evidence that can assist the court to determine whether or not active efforts were provided by the child welfare agency to prevent removal and to promote reunification. Active efforts must take into account the “prevailing social and cultural values and way of life of the Indian child’s Tribe.” Active efforts also require utilization of the available resources of the extended family, the Tribe, Tribal and other Indian social service agencies, and individual Indian caregiver service providers. The expert witness can attest to the availability of resources and their utilization.

Standards of Evidence

The information provided by the Expert Witness can assist the court to assess if the higher standards of evidence requirements for ICWA cases were satisfied, i.e., “clear and convincing” evidence for removal of an Indian child, and “beyond a reasonable doubt” for termination of parental rights.

The testimony of an expert witness is required at the dispositional hearing and at the hearing that terminates parental rights (W&IC Sec. 366.26). The following is excerpted from ACL No. -9-28, page 11:

“The removal of an Indian child may only occur if there is **clear and convincing evidence** that is supported by the testimony of an expert witness that

continued custody by the parent is likely to result in serious emotional or physical damage. The purpose for the use of the qualified expert witness is to provide testimony on the issue of detriment to the child. Qualified expert witness testimony is required before a court orders the child be placed out of the custody of his or her parents or terminates parental rights” (25 U.S.C. 1912(e); W&IC 361.7(c); and FC 7892.5(b))

“*Parental rights may not be terminated* in the absence of a determination, supported by evidence “**beyond a reasonable doubt**” including testimony of a qualified expert witness that the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child” (25 U.S.C. 1912(f); W&IC 366.26(c)(2)(B)(ii); and FC 7892.5(b))

Placement Preferences

The Expert Witness can inform the court as to whether or not placement preferences designated by the ICWA were followed, and if prevailing social and cultural standards of the child’s Tribe were honored. The child’s Tribe may establish a different order of placement preferences, providing that the proposed placements are the least restrictive settings appropriate to the child’s needs. The preferences of parents and children (if of sufficient age) should also be considered. The order of placement preferences may also be changed if good cause can be demonstrated to the court.

Expert Witness Qualifications

Who can be qualified as an expert witness?

Specific qualifications for an expert witness are not stipulated in the ICWA. However, guidelines issued by the Bureau of Indian Affairs emphasized that an expert witness should have knowledge of the prevailing social and cultural values and Tribal customs of the child's Tribe, especially those related to family organization and childrearing practices. Such knowledge can be acquired through education, experience, or a combination of both. Parties may disagree as to the qualifications of particular individuals. The court makes the determination whether or not to declare an individual as a qualified expert witness.

A qualified expert witness must fulfill at least one of the following criteria:

- a member of the child's Tribe who is recognized by the Tribal community as knowledgeable in Tribal customs as they pertain to family organization and childrearing practices;
- a lay expert with substantial experience in the delivery of Indian child and family services and extensive knowledge of prevailing social and cultural standards and child rearing practices of Tribes, specifically the child's Tribe, if possible;
- a professional person with substantial education and experience in the area of his or her specialty; or
- a professional person with substantial education and experience working with Indian families and familiar with Indian social and cultural standards, particularly those of the child's Tribe (added by California Rule of Court 1439(a) (10) (C)).

(ACL 1-43-04, p. 7)

An important consideration is that due to the variation among Native American cultures, family organization, and child-rearing practices, expertise in one Tribe does not necessarily confer expertise in the matters of another Tribe. However, it is generally assumed that "a Native American familiar with issues affecting an Indian child involved in a child custody proceeding may be better qualified than a non-Indian who is not involved in such issues" (ACIN I-40-10).

Additionally, the qualifications of an expert witness would vary depending on the facts of the case. For example, a case involving extreme physical abuse would focus more on the question of child endangerment and less on cultural competency (ACIN I-40-10).

Note that the qualified expert witness cannot be an employee of the person or agency seeking foster care placement or termination of parental rights, such as the child welfare worker, probation office, or probation social worker.

Expert Witness Selection

Selection of a Qualified Expert Witness

The party seeking the order for placement of an Indian child in foster care or for termination of parental rights is responsible for fulfilling the requirement for providing the expert witness. Consequently, the child welfare agency or county counsel is usually the party charged with the responsibility for producing an expert witness.

CDSS recommends that seeking the advice of the child's Tribe is the first and best resource for identifying an expert witness. The Tribe is likely to know Tribal members who can address the issue of child endangerment within the context of the Tribe's prevailing social and cultural standards, particularly those related to family organization and childrearing practices. The identified individual will need to meet the criteria set forth for a qualified expert witness as noted in Segment 5A (ACIN No. I-40-10).

When identifying an expert witness, child welfare workers should keep in mind the goal of selecting an individual who will likely be deemed appropriate by all parties. When all parties agree, the selected individual often will be more disposed to exercising independent judgment. If the parties do not agree on the proposed expert witness, other individuals may be proposed to fulfill the role. The final decision regarding the selection of a qualified ICWA expert rests with the judge (ACIN No. I-40-10).

How can child welfare workers find and Expert Witness?

Other sources of ICWA expert witnesses are Tribal organizations and the listing maintained by the Center for Families, Children and the Courts (CFCC). This listing can be found at: <http://www.courts.ca.gov/8105.htm>

It should be noted that neither the Judicial Council or California nor CDSS endorse or guarantee any individuals on the list. Agencies contracting for the services of an expert witness bear the responsibility for vetting the appropriateness of a potential expert witness. Additionally, individuals who qualify as an expert witness do not have to be included on the list.

Expert Witness Testimony

Preference for In-person Expert Witness Testimony

The California Department of Social Services (CDSS) recommends the use of testimony rather than written declarations, because testimony can address issues that arose after a declaration was written, and testimony may be more informative to a judge. If all parties have agreed in writing, testimony may be submitted by declaration or affidavit, but this method is not preferred by CDSS. (See ACL 08-02.)

The Nature of Expert Witness Testimony

The testimony of the expert witness can have substantial influence in the court. Expert witness testimony is used to answer these fundamental questions:

“Is it likely that the conduct of the parents will result in serious physical or emotional harm to the child?

If such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?” (BIA Recommended Guidelines for State Courts-Indian child Custody Proceedings, published in the Federal Register, vol. 44, No. 70/April 23, 1979)

The expert witness in ICWA matters is subject to the same standards that apply to expert witnesses in general. California Evidence Code Section 801 limits the testimony of expert witnesses to opinions that are:

“(1) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(2) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.”

This excerpt indicates that the expert witness employs his or her expertise to formulate an opinion for the court that will assist the judge to make a determination based on factual evidence.

Although no specific preparation is mandated for providing expert witness testimony, a general expectation exists that it is necessary for the expert witness to meet with the child’s

parents or Indian custodian, observe parent-child interaction whenever possible, meet with extended family members and Tribal representatives, and review the case information. Merely reviewing reports written by the child welfare worker would not meet customary standards (ACIN No. I-40-10).

CDSS recommends that counties request the proposed expert witness to contact the child's family and Tribe prior to court hearings, especially if the proposed expert is not from the child's Tribe (ACIN No. I-40-10, p. 3). Such individuals include:

- Birth parents
- Foster parents or kinship caregivers
- Children (if age-appropriate)
- Tribal members

The following are additional categories of individuals that the expert witness may choose to interview:

- Child welfare staff assigned to the child's case
- Service providers
- Attorneys

Exceptions to the generally accepted standards for preparation for ICWA expert witness testimony may occur when the expert witness is from an out-of-state Tribe, or for cases that concern extreme physical abuse. In situations where there is alleged extreme physical abuse, the focus of the testimony is on the continuing danger to the child and the need for immediate removal from the home (ACIN No. I-40-10).

Tribes or attorneys for children or parents may choose to provide a rebuttal expert witness. The rebuttal expert witness can serve as an additional legal protection for the child's right to preserve her/his Indian identity and Tribal connections. Out-of-state Tribes may decline this option, often because they do not have the resources to provide their own expert witness.

One resource that is helpful for child welfare workers are the *Guidelines for Psychological Evaluations in Child Protection Matters*, published by the American Psychological Association (APA) and available on the APA website: www.apa.org/practice/childprotection.html. It is recommended that the child welfare worker review these guidelines to become more knowledgeable about professional standards for rendering an expert opinion (ACIN No. I-40-10).

Contracting for the Services of an Expert Witness

Tribes are not required to provide an ICWA expert witness, although it is considered best practice for Tribes to assist in identifying qualified individuals, and presumed that Tribal

assistance in locating an expert witness is in the best interest of all parties (ACIN No. I-40-10).

The ICWA expert witness should be paid and reimbursed for services in the same manner as any other expert witness. However, expert witnesses are not precluded from offering their services at no cost. Payment (or the offering of services at no cost) does not carry the expectation that the expert witness agree with the recommendations of the county, and payment is not contingent upon the expert opinion provided by the expert witness. The goal of the ICWA expert witness testimony is to assist the court to rule in favor of the best interest of the Indian child based on the facts of the case.

Expert Witness in Action Questions

1. What concerns or pressures do you think might be experienced by a Tribal representative providing testimony as an expert witness regarding a child and family that are members of his/her Tribe?
2. How might these concerns or pressures differ when the family: a) lives in the Tribal community; or b) lives in an urban area geographically removed from their Tribal lands?
3. How can counties build local capacity for hiring ICWA expert witnesses?

SEGMENT 6

Bringing It Together: Case Plan

TRAINING ACTIVITY 6A

Case Activity Questions

Discuss the following questions in your small groups:

- Which active efforts they would have taken or should have been made in this case?
- Which recommendations would they make for additional active efforts?
- When locating an expert witness for this case, what qualifications would they be looking for?
- When and how would they go about locating the expert witness in their area?

SEGMENT 7

Wrap Up, Talking Circle, and Evaluation

TRAINING ACTIVITY 7A

Walking into the Circle

Reflect on the following questions:

1. What is my contribution to the group's understanding?
2. What did I gain most from the day?
3. What do I risk most by following through?
4. What touched my heart today?

Background on the Talking Circle

The Talking Circle represents many of the values associated with Native American communities. Inclusion, empowerment, collaboration, respect and honesty are a just a few of the values that can be demonstrated through this process. While there are variations on how the Talking Circle is utilized, there are basic concepts in its implementation:

- A leader of the group sets the tone and outlines the rules for the process.
- An object of significance is used (a feather, stick, etc.) to be passed from person to person in the group.
- Each person is given an opportunity to say what he/she would like on the subject at hand. Everyone else is to listen and not interrupt the speaker.
- A person may “pass” and choose not to talk.
- The circle is an opportunity to speak without being judged or criticized, thus encouraging openness and honesty.
- The process is not time limited and ends when everyone has had an opportunity to speak.
- The process is one of interconnectedness, inclusiveness, and wholeness.



CDSS

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ARNOLD SCHWARZENEGGER
GOVERNOR

April 29, 2010

ALL COUNTY INFORMATION NOTICE NO. I-40-10

REASON FOR THIS TRANSMITTAL

- State Law Change
- Federal Law or Regulation Change
- Court Order
- Clarification Requested by One or More Counties
- Initiated by CDSS

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE PROGRAM MANAGERS
ALL CHIEF PROBATION OFFICERS
ALL ADOPTION DISTRICT OFFICES
ALL TRIBES WITH TITLE IV-E AGREEMENTS

SUBJECT: REQUIREMENT OF THE USE OF AN EXPERT WITNESS
BY THE INDIAN CHILD WELFARE ACT (ICWA)

REFERENCE: THE FEDERAL INDIAN CHILD WELFARE ACT (ICWA) OF 1978
CODIFIED AT 25 U.S.C. SECTION 1901 ET SEQ; SENATE BILL
(SB) 678, CHAPTER 838, STATUTES OF 2006; WELFARE AND
INSTITUTIONS CODE (W&IC) SECTIONS 224.6, 361.7, 366.26;
FAMILY CODE SECTIONS 177, 7892.5; PROBATE CODE SECTION
1459.5; ALL COUNTY LETTER NO. 08-02

The purpose of this All County Information Notice (ACIN) is to provide information to counties, adoption agencies, tribes and other interested individuals and organizations regarding the use of qualified expert witnesses, as required by the federal Indian Child Welfare Act (ICWA).

The expert witness requirement has been codified in California's W&IC, Family Code (FC) and in Probate Code (PC). However, many people working in California proceedings where ICWA is applicable do not understand the purpose of ICWA expert witnesses or how they are to be used, and have expressed a desire for clarifying information. The purpose of this notice is to increase the understanding of the requirement of qualified expert witness testimony as applicable to Indian children. It is hoped that a better understanding of this requirement will lead to increased compliance with the ICWA and ultimately improved outcomes for Native American children in California who are the subject of an Indian child custody proceeding.

BACKGROUND

At the foundation of the ICWA is the federal policy that it is in the best interest of the Indian child to retain tribal ties and cultural heritage; and in the interest of the tribe to preserve its future generations. It establishes standards with higher evidentiary requirements when an Indian child is the subject of a child custody proceeding. The ICWA requires expert witness testimony before the state court can order an involuntary foster care placement of a child or the termination of parental rights. Specifically the ICWA requires that the expert witness testify on whether the “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” In addition, the standards for the removal of an Indian child and the termination of parental rights for an Indian child require that the court consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. (25 USC § 1912; W&IC § 361.7(c); W&IC § 366.26(c)(2)(B)(ii); PC § 1459.5(b); FC § 7892.5(a) & (b).)

Historically, Indian children were being removed from their tribal homes and placed in non-Indian foster and adoptive homes and institutions at rates disproportionately higher than federal and state averages (ICWA, 25 USC § 1901). For example, in the late 1970s, California Indian children were eight times more likely to be removed from their families than non-Indian children, and more than 90 percent were placed in non-Indian homes. Indian children were being removed at disproportionately higher rates as compared to other groups, to the detriment of Indian children who were cut off from their tribes and heritage. Such practices were detrimental to tribes as their stability was jeopardized by the high removal rate and its impact on their membership and governmental structure. To address this situation, the federal ICWA was passed in 1978.

While the situation has improved since the ICWA was passed in 1978, Native American children continue to be removed from their homes at a proportionally higher rate than other children in California. Additionally, a large number of Indian children placed in out-of-home care are placed in non-relative, non-Indian homes, further aggravating the loss of ties to the child's tribe and heritage. Therefore, it is critical that the requirement of qualified expert witness testimony is met in every case involving an Indian child. It is not only required by law, but is essential in helping the California courts and child welfare agencies ensure that every effort has been made to assess the safety of the child in the context of the prevailing cultural and child rearing practices within the child's tribe.

Further specifics and recommendations follow to clarify the ICWA expert witness requirements and California Department of Social Services (CDSS) recommendations,

which were developed after consultation with the CDSS ICWA Workgroup, including tribal advocates and county representatives.

USE OF EXPERT WITNESS TESTIMONY

The ICWA itself defines the issue to which the qualified expert witness must testify: whether "...the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The federal Bureau of Indian Affairs guidelines further refine the issues to be addressed by the expert witness:

"Basically two questions are involved: 1) Is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? 2) If such conduct is likely to cause such harm, can the parents be persuaded to modify their conduct?" It is important that the expert's testimony address both of these issues.

