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Judge Shawna Schwarz

So, I'm going to go ahead and begin. Welcome, my name is Shawna Schwarz. I am the supervising judge of Juvenile dependency court in Santa Clara County. And, Judge Vezzola if I could have you introduce yourself.

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Judge Mark Vezzola

Thank you, Judge Schwarz, My name is Mark Vezzola, I am associate senior associate general counsel for the Pechanga Band of Indians and former Chief Judge for the Pala Band of Mission Indians and the Chemehuevi Indian Tribe.

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Judge Shawna Schwarz

Thank you. I do want to take care of a little bit of housekeeping to begin with. First of all, I've been asked to just let you all know that you have all been muted. So, there's nothing wrong with your computer so you won't be able to to be heard by us. However, the chat function for the session is open and the chat will be monitored by somebody from the Judicial Council.

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Judge Shawna Schwarz

So feel free if you have questions comments, put them in the chat. In terms of your MCLE or education credits, you all should have gotten a pretest already and I guess hopefully already taken that. After we finish today, you will all receive the link for a post the post-test. And then there are sign-in sheets, and when all of that is done, then you will get your credit for all of that.

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Judge Shawna Schwarz

So thank you all very much for being with us today. As you can see from the title slide that the presentation today is entitled The Indian Child Welfare Act Legal Update. And specifically, what we're going to go over today are sort of three main topics. First of all, we'll go over an ICWA appeals update and I will be covering that.

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Judge Shawna Schwarz

Then a Judge Vezzola will talk about a new program that will provide attorneys for California Indian tribes. And then he'll take some time to talk about Brackeen, what it is, the impact it will have or could have on California. The objectives for today's training are multiple. First, we're hoping that after today, you'll be able to discuss the main legal issues of the ICWA appeals.

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Judge Shawna Schwarz

The many, many ICWA appeals that we've been seeing. Secondly, we're hoping you'll be able to describe different steps that we all can take to minimize negative ICWA outcomes. We're hoping that you'll be able to describe California's new Tribal Dependency Representation Program. I'm

sure by the time we finish, we are finished today, you'll be able to identify issues in Brackeen v. Haaland.

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Judge Shawna Schwarz

And then finally, you'll be able to discuss how Brackeen may apply in California. And that's a may because as Judge Vezzola will talk about everything is still very up in the air. Before we actually hit the topics. I do want to go over a very quick kind of overview of the ICWA inquiry process. And I want to do that because, I want to be able to highlight sort of where it is that we're seeing all of the appeals.

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Judge Shawna Schwarz

So, I think everybody realizes it was AB 3176 that became law in January of 2019. That really created a pretty big change in how we do ICWA inquiry and notice. Basically, there are three main steps the initial inquiry, the further inquiry, and then finally notice. And what happens basically is if there is a report of abuse or neglect, child abuse or neglect, the social worker goes out and investigates.

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Judge Shawna Schwarz

The social worker by law has to inquire of parents, guardians, extended family. The reporter of the abuse, the Indian custodian, even before filing a petition, has to ask all of those folks whether the child might be an Indian child. By the time folks get to court, let's say a petition is filed, you have your initial hearing in court and the judge then has to inquire of all participants.

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Judge Shawna Schwarz

Notice, not parties, whereas the social workers talking to the parties and other folks. The court has to inquire of the participants to the court process and also direct those participants to let us know if there is additional information that comes to light in the future. Based on the information from the participants as well as the information the Court has from the social worker regarding the ICWA inquiry. The court at that initial hearing can make a number, one of a number of findings. Court can find

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Judge Shawna Schwarz

there's no reason to believe the child is an Indian child. There is reason to believe the child is an Indian child, and there's reason to know the child is an Indian child, or the child is an Indian child. We already know that. If there's reason to know, or the child is an Indian child, ICWA applies. Formal notice has to be given by the tribes, I'm sorry, by the social worker.

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Judge Shawna Schwarz

And we treat the child as an Indian child. If there's reason to believe. The Court then has to order that the department engage in further

inquiry, and that's supposed to be as soon as practicable. If based on further inquiry, there is then reason to know. Then we get back to the situation where ICWA applies, formal notices given, etc. etc. If after further inquiry there's no reason to know,

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Judge Shawna Schwarz

and that's after adequate further inquiry and due diligence, the court can find equities not apply. Couple of interesting things though that we're learning as a result of case law is that even if there's no reason to believe judges should still be ordering further inquiry, we can't rely just on what people tell us in court. So even though we were led to believe that if we have no reason to believe we're done, that's not really the case.

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Judge Shawna Schwarz

Even if there's no reason to believe, based on what the court learns. And after asking participants of the court process, the court should still be ordering the department to engage in further inquiry. And then I also want to make this point that even though I have this this graphic that says initial inquiry, further inquiry notice, as if they're are very distinct time periods, that's not really the case.