In addition, California has specified that when the court is considering whether to involuntarily place an Indian child in foster care, or terminate parental rights, the court shall require the expert's testimony and also consider evidence of the prevailing social and cultural standards of the child's tribe, including the "...the tribe's family organization and child rearing practices." (W&IC § 224.6(b).)

These requirements are designed to assist the judge by providing specific information pertinent to the case of a particular Indian child, as well as to counter the removal of Indian children that might be based on cultural bias.

We recommend counties have the proposed expert witness contact the child's family and tribe prior to court hearings, especially if the proposed expert is not from the child's tribe. This contact will provide valuable insight to the expert who is charged with evaluating the child's circumstances, on whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage. Additional information on this topic is contained in the following section.

In the Case of the Removal of an Indian Child

No removal of an Indian child from the custody of his or her parents or placement in out-of-home care may be ordered in the absence of a determination, supported by "clear and convincing evidence," including the testimony of a qualified expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Therefore, in the case of a child who is ICWA eligible, the testimony of an expert witness is required at the dispositional hearing.

In the Case of a Termination of Parental Rights

In a case involving the termination of parental rights, the evidentiary burden is higher. Parental rights may not be terminated in the absence of a determination, supported by evidence “beyond a reasonable doubt”, including the testimony of a qualified expert witness, that the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Therefore, in the case of a child who is ICWA eligible, the testimony of an expert witness is required at the hearing that terminates parental rights as described in W&IC § 366.26.

In Addressing Active Efforts

The qualified expert witness may also be used to provide information on the separate ICWA requirement to engage in active efforts designed to prevent the breakup of the Indian family. What constitutes active efforts is assessed on a case by case basis. However, active efforts are to be conducted in a manner that takes into account the “prevailing social and cultural values and way of life of the Indian child’s tribe.” Active efforts must use the available resources of the extended family, the tribe, tribal and other Indian social service agencies and individual Indian caregiver service providers.

Evidence of the active efforts engaged in must be provided to the court by the county agency. A tribal expert could be effective in providing testimony on available tribal resources, among other areas, for the purposes of addressing whether or not active efforts have been made in a particular case.

NATURE OF EXPERT WITNESS TESTIMONY

While the ICWA and related statutes and guidelines do not specifically discuss what an expert witness should do to prepare to testify in an ICWA case, there are rules and guidelines which relate to testimony of experts and, in particular, professionals testifying in court cases generally, and specifically in child welfare cases.

California Evidence Code § 801 states that:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

- (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
- (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at

or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

The American Psychological Association (APA) has issued Guidelines for Psychological Evaluations in Child Protection Matters and is generally instructive on the use of experts in child protection. These guidelines may be found on the APAs web site at www.apa.org/practice/childprotection.html. The guidelines stress that in evaluating parental capacity to care for a particular child or the child-parent interaction, professionals should make efforts to observe the child together with the parent when this is possible and appropriate, and may also interview extended family members and others. "If information gathered from a third party is used as a basis for conclusions, ...attempt to corroborate it from at least one other source whenever possible."

It would be difficult for the expert witness to develop an informed opinion about appropriateness of removing the child, or terminating parental rights in the absence of meeting with or assessing the parent(s) or Indian custodian, without reviewing the case information, observing the parent-child interaction whenever possible, and meeting with tribal representatives and extended family members. For that reason, the practice of having qualified expert witness testimony based solely on a review of the social worker's reports typically would not be considered in accord with these standards. There are exceptions, however some examples of exceptions to this standard would be in the case of an out-of-state tribe who provides an expert witness who hasn't had an opportunity to observe the parent and child together; or in cases that involve extreme physical abuse, where the focus of the testimony is on the continuing danger to the child and the need for immediate removal from the home.

QUALIFICATIONS OF THE ICWA EXPERT WITNESS

Generally, in judicial proceedings, a person is qualified to be an expert witness if he or she has a special knowledge, or skill, to be able to provide opinion on a subject beyond the knowledge of the judge. The expert can gain the knowledge or skill by education, experience or a combination of both. Parties in a case may differ on whether or not a specific individual is a qualified expert. It is the court that will ultimately make the determination whether a person proposed to be used as an expert can be declared a qualified expert in a proceeding.

The ICWA itself does not specify the qualifications for an expert witness. However, the federal guidelines issued by the Bureau of Indian Affairs outline desired qualifications, stressing the need for knowledge of the tribal customs of the child's tribe, particularly related to family organization and childrearing practices, and the prevailing social and

cultural standards and childrearing practices within the Indian child's tribe. The Bureau of Indian Affairs (BIA) guidelines on ICWA expert witnesses state, "...knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior-which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm."

Qualifications of the witness may include cultural competency in addition to the ability to address the issue of a specific child's endangerment. A tribal member from the child's tribe is most likely to be able to provide appropriate evidence on the cultural issues. We would note that Native American cultures, family organization and child-rearing practices vary greatly from tribe to tribe. It cannot be assumed that merely because a person is Native American, he or she would necessarily be knowledgeable of, and able to speak to the specific culture, family organization, and child-rearing practices of the specific child's tribe. At the same time, a Native American familiar with issues affecting an Indian child involved in a child custody proceeding may be better qualified than a non-Indian who is not involved in such issues.

Under California law in W&IC § 224.6(a), the qualified expert witness in an ICWA case cannot be an employee of the person or agency seeking the order, such as the child welfare or probation agency social worker or probation officer. While there is otherwise nothing that prevents, for example, a social worker from being a qualified expert witness, the expert witness should be shown to possess expertise beyond merely possessing the educational qualifications of a social worker. It must also be established how the person's background, experience and qualifications can aid the court with such key findings as whether continued custody by the parent or custodian would be likely, or unlikely, to cause serious emotional or physical harm to the Indian child. It must also be established how the person's background and experience can provide the court with relevant information on the child's tribe, culture and childrearing practices.

The above are all appropriate considerations when a social worker is trying to assist in the identification of an ICWA expert witness. Who would qualify as an expert witness and what exact qualifications they would need may vary, depending upon the facts of the case. The standards and focus of evidence may be very different in an emergency removal situation than in a non-emergency case as previously noted. In cases of extreme physical abuse, the focus will be more on the issues of child endangerment and less on cultural competency. (See In re Krystle D. 30 Cal.App.4th 1778, 37 Cal.Rptr.2d 132, Cal. App. 6 Dist., 1994.)

SELECTION OF THE QUALIFIED EXPERT WITNESS

It is the responsibility of the party seeking the order for the placement of the child in foster care or for the termination of parental right to ensure that the qualified expert witness requirement is fulfilled. In practice this means that it is the agency or county counsel who is responsible for locating a qualified expert witness. Best practice would indicate that someone look first to the tribe involved in the child custody proceeding. The federal BIA guidelines state that a court or any party may request the assistance of the Indian child's tribe in locating persons qualified to serve as an expert witnesses. The tribe will generally have the personnel or know of tribal members who can speak to the endangerment issue and of tribal-specific social and cultural norms and practices, including family organization and tribal childrearing practices pertinent to the proceeding.

As set forth in the W&IC, persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings: 1) a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices; 2) any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe; and 3) a professional person having substantial education and experience in the area of his or her specialty. (W&IC § 224.6(c).)

Ideally the ICWA expert witness is someone whose qualifications and appropriateness are agreed to by all parties. Having all parties agree to the expert witness helps to ensure the ability of the witness to give his or her independent assessment of the safety of the child and the needs of the child. However, if the parties do not agree, there is nothing to prevent any of the parties from offering the court a proposed expert witness. Ultimately, the judge in the proceeding will be the one to declare any proposed expert(s) as being a qualified ICWA expert that can provide information that will aid the court.

PAYMENT AND CONTRACTING

As with any other expert witness, counties should develop a standard procedure for payment of individuals serving as a qualified expert witness in ICWA cases. While the court or any party may request the tribe involved in the child custody proceeding to assist in locating a qualified expert witness, the tribe is under no obligation to supply an expert witness for the county. However, frequently it may be in the best interests of all parties if the tribe is willing to assist. If a tribal member or tribal social worker agrees to serve as a qualified expert witness, this person should be paid and reimbursed as any other expert witness would be. As with other experts being used in a proceeding,

however, this is not to preclude the use of individuals or organizations that are willing to provide their services as an expert witness at no cost.

Further, as with any other expert witness, payment should not be contingent upon the individual agreeing with the county's assessment of the case. The goal is to reach the appropriate outcome for the child. For example, if upon review of the file and other relevant evidence, the qualified expert witness concludes that there are insufficient grounds to support termination of parental rights, this would not be a basis for the county to refuse to pay that individual.

WAIVER OF THE QUALIFIED EXPERT WITNESS REQUIREMENT

The requirement of qualified expert witness testimony may be waived, but only under the following conditions:

- W&IC § 224.6(e) provides that the court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if all the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.
- California Rules of Court, Rule 5.484 (a) states "... (1) Testimony by a "qualified expert witness," as defined in W&IC section 224.6, Family Code section 177(a), and Probate Code section 1459.5(b), is required before a court orders a child placed in foster care or terminates parental rights. (2) Stipulation by the parent, Indian custodian, or tribe, or failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the person or tribe has been fully advised of the requirements of the Indian Child Welfare Act and has knowingly, intelligently, and voluntarily waived them. Any such stipulation must be agreed to in writing..."

EXPERT WITNESS LIST

Finally, the CDSS has been asked if it will maintain a list of qualified expert witnesses for ICWA cases. It would be best for county child welfare agencies and probation departments to work with local tribes and/or tribal organizations to identify qualified ICWA expert witnesses, or ask the specific tribe involved in the child custody proceeding for a potential expert witness.

In an effort to assist interested parties, the Judicial Council of California - Administrative Office of the Courts (AOC) has posted a list as a resource for those seeking an expert witness in an ICWA proceeding. However, neither the AOC nor the Department endorse nor guarantee any of the individuals included on this ICWA expert witness list.

The agency or individual seeking to use anyone on this list has the responsibility to screen that person for appropriateness for the specific case. Further, it is not required that an individual be included on the list in order to be considered a qualified ICWA expert.

The list can be found on the AOC's web site at:
<http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-ICWAExpertWitness.htm>.

Any questions regarding the expert witness resource list should be directed to the AOC. You may contact Vida Castaneda, Court Services Analyst at (415) 865-7739 or at vida.castaneda@jud.ca.gov.

Should you have any questions regarding this letter, please contact Lee Ann Kelly, Acting Bureau Chief of the Office of Child Abuse Prevention at lkelly@dss.ca.gov, or at (916) 651-6960.

Sincerely,

Original Document Signed By:

LINNÉ STOUT, Chief
Child Protection and Family Support Branch

Qualified Expert Witness under ICWA

Michele Fahley, Deputy General Counsel

Pechanga Indian Reservation

25th Annual ICWA Conference, June 5, 2018

ICWA and the Qualified Expert Witness

- Foster Care Placement (25 U.S.C. §1912(e); Welf. & Inst. Code §224.6):
 - No *foster care placement* may be ordered in such proceeding in the absence of a determination:
 - Supported by **clear and convincing evidence**,
 - Including testimony of a qualified expert witness,
 - That the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

ICWA and the Qualified Expert Witness

- Termination of Parental Rights (25 U.S.C. §1912(f); Welf. & Inst. 361.7(c)):
 - No *termination of parental rights* may be ordered in such proceeding in the absence of a determination:
 - Supported by **evidence beyond a reasonable doubt**,
 - Including testimony of a qualified expert witness,
 - That the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Child-Custody Proceedings and the QEW

- The new BIA Regulations (25 C.F.R. §23.2) definition of a child custody proceeding provides that, “an action that may culminate in one of four outcomes [foster care, termination of parental rights, pre-adoptive placement, and adoptive placement] is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving a given Indian child. Within each child-custody proceeding, there may be several hearings.”

Timing of the Expert

- Under the new regulations, if there is reason to know the child **IS** an Indian child, the court must receive testimony from a qualified expert witness that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- Detention/Jurisdiction Hearing
 - Emergency proceedings should not be continued for more than 30 days, unless (25 C.F.R. §23.113):
 - The court finds that restoring the child to the parent or Indian Custodian would subject the child to imminent physical damage or harm;
 - The court has been unable to transfer the proceedings to the jurisdiction of the Tribe; or
 - It has not been possible to initiate a "child-custody proceeding."
- Disposition Hearing
- Termination of Parental Rights Hearing

Burden of Producing Expert

- The expert requirement applies when the court seeks to place a child in foster care or terminate parental rights
- In dependency cases, the burden to produce an expert lies with the County
 - Welf. & Inst. §224.6 provides that the court “may” ask the tribe if they have an expert they wish to use.
 - BIA regulations state that the court or any party may request the assistance of the tribe in locating persons qualified to serve as expert witnesses. (25 C.F.R. §23.122(b))
- The County usually requests that a declaration be provided by the expert
 - California law requires that all parties agree in writing to accept the declaration in lieu of oral testimony (Welf. & Inst. Code §224.6(d))

Who Qualifies as an Expert?

- According to Welf. & Inst. §224.6, experts under ICWA include:
 - [P]ersons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:
 - (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family or organization in childrearing practices.
 - (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians and an extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
 - (iii) A professional having substantial education and experience in the area of his or her specialty.
- The BIA Regulations (25 C.F.R. §23.122) state that the social worker assigned to the child may not serve as the QEW, and Welf. & Inst. Code §224.6(a) states that “no employee of the...agency pursuing or recommending foster care placement or termination of parental rights” may serve as an expert witness.

Role of the Expert

- To provide the testimony required regarding “whether continued custody by the parent(s) will result in the likelihood of serious emotional or physical harm to the child.”
- Experts are supposed to testify to the “prevailing social and cultural standards of the Indian child’s tribe, including family organization and child-rearing practices.”
- Evidence must show a “causal relationship” between particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the child (25 C.F.R. §23.121(c)).
- Evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or non-conforming behavior does not by itself constitute sufficient evidence (25 C.F.R. §23.121(d)).

Turning Now to the Experts

- Corrina Garbani Sanchez, Child and Family Services Manager, Pechanga Band of Luiseno Indians
- Elizabeth Elgin-DeRouen, Advocate, Indian Child & Family Preservation Program
- Interactive Role-Play with our Experts!

**QUALIFIED EXPERT WITNESS: A HANDBOOK FOR
INDIAN CHILD WELFARE SOCIAL WORKERS**

Introduction

The idea for a handbook focused on qualified expert witness (QEW) under the Indian Child Welfare Act (ICWA) (25 U.S.C. 1912) and under state law, the Minnesota Indian Family Preservation Act (MIFPA) (Minn. Stat. 260.751) arose out of a need to both educate around the legal requirements for QEW as well as the need to demystify the role of the “expert” under ICWA and MIFPA so that the pool of qualified experts could be increased. Most native people do not wish to be referred to as experts. Even though many are knowledgeable in child rearing practices and cultural beliefs and practices around children and childhood in general, still, the term expert gives pause when applied to oneself. This stems from a way of being in the world that many native people hold that requires humility and great care for cultural knowledge, so that speaking of cultural understandings in a courtroom can create for some native experts an ethical dilemma and pose the possibility for transgressing cultural boundaries. As always, making room for a native way of perceiving things, within our modern institutions, here in particular, the court system, requires concerted effort and generally for native people it makes for an interesting juxtaposition.

Having acknowledged some concerns with identifying as a qualified expert witness, it is also true that native children are being removed from their homes at a rate equal to that of 1978 when the Indian Child Welfare Act was passed. (*See Minnesota Department of Human Services Report on Disparities, 2008.*) Even though reforms have been underway within the child welfare/protection system and specialized training has been offered regarding ICWA and Indian families, the numbers of out-of-home placements have continued at a disproportionate rate in comparison with other racial/ethnic groups. This has created a sense of urgency among Indian child welfare academics and practitioners to address

this growing disproportionality. This handbook on the qualified expert witness is meant to be another tool for Indian child welfare social workers and those who may serve as expert witnesses for tribes in Indian child welfare court proceedings for foster care or termination of parental rights.

The disproportionate removal rate also creates a compelling picture for the native community and tribes. Compliance with ICWA or perhaps the experience of noncompliance with ICWA has become a point of engagement with the native community. It's a justice issue much the same as the practice of religious freedom. Recently, ICWA cases such as the Baby Veronica case have captured widespread media attention over adoption litigation. In these cases the children's tribes have aggressively pursued their rights under the Indian Child Welfare Act to protect their interests as well as the interests of their tribal members. The field of child welfare has proven to be fertile ground for the exercise of tribal sovereignty as tribes carve out their jurisdiction over cases and contribute to transforming the dismal picture wrought by disproportionality.

The handbook is intended to be a training tool for those who may serve as qualified expert witnesses. It is recommended that the handbook be utilized in conjunction with formal training in order to receive the most benefit. It should also be used to supplement the expert's preparation with an attorney prior to offering expert witness testimony.

Why the Need for Experts?

There are instances where the court or the jury must view and or interpret evidence that is outside of their expertise, such as with DNA evidence, firearms and bullets, accident reconstruction or medical evidence of injury. For the presentation of these types of evidence the parties will call their respective experts who will provide information and draw conclusions or inferences based on their expert opinion as to what the DNA evidence revealed, what type of firearm was used in the crime, whether the bullet recovered from the crime scene matched the firearm later recovered by law

enforcement, how the accident occurred or how fast the driver was traveling when the pedestrian was hit, or what force must have been used to cause the extent of injury to the brain. Experts are needed to explain the evidence and then to offer a conclusion and this process assists the court or jury in the fact finding, or decision-making on a case. So, there are times when the court needs specialized knowledge about a particular subject in order to find the truth or to make a decision and therefore an expert opinion is needed.

For cases falling under the Indian Child Welfare Act, the law itself requires the use of qualified expert witness testimony for involuntary foster care placements and for termination of parental rights. 25 U.S.C. § 1912 (e), and (f). The specialized knowledge to offer the court may include child rearing practices of the child's tribe, family organization or tribal structure, cultural norms regarding care, nurture, discipline, teaching, family roles, and any other aspects of child rearing that may aid the court in its decision-making. The content of the expert's testimony will of course be shaped by the facts presented in a particular case.

Take for example an expert's knowledge of the cradleboard and its various uses. The expert may testify that continued custody of the child by the parent will not likely result in serious physical or emotional harm based upon the parents' utilization of the cradleboard (among other things), which provides evidence of the primary place of the child, planning for the child, concern for safety and security of the child, and allowing for an honored place for the child from which to view the world of the parents and family members. The parent may have a problem with alcohol, yet that problem is not determinative of the parent-child relationship, based on the opinion of the expert. This is a type of specialized knowledge that will assist the court in its decision-making.

Prior to offering the testimony above, the expert will have been "qualified" after answering a series of questions called "foundation questions" posed by the attorney. Foundation will be touched on

later in this handbook. Suffice it to say that the expert will have explained to the judge how she came to possess this specialized knowledge of the cradleboard by testifying about herself and her background, perhaps she was carried in a cradleboard herself or helped her relatives make them for family members and she was taught through this process how the cradleboard was to be utilized. Her testimony probably will have included how a family prepares for the birth of a child and perhaps the testimony will have touched on some philosophy regarding the tribe's beliefs about the place and role of the child. All of this will have informed the expert's opinion along with the facts as presented through reports in the case as well as other testimony heard by the expert.

Do You Need Letters After Your Name To Be Considered an Expert?

The short answer to this question is no, but you do need to demonstrate for the court how you are qualified to serve as an expert witness, by knowledge, training, skills or recognition. In Minnesota three categories of persons may be considered as expert witnesses. These include tribal members who are recognized by their tribal community as knowledgeable in the tribe's customs and practices regarding family life and child rearing; lay persons with substantial experience delivering child and family services to Indians and who have extensive knowledge of the prevailing social and cultural standards and child rearing practices within the Indian child's tribe; and a professional person with substantial education and experience in her specialty area and substantial knowledge of the prevailing social and cultural standards and child rearing practices within the Indian community. See *In re the Custody of S.E.G.*, 521 N.W.2d 357, 364-65 (Minn. 1994) (citing with modification the Bureau of Indian Affairs Guidelines, 44 Fed. Reg. 67,584, 67595 at D.4.(b)).

The first category is a member of the child's tribe who is recognized by the tribal community as knowledgeable about tribal customs in relation to family organization and child rearing. Take for example this hypothetical testimony:

Q: Will you state your name for the court?

A: My name is Russell Dupoint, Sr.

Q: Where do you reside?

A: At Squaretop, which is a small Kiowa community between Ft. Cobb and Anadarko.

Q: And are you a Kiowa tribal member?

A: Yes I am.

Q: Are you employed?

A: I'm retired but I volunteer for the Kiowa Tribe in their youth program.

Q: Please explain for the court what you do for the tribe.

A: In the youth program I teach the language and culture to the kids. We have programming during the week and in the summer during the month of June we have a language and culture camp. I teach there also.

Q: How long have you been teaching the language and culture?

A: Well, this program I referred to, I've been involved in that for around 10 years, but I've been teaching our language and culture for much longer than that. It's pretty much been a part of my way of life.

Q: How did you learn your language and cultural ways?

A: The language was spoken by my parents and grandparents. It was the language of our home and that's how I learned it. My folks practiced our tribal ways and so our whole family followed this way.

Q: Do you assist your tribe in any other way?

A: Yes. At times I'm called upon to help in the court system with our children and their families involved in child protection. Sometimes I testify for the tribe.

Q: How did the tribe authorize or select you for this role?

A: The tribal council passed a resolution authorizing me to provide expert testimony in child protection cases.

So, the expert's testimony might begin in this fashion, and other questions regarding the expert's knowledge may be asked to fill in the background for the judge hearing the case. In

order to qualify an expert from one of the other categories set forth above, the questions may follow a similar pattern, tailored to the lay expert's experience in service delivery and knowledge of the social/cultural standards and child rearing practices of the child's tribe, or the professional person's background in her area of expertise as well as her knowledge of cultural standards and child rearing practices.

It is important to note that when qualifying as a lay expert witness, the person must have both substantial experience in delivering services to Indian children and families *and* extensive knowledge of the prevailing social and cultural standards and child rearing practices *within the Indian child's tribe*. While the person may not be recognized by the tribe as knowledgeable in their tribal customs regarding family organization and child rearing, the person must still demonstrate extensive knowledge of these areas in his or her testimony.

Consider the following testimony:

Q: Mr. Dupoint, where are you employed?

A: For the tribe.

Q: What are your job duties?

A: I am a family preservation worker. I work with families in child welfare and I help them to identify what services they need and then help them to get those services. Sometimes I help them remain in housing, or employment, or arrange for transportation to programs. I do a lot of support work for the families. I've been doing this for 10 years.

Q: Are you familiar with the tribe's social and cultural standards around child rearing?

A: Yes I am. I've learned from formal training as well as being in the community and participating in the tribe's gatherings. I understand how children are raised and the different customary practices associated with children.

The lay expert may be qualified or he may need to state more of his knowledge of child rearing practices. Additional questions can be elicited from the witness in order to demonstrate extensive knowledge.

In regard to the professional expert, she must have substantial education and experience in her area of expertise *as well as* substantial knowledge of the prevailing social and cultural standards and child rearing practices within the Indian community. See S.E.G. and In the Matter of the Welfare of B.W., 454 N.W. 2d 437, 442 (Minn. App. 1990). In the termination of parental rights case called B.W., a social worker was qualified by the trial court as an expert witness meeting the requirement under ICWA. The court of appeals for Minnesota reversed and remanded the trial court decision, finding that where the Minnesota Department of Human Services Social Services Manual provided a more stringent standard for defining experts in Indian child welfare matters than the ICWA itself, then the state law standard should be applied. Since this case was decided in 1990, an expert in Minnesota must have expertise beyond her professional qualifications, to include knowledge of cultural standards and child rearing practices within the Indian community. In the case of B.W. the social worker had very little cultural knowledge, did not have knowledge of Indian history or literature and was unaware of service programs within the Indian community. Consequently, she did not meet the standard to provide expert witness testimony on an ICWA case.

Tribal State Agreement

The Minnesota Tribal State Agreement (TSA), revised in 2007, was signed by the eleven tribes in Minnesota and the State of Minnesota Department of Human Services, and it covers most areas within Indian child welfare, including the qualified expert witness requirement under ICWA. Under the TSA the State encourages the counties to utilize qualified experts identified by

the Indian child's tribe. See Tribal State Agreement, Part 1.E.33. The TSA goes further to state that when a tribally designated expert is not available, then the following criteria should be considered when qualifying expert witnesses to testify in an ICWA case:

1. Membership in the child's tribe or significant experience with the child's tribe;
2. Knowledge and understanding of the meaning of membership in the child's tribe;
3. Knowledge and understanding of the meaning of clan relationships and extended family relationships in the child's tribe;
4. Knowledge and understanding of the meaning of traditional and contemporary child rearing practices within the child's tribe;
5. Knowledge and understanding of traditional disciplinary measures used within the child's tribe;
6. Knowledge and understanding of ceremonial and religious practices and cultural traditions within the child's tribe;
7. Knowledge and understanding of medicine and traditional healing of the child's tribe; and
8. Knowledge and understanding of the effect of acculturation or assimilation within the child's tribe.

The Tribal State Agreement acknowledges that these criteria are considerations for the selection of experts and do not hold the force of law. Clearly they represent a way to establish an expert's substantial knowledge of cultural standards and child rearing practices. The criteria can be very helpful on a case where all the parties offer qualified experts to testify as they can be used to form questions for cross examination that may reveal the expert's bias.

Offering an Expert Opinion

The expert's specialized knowledge will assist the court in making the determination as to whether *continued custody of the child by the parent or the Indian custodian is likely to result in serious emotional or physical damage to the child*. See 25 U.S.C. 1912(e) and (f). The expert will be expected to offer an opinion on this very issue and be able to provide the basis for that opinion. This finding must be made by the court before involuntary foster care or termination of parental rights is ordered, and therefore the expert opinion is critically important.

Prior to offering an opinion the expert will have prepared by reviewing documentation provided by the attorney working on the case. The documentation may include psychological evaluations, mental health assessments, chemical health assessments, service provider reports, educational data, medical records, social worker records, and guardian ad litem reports. The information to review can be extensive but necessary in order to have a complete picture of the family involved in the case. When reviewing the records, the expert has to keep in mind the opinion that she will be asked to offer, as to whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The opinion, though a prospective one, has to be made by factoring in the evidence provided by the records in the case.

The expert may also interview individuals involved, such as family members, social worker or guardian ad litem. Taking time to meet with these individuals can be helpful in understanding the records review. The expert may discover why a particular program was ineffective, or why the parent was absent from a program for a period of time, or what concerned the social worker about a provider. In talking with family members, the expert may also learn more of the strengths, resilience and cultural practices observed by the family that may serve to mitigate any serious emotional or physical damage to the child.

Potential experts are encouraged to begin working on the case at the earliest possible stage, thereby gaining knowledge of the child and family as well as all the players involved in the case. The players include the child, parents and family, attorneys, social workers, service providers, guardians ad litem and the court. One advantage in having the expert consult early on the case is utilizing her advice with regard to appropriate services or active efforts provided to the family.

On the day of trial the expert may be allowed to hear the testimony of the other witnesses rather than be sequestered until she testifies. This allows her to hear the sworn testimony of the

professionals involved in the case and to learn how they interpret their own reports. This could be important for the expert as she weighs the appropriateness of services provided to the family, or as she forms her opinion as to the seriousness of any evidence of emotional or physical harm to the child.

To summarize, the expert will prepare to offer her opinion by reviewing the records in the case, meeting with individuals involved, meeting with the attorney to go over her testimony, and listening to testimony on the day of trial. She will offer her opinion based on her specialized knowledge of the tribe's family organization, cultural standards and child rearing practices, as well as the information provided in the particular case. If she prepares well, then her testimony will withstand cross examination by the other parties, though it may seem unpleasant.

Sample Questions for Expert Witness Testimony

Direct Testimony Example

- Name
- What is your occupation
- Authorized to speak on behalf of the ___ tribe regarding child custody matters?
- Familiar with the case in _____ County involving the children _____
- How have you been made familiar with this case?
 - Reviewed the file?
 - Met with the family?
 - Met with others involved in the case?
- Understand there is a petition to [transfer legal custody] [for permanent custody to the agency][termination of parental rights]?
- Is the child___ eligible for or enrolled in the tribe?
- And so in your understanding, does this case fall under the ICWA?
- Has the tribe received notice of these proceedings?
- Are you designated by the tribe as an expert to represent them in these proceedings?
- Are you knowledgeable in tribal customs of the _____ tribe as they pertain to family organization and child rearing practices?
- Are you qualified as an expert to testify in that regard?

- Has the mother's conduct resulted in child raising practices that are unacceptable in the tribal community?
- Has that been demonstrated by _____ [e.g. educational neglect, chemical dependency. Domestic violence]
- Is it your expert opinion that, at this time, the continued custody of the child by ____ is likely to result in serious emotional or physical damage to the child?
- In your opinion, is the [transfer of legal custody][permanency custody to the agency] or [termination of parental rights in the child's best interests?
- Is the proposed placement consistent with the order of preference under the ICWA?
- Were appropriate services provided to the family to prevent out of home placement?
- Were active efforts provided to the family?

Cross Examination Questions

- What are the conditions in the home that lead you to the conclusion that continued custody by the mother would result in serious physical or emotional damage to the children?
- In your opinion, has the county provided active efforts to the mother to try to return the children back to her care?
- What is your understanding of those efforts?
- What is your understanding of the concern that the county had with the mother's parenting in this case?
- What is the tribe's concern with the mother's parenting in this case?
- Does the conduct of the mother herein violate the customs of the tribe as they pertain to family organization and childrearing practices?
- Do you have an opinion as to whether continued custody of the child by the mother is likely to result in serious physical and / or emotional damage to them?
- What is your opinion?
- What is the recommendation of the tribe in this matter at this time?
- Is this recommendation consistent with the order of preferences consistent with the ICWA, 25 USC sec. 1915?