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Judge Shawna Schwarz

Initial inquiry can happen any time, if it's the first time you're asking a particular person. So somebody shows up at a .26 hearing for the very first time. That's an initial inquiry. The appeals all have to do with the initial inquiry, some of them further inquiry, but that's where we're getting tripped up. Basically, is the initial inquiry process.

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Judge Shawna Schwarz

Okay. So, with that in mind, let's talk about the ICWA appeals. So, by the numbers, anybody who's been paying attention to case law has sort of noticed this increase. Thank you to Ann Gilmour from the Judicial Council for actually counting it up for us. But in 2020, there were 186 ICWA appeals. 11 of them were published. So, some of us are looking only at the published.

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Judge Shawna Schwarz

But there are folks who are paying attention to the total number. so 2020, about 186 total. 2021 was not much more. 205. But we get with eight published, but then we get to 2022 and there were 574 ICWA appeals, 40 of them published. So, anybody who was trying to keep track of those really felt it in 2022. And based on the numbers we're seeing so far, we're on track for 650 total ICWA appeals, although so far we've had only four published.

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Judge Shawna Schwarz

So, maybe they're slowing down. We'll see. So, based on all of those appeals, there are four main questions that were addressed and then there are some extraneous ones, but four main questions that really came to light. First of all, can you cure the failure of an initial inquiry by a later inquiry? What about supplementing the record with post appeal evidence?

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Judge Shawna Schwarz

Does somebody on appeal have to make a claim or provide evidence of ICWA heritage Indian heritage? And then what about where there's a failure to ask relatives and extended family members, is that reversible per say? So, the quick answers are yes, there's a split. There's a split and there's a really big split. So, let's talk about each of those individually.

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Judge Shawna Schwarz

In terms of that first question, can you cure the failure of an initial inquiry by a later inquiry? The answer basically is yes. And at this time, I would point you to a really great chart put together by Ann Gilmour, of the Centers of Family and Children's for the courts, and she's really taken each of these questions and divided it up by who says yes, who says no, and which appellate division.

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Judge Shawna Schwarz

So, the question on everybody who has opined on this agrees that you can cure initial inquiry by later inquiry. And in fact, if you're paying attention to the appellate decisions regarding ICWA you notice that most of them have to do with the procedural postures that that the .26 hearings. If you mess up on ICWA and jurisdiction and disposition, you have time to fix it.

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Judge Shawna Schwarz

So, the appellate courts have basically talked about the fact that there's an ongoing continuing duty. And so, there's no need to sort of reverse a court and tell them what to do when they already know they have to do it. The claim is not ripe at that point because it is a continuing duty, there's time to fix it.

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Judge Shawna Schwarz

There are ongoing obligations that are not yet satisfied, but there's still time. And the appellate courts have said there's no sense to order what the order of the juvenile court, what they're already ordered, they're already required to do. So, the courts that have opined on this have already basically said this can be fixed, the initial inquiry can be fixed later on.

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Judge Shawna Schwarz

The problem is if you get to the.26, then you don't have time to fix it. That's pretty much the easiest question that the appeals cases have answered. The next one is a little more complicated and that is what happens when you get to your appeal. Can you supplement the record with your post appeal evidence? And there's a split in authority here.

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Judge Shawna Schwarz

Some appellate courts say yes, but most of them say no. The appellate courts that say yes recognize that appeals caused delays. And basically what what this question is answering is can you use CCP - Code of Civil Procedure §909 to provide additional evidence? And often what we're seeing is the responding party, usually the department saying, well, wait, now we've got we've we now we have the tribe's answer or now we have additional information from the parent.

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Judge Shawna Schwarz

Please accept this additional information. Certainly, one appellate court has said, yes, let's not delay things. And so we'll accept that evidence. But more appellate courts have said you should use CCP §909 very sparingly. The rule is you need exceptional circumstances to do for the appellate court to accept post appeal evidence. There's and there's no exception for juvenile dependency, even though we don't want there to be delays, There's no exception for dependency necessarily.

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Judge Shawna Schwarz

And really the way to fix this is to stipulate to a conditional reversal. If you're worried about delays, stipulate to a conditional reversal, and that will speed things up. So, most of the courts are saying, no, you cannot supplement your appellate record. The third question has to do with whether the parent needs to, at the appellate level, provide information and say, you know, the trial court did it wrong.

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Judge Shawna Schwarz

And by the way, I have Native American heritage. So, must the parent or appellant claim ICWA heritage or provide evidence on appeal? Again, we have a couple of courts that say yes, but and a few that say no. The ones that say yes are basically saying, look, it's a pretty low hurdle for a parent to be able to claim that ICWA heritage.

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Judge Shawna Schwarz

If they don't claim it in the juvenile court, they don't claim it in their opening brief or the reply brief. And they're not saying they have Native American ancestry. They're not. These are folks who are not denying unequivocally that they are Native American. They were in touch with their extended family. So, these are not people who are unknowing members of a tribe.