List of Appendices

1. Indian Child Welfare Act
2. Minnesota Indian Family Preservation Act
3. Minnesota Rules of Juvenile Procedure, Rule 2.01 (21) and Rule 49
4. Minnesota Administrative Rules, Rule 9560.0221

5. BIA Guidelines for State Courts
6. Minnesota Tribal State Agreement
7. Minnesota DHS Social Services Manual, Indian Child Welfare Section
8. Minnesota Cases, B.W. and S.E.G.

Pursuant to 25 United States Code Section 1912 et seq., Ms. Liz DeRouen the ICWA advocate and Interim Director from the Indian Child and Family Preservation Program (the ICFPP) is being offered as the Indian Expert Witness for our Disposition today. The ICFPP is a consortium that represents six federally recognized tribes in ICWA child welfare matters. The child is eligible for enrollment.

1. Qualifications of Ms. DeRouen:

What is your employment?

What are your duties?

What is the ICFPP?

What is your education?

How long have you been at ICFPP as an ICWA Advocate? What is your knowledge of the ICWA? Have you had any continuing education in child welfare issues? How about continuing education for ICWA issues?

Have you been qualified as an expert witness per the ICWA in the state of CA before? How many times? How about any other states?

Are you a member of a tribe? If so, which one? Are you familiar with the Dry Creek Rancheria Band of Pomo Indians' traditions and customs? Did you consult with any tribal council on this case?

Do you consider yourself to have experience in the delivery of services to Indian children and families? Do you have knowledge of prevailing social and cultural standards of the Indian community and a vast knowledge of child practices of the Dry Creek Rancheria Band of Pomo Indians?

2. Minor/Tribal Information:

Are you assigned to the case of SQ?

What has your work been on the case?

From whom does SQ receive her connection to the Dry Creek Rancheria Band?

How can she become enrolled?

Have you received discovery for this case and have you reviewed it?

Have you reviewed the court reports for this case thus far?

To confirm, they include the Detention Report, the Disposition Report, and the Addendum Report, correct?

Are you aware that the Agency's recommendation is to bypass the mother, JG, and to not offer reunification services based on her previous dependency cases in Sacramento for her older children, (4) where her services and/or parental rights were either terminated or she was bypassed?

Do you know if any of the mother's older children were eligible for enrollment with the Dry Creek Rancheria Band of Pomo Indians?

Were you or the ICFPP involved in any of these children's dependency cases in Sacramento County? How?

Have you reviewed the Agency's Request for Judicial Notice with the attached court findings?

Do you know what the reasons for the mother's older children's dependencies were?

Are they the same issues for mother as they are in SQs current case?

Are you aware that the mother's whereabouts are unknown?

Are you aware that the mother has not been engaged in any services?

Are you aware that she has not been in communication with the Agency?

In your opinion, has mother shown a desire to change?

Considering the mother's history and the current situation of her whereabouts being unknown, what is your position regarding the Agency's recommendation of bypass?

You are aware that the Agency is recommending services for the father, correct?

In your review of the case, what would you say about the Agency's Active Efforts to provide remedial services and rehabilitation programs to the parents designed to prevent the breakup of the Indian family?

3. Family Reunification/Outcome:

In your opinion which is based on your knowledge of Indian culture and your personal knowledge of this case, is the continued custody of SQ by her parents, likely to result in serious emotional or physical damage to the child? Why?

The child is out of home in the home of a relative. What is your opinion regarding this?

Considering the situation, is it your opinion that this is the best placement currently to meet the child's need? Is the tribe in agreement?

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KEEPING CULTURAL BIAS OUT OF THE COURTROOM: HOW ICWA “QUALIFIED EXPERT WITNESSES” MAKE A DIFFERENCE

Elizabeth Low*

I. Introduction

For centuries, Indians were regarded as an inferior people causing the government to make efforts to assimilate—and later to dismantle—Indian families to improve and protect the identity of the United States. In the 1970s, the government embraced an era of self-determination for American Indians by creating laws that would simultaneously protect tribes and empower them to flourish without American government assistance.¹ In 1978, Congress promulgated the Indian Child Welfare Act (ICWA). The purpose of ICWA is “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 removal of Indian children from their families . . . which will reflect the unique values of Indian culture.”² ICWA has proven effective in protecting children in many instances, but today courts continue to struggle to interpret and apply some provisions of ICWA.³ As of 2016, American Indian children still represent a higher percentage of children in the foster care system than almost any other race although they represent a smaller percentage of the population than most races.⁴

One of the factors that contributes to a higher percentage of American Indian children in the foster care system is the inconsistent interpretation of the term “qualified expert witness.” According to 25 U.S.C. § 1912(e) and (f), neither foster care placement nor termination of parental rights may be ordered without testimony from a qualified expert witness “that the

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1. Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* 3 (John F. Kennedy School of Gov't, Harv. Univ., HKS Faculty Research Working Paper Series RWP10-043, 2010).

2. Indian Child Welfare Act, 25 U.S.C. § 1902 (2012).

3. Ann E. MacEachron, Nora S. Gustavsson, Suzanne Cross & Allison Lewis, *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 SOC. SERV. REV. 451, 460 (1996).

4. *Racial Disproportionality and Disparity in Child Welfare*, ISSUE BRIEF (Child Welfare Info. Gateway, Washington, D.C.), Nov. 2016, at 1, 3, https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”⁵ Neither Congress nor the courts have uniformly decided what requirements are necessary for a witness to be a “qualified expert witness.”

This Comment will explain how “qualified expert witness” has been interpreted and examine what requirements an expert witness should have to be considered qualified under 25 U.S.C. § 1912(e) and (f). Part I of this Comment will review the history of the Indian family structure necessary to understand the creation, purpose, and application of the qualified expert witness provision. Part II will explain the historical background of ICWA. Part III will explain the qualified expert witness (QEW) provisions of ICWA and the relevant Bureau of Indian Affairs (BIA) guidelines. Part IV will discuss the various problems presented by ICWA and the BIA guidelines. Part V will explore the benefits and disadvantages of states’ solutions to the problems of 25 U.S.C. § 1912(e) and (f) and will discuss other appropriate solutions to the problems of the qualified expert witness provision.

II. Historical Background

The overrepresentation of Indian children in the foster care and adoption system lives on because of a continued historical belief that Indians are an inferior race. In the late nineteenth century, the United States implemented several programs designed to assimilate Indians into white culture.⁶ One program that promoted assimilation was the transport of Indian children to boarding schools. Fearing tribal extinction, some parents sent their children to these schools in hopes that assimilation would ensure survival; other parents were coerced.⁷ Whites who promoted the boarding schools hoped that Indians would become civilized by absorption into mainstream American culture.

Eager to “civilize” Indians, Herbert Welsh and Henry Pancoast founded the first boarding school for Indian children in 1860 on the Yakima reservation in Washington.⁸ To civilize Indian children, Welsh and

5. Indian Child Welfare Act, 25 U.S.C. § 1912(e)–(f).

6. *History and Culture: Boarding Schools*, PARTNERSHIP WITH NATIVE AM., http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools (last visited Oct. 7, 2018).

7. *Id.*

8. Richard Walker, *Seattle Continues Healing ‘Deep Wounds’ with Boarding School Resolution*, INDIAN COUNTRY TODAY (Oct. 20, 2015), <https://newsmaven.io/indian>

Pancoast implemented programs designed to compel children to adopt the values of the mainstream white society.⁹ These values included the importance of Christianity, private property, material wealth, and monogamous nuclear families.¹⁰ Assimilation progress moved rapidly as the government approved the establishment of more schools—both boarding and day schools. By the 1880s, the United States operated sixty on-reservation schools with 6200 Indian students.¹¹

In the following decade, pro-assimilationists realized that on-reservation schools had not efficiently assimilated Indians into white culture. Thus, a movement to build off-reservation schools began.¹² In 1879, Army Lieutenant Richard Henry Pratt received approval from the U.S. Indian Office to found the first off-reservation boarding school in Carlisle, Pennsylvania.¹³ Pratt subsequently became the superintendent of Carlisle Indian Industrial School.¹⁴ Based on furthering his mission of absolute assimilation, Pratt famously said, “Kill the Indian, save the man.”¹⁵ In other words, Indians could only be saved through erasing their birth culture and conforming to American values.

The moment that children set foot on the school grounds, they were stripped of their cultural identities and externally Americanized. The children had their braids cut off, their traditional clothing exchanged for uniforms, their names Anglicized, their diet changed, and their native languages forbidden.¹⁶ When the children were not working on their academics, they were learning to do work that conformed to the normal gender roles of Americans.¹⁷ Girls cooked, cleaned, sewed, and laundered; boys learned blacksmithing, shoemaking, and farming.¹⁸ In the summers,

countrytoday/archive/seattle-continues-healing-deep-wounds-with-boarding-school-resolution-mTsCyHPip0K7HgRCBE0uuQ.

9. *History and Culture: Boarding Schools*, *supra* note 6.

10. *Id.*

11. *Id.*

12. *Id.*

13. Angelique EagleWoman (Wambdi A. WasteWin) & G. William Rice, *American Indian Children and U.S. Indian Policy*, 16 TRIBAL L.J., 2015-2016, at 1, 3–4, http://law.school.unm.edu/tlj/volumes/vol16/TLJ_16_1_EagleWoman_Rice.pdf.

14. *History and Culture: Boarding Schools*, *supra* note 6.

15. “Kill the Indian, and Save the Man”: Capt. Richard H. Pratt on the Education of Native Americans, HISTORY MATTERS: THE U.S. SURVEY COURSE ON THE WEB, <http://historymatters.gmu.edu/d/4929> (last visited Oct. 9, 2018).

16. *History and Culture: Boarding Schools*, *supra* note 6.

17. *Id.*

18. *Id.*

the children were placed with white families for further assimilative learning of the same kind.¹⁹ White families who housed students in the summer for assimilative learning purposes often used girls for domestic labor and boys for harvesting.²⁰ Many times, the children were unsupervised and subjected to danger.²¹

Not only were they forced to adopt white culture outside the classroom, but they were also made to celebrate white culture inside the classroom. History was taught from a biased white perspective: Columbus was heralded as a hero who brought civilization to Indians; Thanksgiving was taught to highlight the “good” Indians who helped the Pilgrims; New Year’s was taught as a time tracking measurement; and Memorial Day honored fallen soldiers, many of whom had killed family members of the children in the school.²² Religion was also a mandatory subject for student learning.²³ This class focused on basic Christian fundamentals, such as the Ten Commandments, the Beatitudes, and the Psalms.²⁴ Conceptions of sin and shame, with a concentration on sexual purity, were also imparted on students.²⁵

Within two decades, twenty-three more schools with the same fundamental principles had been created.²⁶ These schools worked to achieve complete assimilation just as Carlisle had; however, they often employed harsher methods.²⁷ For example, Indian children at these schools “had their mouths washed out with lye soap when they spoke their Native languages.”²⁸ Confinement, deprivation of privileges, corporal punishment, and diet restriction were just some of the other penalties exacted for expressing native cultural traits.²⁹ Among their other impurities, these schools also lacked sufficient education. Many schools struggled to teach

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. EagleWoman & Rice, *supra* note 13, at 4.

27. *Id.*

28. *Id.*

29. Tabatha Toney Booth, *Cheaper Than Bullets: American Indian Boarding Schools and Assimilation Policy, 1890–1930*, *Native American Symposium*, in *IMAGES, IMAGINATIONS, AND BEYOND: PROCEEDINGS OF THE EIGHTH NATIVE AMERICAN SYMPOSIUM* 46, 54 (Mark B. Spencer ed., 2010), <https://www.se.edu/native-american/wp-content/uploads/sites/49/2019/09/NAS-2009-Proceedings-Booth.pdf>.

basic English, for they did not know how to teach the English language when the Indian language did not translate perfectly.³⁰

Harsh punishment for cultural offenses was only one form of trauma Indian children experienced while at boarding school. In addition to emotional damage caused by the separation from their families, physical and sexual abuse were also rampant.³¹ Students reported being severely abused by teachers, administrators, and other students.³² What had started as a mission to assimilate became a method to destroy.

Even if children were fortunate enough to attend schools not run harshly, they were subject to overcrowding, poor sanitation, malnutrition, stress, and emotional trauma.³³ These conditions led to high rates of tuberculosis, trachoma, and other afflictions.³⁴ For example, in 1899, the Phoenix Indian School had 325 cases of measles, sixty cases of pneumonia, and nine deaths in just ten days.³⁵ Eventually, sanatoriums and cemeteries³⁶ were built solely to deal with the consequences these schools created.

Finally, in 1928, a comprehensive study on the social, economic, and health conditions of Indian life, known as the Meriam Report, was published.³⁷ The study brought the impurities of boarding schools to light, *inter alia*, noting that boarding schools were generally facilities that made children do labor-intensive chores; taught mostly vocational classes; and abused children physically and emotionally.³⁸

These cultural troubles, coupled with troubles from the past, have translated to the court system today. In the post-World War II era, the government still considered Indians' divergence from white American middle-class norms problematic.³⁹ This period in United States history was marked by values of wealth and the nuclear family, but Indian values differed in many tribes. The disparity between the values of whites and

30. *History and Culture: Boarding Schools*, *supra* note 6.

31. Gretchen Millich, *Survivors of Indian Boarding Schools Tell Their Stories*, WKAR, <http://www.wkar.org/post/survivors-indian-boarding-schools-tell-their-stories#stream/0> (last visited Oct. 11, 2019).

32. *Id.*

33. Booth, *supra* note 29, at 53.

34. *Id.*

35. *History and Culture: Boarding Schools*, *supra* note 6.

36. Booth, *supra* note 29, at 53.

37. EagleWoman & Rice, *supra* note 13, at 5.

38. *Id.*

39. Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. (SPECIAL ISSUE) 136, 140 (2013).

Indians remained. Because the whites viewed Indian values as inferior, Indian children were permanently moved to homes with white families who promoted the more mainstream values.⁴⁰

To achieve a picturesque life, white couples who had trouble creating the nuclear family on their own began adopting Indian children. In the 1950s and 60s, contraception, abortion clinics, and a fading stigma of unwed mothers all contributed to the lack of white children available for adoption.⁴¹ This, coupled with an emotional appeal from the government, caused couples to consider adopting American Indian children. As Thomas Lyslo, a former BIA employee, said, "During the past decade there have been many programs designed to promote the adoption of all children But the Indian child has remained the 'forgotten child,' left unloved and uncared for on the reservation, without a home or parents he can call his own."⁴²

Answering the needs of non-nuclear white families, the government crafted a new policy of forced adoption that was portrayed as a symbiotic relationship, giving white parents a nuclear family and Indian children a nourishing home life. Instead of nudging Indians toward whiteness, the government pushed them directly into it by taking Indian children from their families and placing them with white families.⁴³ To execute this new policy of forced adoption, the government created the Indian Adoption Project (IAP) in 1958.⁴⁴ On the record, the IAP was a program designed to break down racial barriers that prevented whites from adopting American Indian children.⁴⁵ In reality, the IAP unnecessarily broke up Indian families under the guise of benevolence.

With the demand for adopted children high, Lyslo, the Director of the IAP, and his associates moved to increase the "supply of adoptable children."⁴⁶ He enlisted the BIA and state social workers to convince Indian mothers to relinquish their infants at birth and intervened in Indian families to remove older children they claimed were neglected.⁴⁷ Lyslo embellished the struggles of Indian families and popularized them as units plagued by unwed parents, deviant extended families, and crushingly impoverished and

40. *Id.* at 147.

41. *Id.* at 142.

42. *Id.* at 143.

43. *See id.* at 149.

44. *Id.* at 140.

45. *Id.*

46. *Id.* at 144.

47. *Id.*

alcoholic parents.⁴⁸ As a result, many Indian children were removed from their homes, not because of danger to the child, but because of cultural biases and misunderstandings.

One of the most commonly maligned and misunderstood cultural traits of Indian life is the cohesiveness of the extended family. For example, the Choctaw concept of family demonstrates the close extended family relationship.⁴⁹ In this tribe, the mother's brother was generally the person who made marriage arrangements and educated the sister's children.⁵⁰ Aunts, uncles, and grandparents were usually the disciplinarians.⁵¹ This traditional Indian concept of extended family was rejected and ignored in favor of the nuclear family, which was considered to be the "correct" form of home to raise a child in.⁵² Lyslo promoted pessimistic visions of such family structures,

[I]llegitimacy among Indian peoples is frequently acceptable, and the extended family is by no means extinct. The unwed mother may bring her child home to be cared for by herself, her family, or some relative, and he may be successfully absorbed by the tribe. [F]or [only] a small percentage of these children, a plan can be developed on the reservation for their care . . . for the majority, resources outside the reservation must be found.⁵³

The BIA and state social workers believed that the tribes' extended kin networks were rarely effective or appropriate for raising children.⁵⁴ Thus, many Indian children were removed from the care of extended family members, and courts routinely denied custody to extended family members, believing unfamiliar married couples to be more suitable parents than relatives of the child.⁵⁵

48. *Id.*

49. See *Marriage*, CHOCTAW NATION, <https://www.choctawnation.com/history-culture/heritage-traditions/marriage> (last visited Jan. 8, 2019).

50. Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 336 (2008–2009).

51. Jacobs, *supra* note 39, at 147.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

Not only did America value the nuclear family, but Americans also valued affluence.⁵⁶ In a tragic twist of irony, the government began removing children from homes because of poverty that it had itself caused through different policies and laws that made Indian livelihoods obsolete. Although poverty was a consequence of history, people in charge of state and federal agencies responsible for the welfare of children saw it as a moral and cultural failing.⁵⁷ For instance, sharing beds or sleeping in the same room as a parent was thought to stunt the development of children, which was a moral failing.⁵⁸ Another standard demanded of American Indians—but not whites—was indoor plumbing.⁵⁹ Furthermore, even when families attempted to seek financial assistance, they risked alerting government officials of their impoverished status. One case is illustrative of this scenario: a grandmother caring for six children whose parents had died⁶⁰ sought financial aid from local welfare authorities, who responded by removing the four youngest children from the home.⁶¹

Removing children because of cultural differences and poverty was detrimental to children and their tribes then and now. Indian children who were removed from their homes and placed in boarding schools or with white families generally felt as if they did not belong.⁶² Thus, many of the children placed with white families questioned their identities and developed negative views about the culture from which they were removed.⁶³ If the children ever returned home, they often no longer felt like they belonged there either.⁶⁴ Stripped of their cultural identity and language, it was difficult to connect with their family members.⁶⁵ As adults, the loss of identity is difficult to regain. These experiences affected the way they raised their children as well. Those who had been in boarding schools had little knowledge about parenting and were overwhelmed by raising children.⁶⁶ Furthermore, the tribes' loss of generations left them unable to

56. *See id.* at 148.

57. *Id.*

58. *See id.*

59. *See id.*

60. *Id.* at 147.

61. *Id.*

62. *See* Kacy Wothe, Note, *The Ambiguity of Culture as a Best Interests Factor: Finding Guidance in the Indian Child Welfare Act's Qualified Expert Witness*, 35 *HAMLIN L. REV.* 729, 744 (2012).

63. *Id.* at 761.

64. *Id.*

65. *Id.* at 744.

66. Millich, *supra* note 31.

effectively continue their traditions and customs as they had for so many decades. Too, the loss of the children itself was difficult for tribes to bear because many tribes believed that children were sacred.⁶⁷

As time progressed the tribes became more politically active and tribal leaders, Indian communities, and Indian activists demanded change. They attempted to bring light to the public of just how harmful the government had been to Indian children and their families. The tribes' concerns were finally heard by Congress in the 1970s. When Congress became aware that significantly more Indian children were being removed from their homes than white children, Congress directed a statistical assessment of Indian adoption and foster placement.⁶⁸ In 1973, Congress conducted a statistical analysis revealing that states were removing twenty-five to thirty-five percent of all Indian children from their homes.⁶⁹ Of these, eighty-five percent were placed in non-tribal homes, even when suitable and willing tribal relatives were available.⁷⁰

In 1978, the federal government took action to remedy the overrepresentation of Indian children in the foster care system.⁷¹ To combat the removal of children from a home that was fit, but culturally and socially different from mainstream Americans', Congress promulgated the Indian Child Welfare Act because "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." The sponsors of ICWA believed that the removal of Indian children was disproportionate because of a misunderstanding of cultural and social differences between Indian and non-Indian households.⁷² The House Committee concluded that

[There is] a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming

67. Delphine Red Shirt, *The Lakota Children Are Called Wakanyeja 'Little Sacred Ones'*, NATIVE TIMES (Feb. 9, 2015), <https://www.nativetimes.com/46-life/commentary/11125-the-lakota-children-are-called-wakanyeja-little-sacred-ones>.

68. RACHEL BENNETT, NAT'L RESOURCE CTR. FOR FOSTER CARE & PERMANENCY PLANNING, INFORMATION PACKET: AMERICAN INDIAN CHILDREN IN FOSTER CARE (May 2003), <http://centerforchildwelfare.org/kb/ICWA/american-indian-children-in-fc.pdf>.

69. *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N, <https://www.nicwa.org/about-icwa/> (last visited Jan. 14, 2019).

70. *Id.*

71. *Id.*

72. Denise L. Stiffarm, Comment, *The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart from the Statutory Placement Preferences*, 70 WASH. L. REV. 1151, 1153 (1995).

rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future. . . . [Congress] feel[s] the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family, and the Indian tribe.⁷³

ICWA was thus intended as a congressional fix for the abusive state practices and procedures regarding Indian children, and it provided federal standards to determine whether Indian children could be subjected to foster care or adoptive placement under state law.⁷⁴

ICWA's standards apply to child custody proceedings, which include most legal processes in which an Indian child is subjected to non-voluntary foster care or adoptive placement. ICWA also establishes minimal procedures that a state must follow in child custody cases involving Indian children.⁷⁵ For example, this ICWA section codifies basic human rights, such as notice of proceedings.⁷⁶ Likewise, sufficient time to prepare for the proceedings must be given.⁷⁷ Parents and other caretakers must have an opportunity to be heard, and Indian parents have a right to professional counsel.⁷⁸ This part of the statute also requires that parties seeking to maintain custody have access to all documents that a judge will use to make a decision.⁷⁹ This section also mandates that parties seeking placement or termination must make active efforts to preserve the family.⁸⁰ Finally, and most importantly for the purposes of this Comment, this section of ICWA

73. COMM. ON INTERIOR AND INSULAR AFFAIRS, 95TH CONG., 2D. SESS., ESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES, H.R. REP. NO. 1386, at 19 (1978).

74. *State Statutes Related to the Indian Child Welfare Act*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 16, 2018), <http://www.ncsl.org/research/human-services/state-statutes-related-to-indian-child-welfare.aspx>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

demands that a qualified expert witness be used in foster care placement and termination of parental rights proceedings.⁸¹

Congress did not create ICWA to ensure that protections which Indians already had remained in place. Rather, it created ICWA to correct the abuses that had separated families for decades. As highlighted previously, the history of the Indian family is a saddening one. Children were ripped from their homes and transported to boarding schools in an effort to assimilate them. Others were taken from their parents and placed in adoptive homes because the government believed that Indians were inherently poor at parenting. The implementation of ICWA has been instrumental in preserving Indian families, but the application and interpretation of ICWA has not been perfect.

III. “Qualified Expert Witnesses” Under ICWA

One standard of ICWA that has been applied and interpreted differently across the country is the requirement of qualified expert witness testimony in foster care and adoptive placements. Qualified expert witness testimony is a mandatory piece of evidence that the court requires in foster care placement and parental rights termination proceedings.⁸² According to the federal ICWA statute, the testimony of at least one qualified expert witness must support the court’s determination that the ICWA burden of proof has been met in foster care and termination proceedings.⁸³ For foster care proceedings, the standard for the burden of proof is by clear and convincing evidence.⁸⁴ For termination proceedings, the standard for the burden of proof is beyond a reasonable doubt.⁸⁵ Even though the standards of proof are different, the applicable qualified expert witness requirements and guidelines are the same.

81. Indian Child Welfare Act, 25 U.S.C. § 1902 (2012).

82. *Id.* § 1912(e)–(f).

83. *Id.*

84. *Topic 14. Expert Witnesses*, NAT’L INDIAN L. LIBR., <https://narf.org/nill/documents/icwa/faq/expert.html> (last visited Jan. 14, 2019).

85. *Id.* (“In a termination of parental rights proceeding, the court will use the applicable state burden of proof to determine if the state factors have been met to terminate the parental rights to an Indian child. Then, under 1912(f), it will use the higher the ICWA ‘beyond a reasonable doubt’ burden of proof to determine whether ‘the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.’ In those states where a dual burden of proof is not used, the court will use only the ICWA burden of proof in either type of proceeding.”).

Scholars and lawyers debate what qualifications Congress intended an expert witness in this context to have. It is clear from Congress's stated purpose that it intended to reduce the number of Indian children removed from their homes due to cultural bias or misunderstanding.⁸⁶ In 1979, just after the creation of ICWA, the BIA set guidelines for a "qualified expert witness." According to the BIA, the purpose of a qualified expert witness is to provide "competent testimony . . . to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child."⁸⁷ Explaining how the purpose should be implemented in practice, the BIA listed in Section D.4 of the Federal Guidelines the following people as possible candidates for qualified expert witnesses:

- (1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practice;
- (2) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe; and
- (3) A professional person having substantial education and experience in the area of his or her specialty.⁸⁸

Some scholars argue that experts must be uniquely qualified to determine whether court proceedings implicate cultural bias, and, therefore, must be Indian.⁸⁹ Others argue that ICWA's language makes no requirement that qualified expert witnesses be Indian, and, therefore, the expert witness may be white or Indian.⁹⁰ Chiming in on this debate, the BIA has interpreted the statute to prefer Indians, but it does not require that qualified expert witnesses be Indians. States usually follow the BIA guidelines⁹¹—sometimes with resistance—but, because ICWA and the BIA guidelines are

86. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 649 (2013).

87. *Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/state_guidelines.htm (last visited Oct. 17, 2019).

88. *Id.*

89. Paul David Kouri, Note, *In re M.J.J., J.P.L., & J.P.G.: The "Qualified Expert Witness" Requirements of the Indian Child Welfare Act*, 29 AM. INDIAN L. REV. 403, 407–08 (2004–2005).

90. *Id.* at 408–09.

91. *See infra* note 92.

not exactly clear, states do not uniformly agree on what qualifications a qualified expert witness should have.

In 2015, the BIA revised its stance on who may be a qualified expert witness in light of written and oral comments received during a review of the Guidelines for State Courts in Indian Child Custody Proceedings.⁹² Many of these comments criticized the ICWA for not requiring that the qualified expert witness have specialized knowledge of the Indian child's tribal culture and customs.⁹³ In this set of comments, the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence made recommendations on updating the BIA guidelines concerning ICWA and its development in jurisprudence since its inception.⁹⁴ The updated BIA guidelines for a qualified expert witness are as follows:

(a) A qualified expert witness should have specific knowledge of the Indian tribe's culture and customs.

(b) Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:

(1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.

(3) A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural

92. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015).

93. *Id.* at 10,149.

94. *Id.* at 10,146.

standards and childrearing practices within the Indian child's tribe.

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.⁹⁵

The only other BIA requirement is that the expert witness should have more qualifications than an average social worker, whether the social worker is employed by the tribe or employed by the state.

IV. Difficulties Presented by ICWA and the BIA Guidelines

A. Finding a Qualified Expert Witness

1. The Small Population Problem

A qualified expert witness must be available for proceedings involving foster care placement or termination of parental rights of an Indian child according to ICWA.⁹⁶ The requirement of an expert witness is designed to protect the child from being removed from his home because of cultural bias or misunderstanding; however, it can be difficult to find a qualified expert witness to testify as required by the BIA guidelines or state statutes.⁹⁷ If no qualified expert witness testimony is available, the case will not meet the burden of proof required by 25 U.S.C. § 1912(e) or (f).⁹⁸ Too, no qualified expert testimony is grounds for mandatory reversal under 25 U.S.C. § 1914.⁹⁹

For both the State and parents, finding a qualified expert witness can be difficult.¹⁰⁰ Although a qualified expert witness is one who may satisfy any of the four provisions provided by the BIA—and potentially even other requirements because the BIA provisions are not an exhaustive list—it can

95. *Id.* at 10,157 (section D.4(a)–(c)).

96. Indian Child Welfare Act, 25 U.S.C. § 1912(e)–(f) (2012).

97. Telephone Interview with Steve Hager, Dir. of Litig., Okla. Indian Law Servs. (Nov. 14, 2018).

98. 25 U.S.C. § 1912(e)–(f).

99. *Id.* § 1914 (“[A]ny parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.”); see *In re N.L.*, 754 P.2d 863, 868 (Okla. 1988); *In re M.H.*, 691 N.W.2d 622, 627 (S.D. 2005).

100. *Id.*

be difficult to find a person with the credentials necessary to fit into one of the four categories and other state law requirements.¹⁰¹

Many tribes have small populations, making it extremely difficult to find someone with knowledge of the tribe who can testify as a qualified expert witness.¹⁰² Because of small tribal populations, it is quite possible that no one within the tribe may fit the credentials required under D.4(b)(1) of the BIA guidelines. Tribal members may not have the required childrearing knowledge, may be inhibited by a language barrier, or may be prevented from traveling to the court on the day of the proceeding. There are endless reasons why the tribe may not be able to produce a qualified expert witness, and these reasons are exacerbated if the tribe is small in size.

In Oklahoma alone, there are thirty-eight federally recognized tribes.¹⁰³ In accordance with the general notion, many of these tribes have small populations.¹⁰⁴ For example, as of 2011, the Delaware Nation had a population of 1440, the Fort Sill Apache Tribe 650, the Iowa Tribe 697, the Kialegee Tribe 439, and the Modoc Tribe 200.¹⁰⁵ The in-state enrolled members were even less.¹⁰⁶ These numbers provide a snapshot of tribal enrollment across the United States. Many tribes even have populations of less than 100.¹⁰⁷ Thus, locating a qualified expert witness could take hours of searching, many phone calls, and plenty of rejections; even then, the party seeking a qualified expert witness may not end up with one. Furthermore, if parents are seeking a qualified expert witness, they may run into heightened challenges. For instance, the only available qualified expert witness in the jurisdiction may already be testifying for the State.

If the tribe cannot offer a qualified expert witness under D.4(b)(1), the State may look to provision D.4(b)(2), which allows the testimony of a member of another tribe that the Indian child's tribe recognizes as qualified. This provision poses its own challenges. It may be difficult to find someone from another tribe that the Indian child's tribe recognizes as knowledgeable

101. *Id.*

102. *2010 Census CPH-T-6. American Indian and Alaska Native Tribes in the United States and Puerto Rico: 2010*, U.S. CENSUS BUREAU tbl. 1 (Dec. 2013), <http://www.census.gov/population/www/cen2010/cph-t/t-6tables/TABLE%20%281%29.pdf>.

103. OKLA. INDIAN AFFAIRS COMM'N, 2011 OKLAHOMA INDIAN NATIONS POCKET PICTORIAL DIRECTORY (n.d.), <https://www.digitalprairie.ok.gov/digital/collection/stgovpub/id/5215>.

104. *Id.*

105. *Id.* at 12, 15, 16, 18, 22.

106. *Id.*

107. *2010 Census CPH-T-6. American Indian and Alaska Native Tribes in the United States and Puerto Rico: 2010*, *supra* note 102.

about childrearing practices in the Indian child's tribe. Cultural differences can vary greatly from tribe to tribe, so if the Indian child's tribe has unique customs, it may not be willing to qualify someone from another tribe. Even if the Indian child's tribe is willing to recognize someone from another tribe as qualified to be an ICWA expert witness, there may not be any qualified expert witnesses available from that tribe.

If the first two types of qualified expert witnesses are unavailable, the State can look to provision D.4(b)(3), which allows a layperson to testify. Again, it may be extremely difficult to find a layperson with enough knowledge about a specific tribe who is willing to testify. If a tribe is small, the number of laypeople who have dealt with that tribe is likely small as well. Furthermore, tribes may be mostly confined to reservations where they work amongst themselves, so laypeople may not have the opportunity to become familiar with a tribe.

Finally, the State may look to provision D.4(b)(4), which allows a professional with substantial education and experience with the Indian child's tribe to testify. Again, if a tribe is small, it may be challenging to find someone with tribal education and experience. If someone has education, it may be personal, limited mostly to tribal members themselves. Formal education outside the tribe may not exist. Also, tribal experience will be less likely if the tribe is small and/or isolated.

2. Compensation

Another problem with finding qualified expert witnesses is finding willing witnesses because of compensation. Qualified expert witnesses may demand compensation for their services.¹⁰⁸ If the tribe offers the qualified expert witness, then compensation is likely unnecessary; however, if the qualified expert witness is privately retained, compensation is likely necessary.¹⁰⁹ Compensation creates more of a problem for the parents than the State. Generally, the State presents the qualified expert witness because the State has more resources at its disposal to pay for the qualified expert witness's services. The State's witness presumably testifies in favor of the State's decision to remove the child from her home. Thus, parents will often want to present their own qualified expert witness to dispute that testimony if they can find and afford one.¹¹⁰

108. Telephone Interview with Steve Hager, *supra* note 97.

109. E-mail from Steve Hager, Dir. of Litig., Okla. Indian Law Servs., to Elizabeth Low, Student at Univ. of Okla. Coll. of Law (Dec. 31, 2018, 16:37 CST) (on file with author).

110. Telephone Interview with Steve Hager, *supra* note 97.

The State and the parents can reach out to a number of resources to find a qualified expert witness. D.4(c) of the BIA guidelines states, “The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.”¹¹¹ The National Indian Law Library website provides links to state and tribal associations that may be of help in finding a qualified expert witness.¹¹² The site also lists several national child welfare organizations that can help locate qualified expert witnesses.¹¹³ These resources, along with the Bureau of Indian Affairs and the tribe, may be of help, but for those tribes that are small, there may be no avail in locating a qualified expert witness.

Once a party finds a qualified expert witness, it will need to assess the cost of that witness. Adding another element to the challenge, the modern tribal population struggles with poverty.¹¹⁴ According to the United States Census Bureau, as of 2016, those identifying as solely American Indian or Alaskan Native were at a greater risk of being in poverty than the rest of the population.¹¹⁵ The median household income for American Indians and Alaskan Natives was \$39,719, compared to \$57,617 for the nation as a whole.¹¹⁶ The percentage of the nation living in poverty was fourteen percent while the percentage of American Indians and Alaskan Natives living in poverty was twenty-six percent.¹¹⁷

The cost of an expert witness alone could constitute a large percentage of the average income for an American Indian family. For non-medical expert witnesses, the 2017 average fee for initial review was \$267. The 2017 average deposition fee was \$317.¹¹⁸ The 2017 average court fee was \$328, showing the steepest increase of all non-medical expert fees—six percent from 2016.¹¹⁹ Even the lowest average expert witness fee could be a significant blow to someone's savings. On average, Alaska has the least expensive expert witness fees in the country, with the average hourly cost

111. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(c)).

112. *Topic 14. Expert Witnesses*, *supra* note 84.

113. *Id.*

114. *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html>.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

of initial review being \$183.13,¹²⁰ average hourly cost of deposition being \$269.38,¹²¹ and average hourly cost of trial being \$310.625.¹²² South Dakota has the second least expensive expert witness fees in the country, with the average hourly cost of initial review being \$233.64,¹²³ average hourly cost of deposition being \$315.45,¹²⁴ and average hourly cost of trial being \$278.61.¹²⁵ These statistics do not include travel costs, which can be especially great if a party requires a person to travel a great distance from their residence.¹²⁶ There is a lack of data on the costs of ICWA expert witnesses, but one attorney has stated that it can cost up to \$500 to present a qualified expert witness in the ICWA context.¹²⁷

To put this into perspective, just two hours of non-medical testimony work could cost an American Indian almost 1.5% of their household income.¹²⁸ Of course, this is in addition to paying the attorney fees that are probably being charged.¹²⁹ Little research has been done on the trouble finding ICWA experts, but experts in the field know that parents have trouble paying for these qualified expert witnesses that ICWA requires.¹³⁰

B. Cultural Bias

While the current BIA guidelines provide more clarity than those from 1979, they still do not delineate the exact qualifications required of an ICWA expert witness.¹³¹ Without specific requirements, ICWA and the BIA guidelines may be interpreted broadly, inviting the opportunity for cultural bias in foster care placement and parental termination proceedings.

While it is preferable that an expert witness has “specific knowledge of the Indian tribe’s culture and customs,” he does not necessarily need to have specific knowledge.¹³² Congress prefers qualified expert witnesses who have specific knowledge of the Indian tribe’s culture and customs, for

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. E-mail from Steve Hager, *supra* note 109.

128. *Id.*

129. *Id.*

130. Telephone Interview with Steve Hager, *supra* note 97.

131. *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(a)–(c)).

132. *Id.* (section D.4(a)).

it lists those more closely associated with tribes first in the descending order of preference.¹³³ However, any expert witness that fits into one of the four categories is presumed to be qualified.¹³⁴ Because there is no specific educational or career requirement to be a qualified expert witness, anyone ranging from a tribal citizen to a marginal tribal scholar can be a qualified expert witness. Common qualified expert witnesses include tribal elders, college professors, tribal appointed individuals, teachers, tribal professionals, certain Child Protective Service workers, tribal council members, retired Human Service Workers, traditional healers, healthcare professionals, tribal chiefs, and members of tribal organizations.¹³⁵ Because ICWA and the BIA guidelines allow people with a wide variety of experience to testify, a qualified expert witness need not have any knowledge of the child's specific tribe.

Congress purposely chose not to require that the expert witness have specific knowledge of the Indian child's tribe's customs and culture.¹³⁶ The qualified expert witness need not have specific knowledge of the Indian child tribe's customs and culture because this knowledge may be irrelevant to the reasons that the child was removed from the home.¹³⁷ In response to comments from the public about D.4(a)'s use of the term "should" instead of "must," the BIA stated, "[A] leading expert . . . may not need to know about specific Tribal social and cultural standards in order to testify . . . whether return of a child to a parent [with] a history of sexual abus[e] . . . is likely to result in serious emotional or physical damage to the child."¹³⁸

Furthermore, because the expert witness does not need to have knowledge of the Indian child's tribe's customs and culture, it is presumably easier to locate an expert witness. It is much easier to locate someone who can testify about the generally acceptable forms of childrearing than it is to find someone who can testify about the Indian child's tribe's childrearing practices. This laxity in requirements opens up the availability of people who may serve as witnesses. If the Indian child's

133. *Id.* (section D.4(b)(1)).

134. *Id.* (section D.4(b)).

135. *Qualified Expert Witnesses (QEWs) and the Indian Child Welfare Act (ICWA)*, UNIV. OF N.D.: CHILD. & FAM. SERVS. TRAINING CTR., <https://web.archive.org/web/20171124125003/http://www1.und.edu/centers/children-and-family-services-training-center/icwa/qew-quicksheet.pdf> (last visited Jan. 14, 2019).

136. *See* Indian Child Welfare Act Proceedings—Final Rule, 88 Fed. Reg. 38,778, 38,829 (June 14, 2016).

137. *Id.* at 38,830.

138. *Id.*

tribe's culture and customs are irrelevant to the issue, then time and money spent finding an expert witness who is knowledgeable about the Indian child's tribe may be a waste of resources.

While the language of D.4(a) was purposefully chosen, the flexibility it provides sacrifices protection from cultural bias. The decision of whether the qualified expert witness needs cultural knowledge of the Indian child's tribe is now up to the court, an entity that presumably does not have cultural knowledge about the tribe. To allow an uninformed court to make such an important decision begs for cultural bias. Although no cultural issue may be readily apparent, that does not mean there is no cultural issue in the case. For example, several tribes practice traditional medicine,¹³⁹ which some Americans would regard as negligent or immoral. If a qualified expert witness in a case involving traditional medicine practices is an average American physician and the court qualifies her as an expert witness, there is potential that the court may never hear any testimony regarding cultural medicinal practices.¹⁴⁰ Thus, the court may accept an unqualified expert witness because it assumes that there is no cultural issue of bias, and a child could be separated from its parents because of a misunderstanding.

Of all the expert witnesses presumed to be qualified, D.4(b)(1) leaves the least room for cultural bias. Its language is unambiguous.¹⁴¹ Although it can sometimes be difficult to ascertain if a person is a member of a tribe,¹⁴² ICWA defines "Indian child's tribe" to prevent too much debate over whether an expert witness is a member of the Indian child's tribe.¹⁴³ Once membership of the witness is confirmed, the tribe will decide whether to qualify the expert witness. Similar to the courts, most tribes will look at the

139. Mary Koithan & Cynthia Farrell, *Indigenous Native American Healing Traditions*, 6 J. FOR NURSE PRAC. 477 (2010), [https://www.npjournals.org/article/S1555-4155\(10\)00170-4/fulltext](https://www.npjournals.org/article/S1555-4155(10)00170-4/fulltext).

140. *Topic 14. Expert Witnesses*, *supra* note 84.

141. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(b)(1)).

142. A person may have little evidence to prove his Indian blood or the degree of Indian blood necessary to be enrolled, which can be problematic because tribes have certain requirements for enrollment. For example, the Cherokee can have any blood quantum from a descendant of the tribe to be eligible for membership. The Ponca differ from the Cherokee by requiring at least ¼ degree of Indian blood and an enrolled parent. *Tribal Membership*, OKLA. INDIAN LEGAL SERVS., INC., <http://thorpe.ou.edu/OILS/blood.html> (last visited Jan. 14, 2019).

143. "Indian child's tribe" means either (1) "the Indian tribe in which an Indian child is a member or eligible for membership or" (2) when an "Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts." 25 U.S.C. § 1903(5) (1978).

accomplishments of an expert when deciding whether to qualify them as an ICWA expert witnesses.¹⁴⁴ These accomplishments include education, career, and length of experience.¹⁴⁵ *In re L.M.B.* presents a typical example of a qualified expert witness that fits D.4(b)(1).¹⁴⁶ In this case, the qualified expert witness was a member of the same tribe as the child, had a Ph.D. in Native American history, chaired and taught classes on indigenous American studies at Haskell Indian Nations University, and studied and taught classes on the Indian Child Welfare Act.¹⁴⁷ Because the expert witness must be approved by the tribe, there is little concern that expert witnesses falling under D.4(b)(1) would be unqualified.

The qualified expert witness described under D.4(b)(2) also leaves some but still little room for cultural bias.¹⁴⁸ The expert witness in this category does not need to have specific knowledge of the Indian child's tribe but only knowledge of family services delivered to the Indian child's tribe.¹⁴⁹ Just because a potential witness knows of the services available to a tribe does not mean that he knows the customs or childrearing practices of a tribe. For example, in *In re M.R.G.*, a member of the Blackfeet tribe was recognized as a suitable expert witness although she had no knowledge of the Confederation of Tribes of the Siletz Indians of Oregon, the tribe in which the child was a member.¹⁵⁰ The qualified expert witness was a family resource specialist of the Department of Public Health and Human Resources.¹⁵¹ Tribal elders taught her their culture at a young age and allowed her to participate in Blackfeet culture.¹⁵² After obtaining a Bachelor's degree in elementary education and a Master's in business administration, she worked as the tribal court clerk for the Blackfeet tribe.¹⁵³ As court clerk, she conducted home studies and wrote reports related to the adoption and foster care placement of children.¹⁵⁴ Eventually,

144. E-mail from Dr. Karen Wynn, Exec. Dir., Am. Indian Educ. Consultants, Inc., to Elizabeth Low, Student, the Univ. of Okla. Coll. of Law (Dec. 31, 2018, 16:37 CST) (on file with author).

145. *Id.*

146. 54 Kan. App. 2d 285, 301 (Ct. App. 2017).

147. *Id.*

148. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(b)(2)).

149. *Id.*

150. *In re M.R.G.*, 66 P.3d 312, 315–16 (Mont. 2003).

151. *Id.* at 316.

152. *Id.* at 315.

153. *Id.* at 315–16.

154. *Id.* at 316.

she moved to Minnesota and taught at an Indian school for several years.¹⁵⁵ In this position, she came into contact with many Indian cultures besides the Blackfeet. At the time of the case, she worked as a department family resource specialist, working with teenagers, half of whom were Indian.¹⁵⁶ She had been trained as an ICWA expert and had served in that capacity in approximately ten other cases.¹⁵⁷

Regarding the facts of the specific case, the child's parent contested the termination of his parental rights, arguing that the court had accepted an expert witness who was not qualified to testify about childrearing practices of the Siletz Indians.¹⁵⁸ The court disagreed and found the expert witness qualified based on her extensive knowledge of Indian services, although she had no particular knowledge of the child's tribe's customs and practices.¹⁵⁹ Perhaps no bias was specifically present in *In re M.R.G.*, but the simple lack of a requirement of knowledge of the Indian child's tribe's customs and practices allows for the potential for culturally biased testimony. Although the witness is a member of a tribe, this fact does not mean that she will understand the customs and practices of another tribe, for tribes have vastly different customs from one another.¹⁶⁰ D.4(b)(2) also demands that the expert witness be recognized by the Indian child's tribe. Although such a demand lessens the concern of cultural bias, it does not completely eradicate it.

The opportunity for cultural bias must be balanced with the need for access to expert witnesses. Broadening the witness requirements to members of all tribes instead of just the child's tribe increases the number of witnesses available. Because an expert witness can be difficult to locate, increasing the number of witnesses available is crucial to allow for ICWA compliance.

The language describing the third type of qualified expert witness listed in D.4(b)(3) of the BIA guidelines¹⁶¹ is more vague than the language of D.4(b)(1) or (2).¹⁶² This standard is ambiguous because "substantial" is an

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 314.

159. *Id.* at 316.

160. For example, the tribes may have different medicinal practices. See Koithan & Farrell, *supra* note 139.

161. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(b)(3)).

162. *Id.* (section D.4(b)(1)-(2)).

unclear term. The guidelines do not specify a minimum number of months or years of experience needed with child and family services, nor does it outline the specific services necessary. Furthermore, the expert witness need not have specific experience with family services provided to the Indian child's tribe. For instance, delivery services available for one tribe may not be available for another, so the witness's specific experience may be of little use.

The knowledge needed for a layperson to serve as a qualified expert witnesses is more detailed because it includes not only sociocultural, but also childrearing knowledge.¹⁶³ The specificity of the knowledge requirement, combined with the broad experience requirement, squashes much concern for cultural bias, but it still does not erase the possibility. Furthermore, any vagueness in the guideline's language is less concerning because a qualified expert witness under this provision must be recognized by the tribe as qualified.¹⁶⁴ If the qualified expert witness is recognized by the tribe, then any gap in experience or knowledge is presumably of nominal importance. Like D.4(b)(2), D.4(b)(3) expands the pool of available witnesses. Thus, D.4(b)(3) attempts to strike a balance between the availability of expert witnesses and the requirement of necessary experience and knowledge of Indian customs.

The requirements for the fourth type of qualified expert listed in the BIA guidelines also use the word "substantial."¹⁶⁵ "Substantial" experience is no clearer in the context of a "professional" expert witness listed in D.4(b)(4). Again, there is not a time, experience, or education requirement. For instance, substantial education could mean a number of things. It is not clear whether a Bachelor's, Master's, or Doctorate degree would be sufficient. Regarding a specialty, education and experience are also unclear. The area of specialty can be anything, for the guidelines do not require that the area of specialty relate specifically to Indians. Too, substantial experience may mean that someone has worked in their field for ten years. It could also mean that someone has had adequate training to work in their field; that someone has worked in various capacities related to children; that someone specializes in some aspect of the medical profession. The possibilities for who may qualify as an ICWA expert witness are almost endless.

163. *Id.* (section D.4(b)(3)).

164. *Id.* (section D.4(b)(1)).

165. *Id.* (section D.4(b)(2)–(3)).

While the word “substantial” allows for flexibility, it sacrifices clarity. The term substantial does not at all help the court ascertain whether someone is qualified to serve as an expert witness. As discussed, substantial can refer to a time period, a type of education, or a type of job. Because the tribe does not need to qualify the expert witness under this provision, a court decides what substantial means. When the court is given this power, it may inadvertently qualify someone that has had little education or experience for the sake of having a qualified expert witness present and expediting the case.

Like D.4(b)(1)–(3), D.4(b)(4) broadens the potential for qualified expert witnesses. The ambiguity of the term “substantial” allows for flexibility in deeming an expert witness qualified. As discussed previously, substantial may mean different things in different cases. For example, someone may need only to have substantial education and experience with tribal medicinal practices in one case, but in another case, they may need substantial knowledge about familial relations within the tribe. If ICWA specified the education or experience requirements for qualified expert witnesses, it would reduce cultural misunderstandings, but this would come at the price of limiting the number of people able to serve as qualified expert witnesses. Of course, the witnesses listed are only those presumed to be qualified,¹⁶⁶ the guidelines do not restrict others from being qualified. Again, this offers flexibility but also invites cultural bias.

C. Attitude of Courts

Courts in the current era generally do not take a favorable view toward tribes. Courts have engaged in implicit divestiture, slowly dwindling tribal rights.¹⁶⁷ Perhaps the courts are unaware of the consequences of their opinions. Whatever the case, courts do not treat ICWA cases involving expert witnesses any more favorably.

In the following cases, each court has taken a casual attitude regarding expert witnesses. In *Kent K. v. Department of Health & Social Services, Office of Children's Services*,¹⁶⁸ relying on the 2015 BIA Guidelines, Kent argued that the trial court erroneously concluded that Dr. Rose was a qualified expert witness under the ICWA. Dr. Rose "is not a member of the children's tribe or of any tribe, and has no experience or expertise

166. *Id.* (section D.4).

167. Samuel E. Ennis, *Implicit Divestiture and The Supreme Court's (Re)Construction of The Indian Canons*, 35 VT. L. REV. 623, 626 (2011).

168. *Kent K. v. Dep't of Health & Soc. Servs., Office of Children's Servs.*, No. S-15708, 2016 Alas. LEXIS 13, at *14 (Alaska Feb. 3, 2016).

providing services to the children's tribe or any tribe." Because of his lack of experience with and knowledge of tribes, Kent asserted that Dr. Rose could not be qualified as an expert because Dr. Rose did not fall into any of the enumerated categories. Though the termination case happened before the BIA guidelines were finalized, the court did not recommend that this issue be considered upon remand.

In *In re L.M.B.*, the Court of Appeals of Kansas noted that the trial court should have expressly followed the 2015 BIA guidelines.¹⁶⁹ Although the trial court's expert witness did fall into one of the enumerated categories of expert witnesses presumed to be qualified, the court did not expressly state whether it relied on the 1979 or 2015 guidelines.¹⁷⁰ Moreover, it is clear that the court paid little attention to the major effects the guidelines can have on a case, as it stated, "the changes from the 1979 to the 2015 version are arguably minor"¹⁷¹ The changes to the guidelines have not been minor but have majorly changed the requirements; however, the court still seems to treat the expert witness provision of ICWA as a procedural necessity rather than an important part of the process.

A subtler way to understand the court's casual attitude toward ICWA cases is to look at the sheer number of cases published. Many of the ICWA cases that reach state appellate courts go unpublished every year.¹⁷² "Unpublished" does not mean that the opinion is classified but rather that it is marked by the court as not pressing enough to be published.¹⁷³ Federal unpublished opinions are easily accessible online via databases like Westlaw and LexisNexis.¹⁷⁴ Unpublished state cases can be much more difficult to locate.¹⁷⁵ For example, of the Tenth Circuit's six states, only Utah makes some of its unpublished cases available online.¹⁷⁶

169. *In re L.M.B.*, 54 Kan. App. 2d 285, 300 (Ct. App. 2017).

170. *Id.*

171. *Id.*

172. Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 7 AM. INDIAN L.J. 21, 27–28 (2019) [hereinafter Fort & Smith, *2019 ICRA Case Law Update*], <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1198&context=ailj>.

173. Anika C. Stucky, Comment, *Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 OKLA. L. REV. 403, 405–07 (2006).

174. *Id.* at 406.

175. *Id.*

176. *Id.*

Unpublished cases cannot be used as precedent.¹⁷⁷ In some instances, this is harmless. Opinions may be marked as unpublished because they repeat an issue that has been decided by the court many times over.¹⁷⁸ In those cases, the issue already has precedent, so it is unnecessary to publish new cases on the same issues. Furthermore, it saves the court's resources to forego repetitive opinions.¹⁷⁹ While unpublished opinions help reduce the plethora of redundant cases and the backlog of judicial resources such as time and money, they also cause some cases to fall by the wayside. For example, in Oklahoma, it is the judge who decides what cases will get published.¹⁸⁰ There are rules governing how these decisions are made, focusing on publishing cases that add to settled law.¹⁸¹ However, judges may not necessarily follow these guidelines. If a judge strays from the guidelines, cases involving new issues of law or cases involving the same issues in a new set of circumstances could be set aside.

It is unknown why so many of the ICWA cases go unpublished or how many of the ICWA cases that go unpublished are cases involving qualified expert witnesses. While there is not an obvious reason for the number of unpublished ICWA cases, ignoring the ICWA cases understates the sizeable role they have on the appellate docket.¹⁸² A vast majority of the unpublished opinions are about inquiry and notice, but there is not another clear pattern for published opinions.¹⁸³ For instance, "eight active efforts cases were unreported, as were three placement preference cases and three determinations regarding whether the case was a foster care proceeding under ICWA."¹⁸⁴

In at least one case, Washington's appellate court spent considerable time discussing who may qualify as an expert witness in ICWA cases.¹⁸⁵ That opinion was never published however, so it set no legal precedent.¹⁸⁶ Undoubtedly, there are similar instances of other relevant cases that remain unpublished. Perhaps the issue of whether or not an expert witness is

177. Fort & Smith, *2019 ICRA Case Law Update*, *supra* note 172, at 28.

178. Stucky, *supra* note 174, at 443.

179. *Id.*

180. *Id.* at 444.

181. *Id.*

182. Fort & Smith, *2019 ICRA Case Law Update*, *supra* note 172, at 28.

183. *Id.* at 29.

184. Kathryn E. Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 6 AM. INDIAN L.J. 32, 36 (2018), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1183&context=ailj>.

185. *Id.*

186. *Id.*

qualified seems as if it has already been decided, but the answer is vague; thus, cases regarding ICWA expert witnesses should be published to aid in answering the question of exactly who should serve as a qualified expert witness.

D. Knowledge of the Case

While the BIA guidelines alleviate some aspects of cultural bias, they could be improved even further by requiring that a witness have actual knowledge of the facts of the case. The current lack of specific knowledge is often a point of contention challenged by parents.¹⁸⁷ Under the BIA guidelines, a qualified expert witness need not have direct knowledge of the issue. Some state courts have said that a qualified expert witness should have knowledge of the case, but this is not binding precedent on all courts.¹⁸⁸ For example, in *C.J. v. Department of Health & Social Services*, the Supreme Court of Alaska found the expert witness unqualified because she based her testimony solely off the case file that had been given to her by the Division of Youth and Family Services.¹⁸⁹ She never had direct contact with the father or the children, and her assertions were mostly generalizations about harm that can happen to children with an absent father.¹⁹⁰ The qualified expert witness needs to have just enough information about the case so that he can speak in more than vague generalities.

Not requiring knowledge of the case may be harmless—and even beneficial. Of course, it is less time-consuming and less overwhelming to read a case file rather than do an in-depth investigation of a case. Also, a qualified expert witness may not need to know the specific case facts to answer the court's question of whether the child can return to the parents. For example, if the qualified expert witness is the parent's psychiatrist, she may not need to have case knowledge if she believes that there is a risk that the parent will continue to sexually abuse a child. Additionally, another example includes a doctor testifying that a child has been beaten so severely that returning to the home would be dangerous.

While no knowledge of the case facts may be permissible in some instances, the lack of knowledge reduces the credibility of the witness and the integrity of the court. If a qualified expert witness has no direct knowledge of the case, then he will not be able to provide a full picture of

187. Telephone Interview with Steve Hager, *supra* note 97.

188. *C.J. v. Dep't of Health & Soc. Servs.*, 18 P.3d 1214, 1218 (2001).

189. 18 P.3d at 1218.

190. *Id.*

what happened. An expert will have a more complete picture if he has contact with the parents, observes interactions between the parent(s) and child, and meets with extended family members in the child's life.¹⁹¹ Alternatively, an incomplete picture presented to the court may lack important facts, and these omissions may never be discovered if the witness does not bring such details to the court's attention. More importantly, the court's integrity is threatened if a qualified expert witness lacks specific knowledge. An expert's testimony is less credible without direct knowledge of the case. Less credible testimony serves as an injustice and uses the court as a means to an end rather than as a true decision-making body.

V. Solutions for Clarifying "Qualified Expert Witness"

A. State Statute Solutions

States generally use one of the expert witnesses described by the BIA guidelines. Many attorneys and courts lament the promulgation of ICWA, finding it cumbersome to comply with.¹⁹² Other states have relished the opportunity to provide legal safeguards for Indian families, enacting their own versions of the ICWA. Several states have implemented stricter qualifications for qualified expert witnesses to deal with the problems created by the lack of clarity from ICWA and the BIA guidelines.¹⁹³ Eight states have their own Indian Child Welfare Acts: Iowa, Minnesota, Michigan, Nebraska, Oklahoma, Washington, Wisconsin, and California.¹⁹⁴ All of these, besides Oklahoma, (which has no provision on expert witness testimony different from that of 25 U.S.C. § 1912(e) or (f)) have distinct provisions about qualified expert witness testimony designed to fill in the gaps left by the ICWA and the BIA.¹⁹⁵

1. Demand for Cultural Knowledge

One of the ways that states have created stricter standards is by demanding that the expert witness have cultural knowledge of the Indian

191. *Adjudication of Involuntary Proceedings: Federal Regulations and Guidelines*, UNIV. OF N.D.: CHILD. & FAM. SERVS. TRAINING CTR., <http://www1.und.edu/centers/children-and-family-services-training-center/ICWA/aip-fedregsguides.cfm> (last visited Jan. 14, 2019).

192. Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 3 (2017).

193. See *infra* notes 197, 207.

194. *State Statutes Related to the Indian Child Welfare Act*, *supra* note 74.

195. See 10 OKLA. STAT. § 40.1–9 (2011).

child's tribe. This requirement helps fill in the gap left by the language of provision D.4(a), which says that the expert witness "should" have knowledge of the tribe, not "must." Iowa, Michigan, Wisconsin, and Nebraska all require that the expert witness have knowledge of the Indian child's tribe or be qualified by the Indian child's tribe.¹⁹⁶ Presumably, if the Indian child's tribe qualified the expert witness, she has knowledge of the Indian child's tribe or such knowledge is deemed unnecessary even by the child's tribe.

Many state courts have argued that a qualified expert witness need only have knowledge of Indian customs if there is a cultural issue, but the states listed in the previous paragraph require that all expert witnesses have knowledge of the Indian child's tribe—whether or not there is a cultural issue. Recognition by the Indian child's tribe greatly reduces the chances for cultural bias. Iowa's provision is the most extensive on its requirements for expert witnesses.¹⁹⁷

196. All of the witnesses listed in Iowa's ICWA statute must have substantial knowledge relating to the Indian child's particular tribe. Michigan, Nebraska, and Wisconsin have similar provisions about their expert witnesses needing knowledge of the Indian child's tribe. Michigan has a similar provision to (a) of Iowa's and then a combination of c, d, and e above as its second qualified expert witness. Nebraska has extremely similar provisions and only excludes e. Wisconsin is almost identical to Nebraska, also leaving out only e of Iowa's list of qualified expert witnesses. Presumably, Wisconsin and Nebraska leave out e because it is extremely similar to d.

197. IOWA CODE § 232B.10 (Westlaw through 2019 Reg. Sess.) (emphasis added). Iowa's ICWA provision, section 232.B10, is representative of the other states' laws, and it reads as follows:

1. For the purposes of this chapter, unless the context otherwise requires, a "qualified expert witness" may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, spiritual leader, historian, or elder. . . .

3. In the following descending order of preference, a qualified expert witness is a person who is one of the following:

a. A member of the *child's Indian tribe* who is recognized by the child's tribal community as knowledgeable regarding tribal customs as the customs pertain to family organization or child-rearing practices.

b. A member of another tribe who is formally recognized by the *Indian child's tribe* as having the knowledge to be a qualified expert witness.

c. A layperson having substantial experience in the delivery of child and family services to Indians, and substantial knowledge of the prevailing social and cultural standards and child-rearing practices within the *Indian child's tribe*.

d. A professional person having substantial education and experience in the person's professional specialty and having substantial knowledge of the

Iowa's statutory provisions in section 232.B10 are beneficial for ICWA parental rights termination and foster care placement cases because they clear up portions of the BIA guidelines. First, the statute limits the qualified expert witnesses to those listed in the statute. The statute contains an exhaustive list of the available people who can be a qualified expert witness, unlike the BIA guidelines, and each person on the list must have some experience and/or knowledge of the Indian child's tribe (except for the witness listed in section 232.B10(3)(b) who must be recognized by the child's tribe).¹⁹⁸ The BIA guidelines only say that the expert witnesses listed are presumed qualified; others who do not fit into the four enumerated categories could still be qualified as an expert witness by the court. As stated above, the BIA guidelines also purport that the expert witness should have knowledge of the Indian child's tribe, but they are not necessarily required to do so. Iowa's statute does not aim to limit the qualified expert witness to an extremely narrow subset of people. Section 232.B10(1) lists several people that can be a qualified expert witness: social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, spiritual leader, historian, or elder.¹⁹⁹ The requirement that an expert witness be knowledgeable about the Indian child's tribe or be recognized by the tribe gives the court's decision more stability because it is then less vulnerable to appeals based on challenges of cultural bias.

In re E.M. exemplifies how a clause requiring the expert witness to have knowledge of the Indian child's tribe can strengthen the integrity of the justice system. In this case, a two-month-old child had several bone fractures.²⁰⁰ In an attempt to reverse the trial court, the child's father argued that the expert witnesses were not qualified to testify against him.²⁰¹ The appellate court disagreed.²⁰² One expert witness was a clinical psychologist that had evaluated the father.²⁰³ He testified that the father was a danger to

prevailing social and cultural standards and child-rearing practices within the *Indian child's tribe*.

e. A professional person having substantial education and experience in the person's professional specialty and having extensive knowledge of the customs, traditions, and values of the *Indian child's tribe* as the customs, traditions, and values pertain to family organization and child-rearing practices.

Id.

198. *Id.*

199. *Id.*

200. *In re England*, 314 Mich. App. 245, 262 (Ct. App. 2016).

201. *Id.*

202. *Id.*

203. *Id.* at 255.

children and that the child, E.M., should not return home. Another expert witness was a member of—and caseworker for—the child’s tribe and opined that the father posed a substantial risk to the child.²⁰⁴ The caseworker for the tribe was involved at the outset of the proceedings and maintained regular contact with the child’s caseworker throughout the approximately eleven-month-long proceedings.²⁰⁵ Using this testimony as part of the entire record, the court determined that the father’s rights should be terminated because the expert witnesses were reliable and culturally knowledgeable about the Indian child’s tribe.²⁰⁶ If the doctor alone had testified, the testimony from expert witnesses would not have been as reliable.

While Iowa’s statute does seem to cure the defects left by D.4(a) of the BIA’s guidelines, it has its drawbacks. The statute is designed to broaden the qualifications for those able to serve as an expert witness, but it is still difficult to find a qualified expert witness that has knowledge of the child’s tribe. Another drawback is that there may not be a need to have a qualified expert witness that has cultural knowledge of the Indian child’s tribe because the issues involved in the case may not be culturally based. Despite these drawbacks, the Iowa statute gets closer to the overall goal of ICWA—which is to protect Indian children from being removed from their homes due to cultural bias.

2. Proof of Active Efforts

To supplement the preferred order provision, Minnesota’s ICWA law requires that when a lower preference qualified expert witness is used, active efforts to have obtained higher preference expert witnesses must be shown. The Minnesota Indian Family Preservation Act (MIFPA) lists requirements for proving that the state made diligent efforts to obtain a highly qualified expert witness.²⁰⁷

204. *Id.*

205. *Id.* at 260.

206. *Id.* at 265.

207. MINN. STAT. ANN. § 260.771:

(b) The local social services agency or any other party shall make *diligent efforts* to locate and present to the court a qualified expert witness designated by the Indian child’s tribe. The qualifications of a qualified expert witness designated by the child’s tribe are not subject to a challenge in Indian child custody proceedings.

(c) If a party cannot obtain testimony from a tribally designated qualified expert witness, *the party shall submit to the court the diligent efforts made to obtain a tribally designated qualified expert witness.*

Minnesota has one of the stricter standards about what satisfies diligent efforts to find a qualified expert witness of higher preference. The court requires that diligent efforts to obtain a qualified expert witness of higher preference be proven at various stages.²⁰⁸ First, the party obtaining the witness must prove to the court that it tried to obtain an expert witness designated by the tribe, and it must prove these efforts by clear and convincing evidence.²⁰⁹ If no tribally designated expert witness is obtained, the party then has to prove by clear and convincing evidence that it tried to obtain the next highest preference of qualified expert witness.²¹⁰ Finally, if even the second-tier preference qualified expert witness was not obtained, the party must prove that diligent efforts were made to obtain one.²¹¹

Requiring active efforts to obtain the highest order preference of qualified expert witness ensures that cultural bias is avoided. First, it incentivizes the party using the qualified expert witness to obtain the highest-preference witness, who will have the fullest knowledge of the culture and customs of the Indian child's tribe. Another benefit of requiring active efforts is that it preserves the integrity of the court. Under MIFPA, it is clear that the party trying to obtain the qualified expert witness will not

(d) If clear and convincing evidence establishes that a party's diligent efforts cannot produce testimony from a tribally designated qualified expert witness, the party shall demonstrate to the court that a proposed qualified expert witness is, in descending order of preference:

(1) a member of the child's tribe who is recognized by the Indian child's tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; or

(2) an Indian person from an Indian community who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and contemporary and traditional child-rearing practices of the Indian child's tribe.

If clear and convincing evidence establishes that diligent efforts have been made to obtain a qualified expert witness who meets the criteria in clause (1) or (2), but those efforts have not been successful, a party may use an expert witness, as defined by the Minnesota Rules of Evidence, rule 702, who has substantial experience in providing services to Indian families and who has substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.

Id.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

be able to circumvent the law and obtain an expert witness that may be biased against American Indians.

To prove active efforts to obtain the preferred highest order, the party obtaining the expert witness may have to expend considerable time and money to try to find the highest-preference expert witness. If a qualified expert witness in D.4(b)(3) is readily available and one from D.4(b)(1) or (2) is not, the active efforts cause the party to lose time that may be better spent elsewhere.

3. Reviewability

Third, another way that state courts have worked to prevent cultural bias in the court system is to prevent the reviewability of ICWA expert witnesses. Only Minnesota has a provision regarding the reviewability of qualified expert witnesses picked by the tribe. Minnesota's statute reads as follows:

The local social services agency or any other party shall make diligent efforts to locate and present to the court a qualified expert witness designated by the Indian child's tribe. The qualifications of a qualified expert witness designated by the child's tribe are not subject to a challenge in Indian child custody proceedings.²¹²

While this provision does not necessarily help promote knowledge of the Indian child's tribe on its face, it does so in practice. First, precluding reviewability of the qualifications of a tribally designated witness prevents cultural bias. A reviewing court will not have the power to overturn a decision made by the tribe. The tribe, which is aware of the Indian child's tribes' customs and culture, is more suited to make the decision about who is a proper witness because it presumably values the protection of its members and understands culture and customs more than another court. Another benefit of precluding reviewability of tribally designated witnesses is that the parents also cannot object to the witness upon appeal. This is often a tactic used by parents, and it can be a waste of the court's resources. Thus, precluding reviewability of tribally designated witnesses both protects parties from cultural bias and saves the court's resources.

212. MINN. STAT. ANN. § 260.771.

B. Other Recommended Solutions

State Indian Child Welfare Acts do have stricter standards than ICWA itself. These state laws help strengthen ICWA and reduce the chance that a child will be removed from his home because of cultural bias. There are, however, solutions apart from those presented by the states.

Availability of witnesses has plagued parents in several cases. The BIA and tribes already offer resources to help parents locate witnesses. Otherwise, it is difficult to determine what can be done to increase the supply of witnesses available. One solution may be to require tribes to present at least one qualified expert witness for ICWA cases. This solution would help prevent mandatory reversal of cases under 25 U.S.C. § 1914. Mandating that the tribe have an available qualified expert witness would not allow both parties access to an expert witness, unfortunately. Another solution to the availability for expert witnesses may be to require that the tribe pay for some or all of an expert witness's fees. This solution would be especially helpful for parents trying to hire an expert witness to rebut that of the government. Depending on the tribe's funds available, this may not be a feasible solution. Many tribes are impoverished, so the likelihood that these tribes could offer payment to witnesses is slim.

To better protect the interests of the tribe, states could require that the qualified expert witness has specific knowledge of the Indian child's tribe unless the tribe accepts a qualified expert witness without such knowledge. Another measure which may address this issue may be to require that the tribe recognize the expert witness as suitable whether he has knowledge of the child's tribe or not. If no witness can be found that knows enough about the culture of the child's tribe and the facts of the case, multiple witnesses could be presented to complete these needs. Currently, multiple witnesses are allowed to testify; however, cultural proficiency is not required. The guidelines could demand that at least one witness have knowledge of the child's tribe. For example, one witness may have cultural knowledge while another knows of the issue in the particular case before the court. Thus, the two witnesses' testimony should be able to satisfy the ICWA requirements.

In many cases, a medical doctor is one of the qualified expert witnesses, if not the only qualified expert witness. Most doctors have no knowledge of Native American culture.²¹³ While they are very educated in their fields, they are not necessarily cognizant of a tribe's culture and customs. Sometimes this ignorance is harmless because an injury is so severe or traumatizing that it is clear the child should not return to the parents.

213. See *In re England*, 314 Mich. App. 245, 261 (Ct. App. 2016).

However, there are other instances in which the Native American medicinal practices may be seen as neglectful because they are untraditional, and it is in these cases that it is dangerous to have a non-Indian doctor be the only expert witness.²¹⁴ In cases such as these, another qualified expert witness should be added to supplement the doctor's testimony regarding cultural practices. Such a requirement limits the risk of cultural bias in the testimony for experts like doctors that fall under no category in the guidelines or under D.4(b)(4).

Involving the tribe in the decision to qualify an expert witness is the best way to prevent cultural bias. This solution will involve more time spent, and will perhaps necessitate the proponents of a witness finding a different qualified expert witness if the tribe does not accept their first choice. Time, however, is a resource that can—and should—be spent when the breakup of a family is the issue. Furthermore, if the tribe is made aware of the issue, perhaps the tribe will be willing to find someone that can serve as an expert witness. If the tribe certifies the witness, the court will not need to rule on whether the expert witness has enough knowledge about the tribe; it is presumed that the expert witness does. Thus, a witness is less likely to testify discriminatorily or with unacknowledged bias.

Yet another way to rewrite the guidelines so that cultural bias cannot enter the courtroom is to demand specific experiential and educational requirements. As it is, D.4(b)(3) and (4) use the vague term “substantial” to describe the educational and experiential requirements necessary for the expert witness to be qualified. A witness under D.4(b)(3) must be recognized by the tribe, so cultural bias is less of a concern. Yet, a witness that falls under D.4(b)(4) need not be recognized by the tribe, so defining the terms “substantial” would greatly clarify who satisfies this provision. “Substantial” could be defined in several ways. For example, courts could use a sliding scale for the education and experience requirements. A sliding scale would provide clarity and flexibility. If the person's education is extensive, then the experience need not be as strong. If the experience is extensive, the education can be less expansive. More specificity may be necessary to help appropriately define this category of qualified expert witness. For instance, perhaps it is necessary to say that a witness should have a Bachelor's degree in something related to children or Native American studies and at least five years in experience with children and/or Native Americans. Another example of a specific educational and experiential requirement may be that a witness should have a Master's

214. See *Topic 14. Expert Witnesses*, *supra* note 84.

degree in something related to children or Native American studies but only have a minimum of two years in experience with children and/or Native Americans. Such a detailed description may create too great of a limit on the availability of witnesses, but it is a valid option to consider for making the court less open to cultural bias.

Besides cultural bias, another issue for ICWA cases is that many courts do not take the difficulty of qualifying an expert witness seriously or see it as a minor problem. Because they see the qualification of an expert witness in ICWA cases as a box to be checked for the continuation of the case, the expert witness's credentials are rarely strictly evaluated or discussed. Little analysis of expert witnesses causes confusion and mystery in future cases facing similar problems. The easiest way to provide clarity would be to publish opinions addressing ICWA expert witnesses. While unpublished opinions can be used as persuasive authority, they are not binding. Furthermore, unpublished opinions tend to be less analytical than published ones, so using them as authority may be difficult. Publishing opinions does take more of the court's time; however, if courts can clarify the qualified expert witness issue in ICWA cases, less appeals on the issue will arise and save the court time in the long run.

The final problem discussed in this Comment is that the BIA guidelines do not require qualified expert witnesses to have knowledge of the specific facts of the case. This could easily be fixed by amending the BIA guidelines and adding a clause that requires the expert witness to have knowledge of the case. Many states already implement this requirement, but if the requirement were listed under the BIA guidelines, all states would be subject to the requirement. Because an unlimited number of ICWA experts may testify in one case, at least one expert witness should have knowledge of the case before the court. To have an expert witness familiar with the case prevents testimony that is incomplete or vague and will better accomplish the goal of providing an expert witness that can give a credible opinion on whether or not the child should be able to return to the parents.

VI. Conclusion

The question of what credentials a qualified expert witness for ICWA cases should have is a difficult one to answer. The BIA as well as certain states have attempted to address this question, but there is no clear answer. The potential for cultural bias must be balanced with availability of witnesses who know the specific facts of the case. Furthermore, it is difficult to enact meaningful change when many courts treat the issue of

expert witnesses in ICWA cases less seriously than they should. Some states have enacted their own ICWA legislation to give American Indian families protection from cultural bias in the courtroom, and some state courts have ruled that the expert witness must have knowledge of the specific facts of the case. Unfortunately, even these solutions have not explained what credentials an expert witness should have, nor do they entirely protect American Indian children from cultural bias. Cultural bias will likely always lurk in the courtroom because there must be some flexibility in the credentials necessary to be an ICWA expert witness. There are some solutions to address the current problems of cultural bias, but implementation is a difficult path that requires agency amendments, state statute amendments, and legal stamina. Ultimately, there is no answer to what specific credentials an ICWA expert witness should have, and it is up to the BIA, states, and courts to make changes that may extinguish the cultural bias that the ICWA is designed to prevent.