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Judge Shawna Schwarz

But again, that is a minority position, the majority position. And where we're seeing more appellate courts are basically saying, no, a parent does not have an affirmative duty to make a claim or a factual assertion on appeal that they can't refer to the the trial court record. So most appellate courts are saying, no, the parent does not have to even claim on appeal that they have Native American heritage.

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Judge Shawna Schwarz

And then the biggest question where we're seeing the most case law is where we see trial courts and department social workers failing to ask extended family. And so the question then, is that reversible per say, or more broadly, what is the test to determine if it is error? Again, by far most of the appellate decisions regarding ICWA has to do with the failure of inquiry.

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Judge Shawna Schwarz

And the most common problem that we see are failure to ask available extended family members. And by the way, all people agree this is required. That's not the split, right? This is required. There's no question the split has to do with what is the consequence of that failure to ask. And unfortunately, there are lots of circumstances where there is a failure to ask.

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Judge Shawna Schwarz

So how do you evaluate this? And some folks say it's reversible per se, but basically, if your initial inquiries deficient, the appellate courts have developed at least four and possibly five different approaches to evaluate whether the appeal or whether the error at the inquiry stage is prejudicial or not. So, there is one group of cases that say it's the automatic reversal rule if you fail to ask or it is an automatic reversal and that is required.

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Judge Shawna Schwarz

And I've listed some of the cases here that subscribe to that rule. On the other end of the spectrum is the presumptive affirmance rule, which says the defect is harmless unless the parent proffers on appeal. Why further inquiry would lead to a different result. And then there are a few cases. There are a few tests in between the readily obtainable information rule which was articulated

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Judge Shawna Schwarz

And Benjamin M says that the defect, the defect is harmless unless the record does indicate that there was what's described as readily obtainable information that would bear meaningfully upon whether the child is an Indian child and the probability of getting that information is reasonable. There are a number of cases that have subscribed to that rule. You would think three would be enough.

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Judge Shawna Schwarz

But no, we then have a fourth rule that was articulated in Dezi C. the reason to believe rule, which says that the defect that is not asking is harmless unless the record does contain information that suggests that a reason to believe such that the absence of further inquiry was prejudicial. So there had to have been some information that would give you some reason to believe. And then most recently, a case or two has cited a substantial evidence test.

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Judge Shawna Schwarz

So, the error should be reviewed under a hybrid standard of substantial evidence, abuse of discretion standard. If the record is insufficient, then there's not substantial evidence to support the ruling. And the court has abused its discretion. So we've got all these rules, and this is probably just a subset of the cases or the districts that are actually subscribing to them.

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Judge Shawna Schwarz

We've got all of these rules and we're hoping to get an answer very soon. But in case you're interested in where your district lands, it looks like the first and the sixth district have not necessarily articulated either their own rule or an indication that they're subscribing to one of the other rules. But you can try to look on here and see where your own district lands.

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Judge Shawna Schwarz

And in fact, some districts use different rules. It depends on the panel that you are, ... well, each division and district are using just different rules. So where do we go from here? Well, we're waiting for Dezi C.. Dezi C.. use the reason to believe rule. And Dezi C., review was granted in September of 2022. The there is a request to de-publish.

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Judge Shawna Schwarz

It was denied. And, you know, I've been talking to some judge friends of mine about does it even matter really what what Dezi C. says. Right. As a judge, should we care about how our error is assessed or should we just be trying to not make error? Well, obviously the latter. Judge Vezzola, this whole idea of ... thoughts on Dezi C.?

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Judge Shawna Schwarz

And how does that impact trial court judges? Do you think?

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Judge Mark Vezzola

Thank you, Judge Schwarz. And thank you very much for this amazing PowerPoint that you and only you are responsive for in terms of the animation and the graphics. I had nothing to do with it. So, I think I think Dezi C. is important for all the reasons that you've stated. But from a tribal perspective, I think it's important to note that there are

a lot of reasons why parents might not be aware of their own status as tribal members that I know some organizations and some tribes tried to bring to light in amicus briefs, one of which was filed by California Indian Legal Services, my former employer, just a couple of weeks ago.

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Judge Mark Vezzola

And as an example, back in the 1950s and sixties, the federal government had a policy of encouraging to the point of pushing Native Americans from their Midwestern reservations into large urban areas like L.A., San Francisco, Chicago, with the promise of obtaining jobs and private homes. So essentially, the federal government could eliminate its responsibility to those tribes and their members.

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Judge Mark Vezzola

So that's just one example of the possible disconnect between tribal membership and tribal identity and how that's trickled down over generations. L.A. County has, I think, the largest Native American population in the state, yet they have no federally recognized tribes in L.A. County. So, I think that's important to mention. And I think that drives home the point of why it's important to inquire.

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Judge Mark Vezzola

Not only is it the law, but there are practical reasons why people, the parents, anyway, might not be familiar with their own tribal status. They might not have a connection to a tribe or a reservation. Maybe they were raised by non-Native family members, and it's important to keep asking. I would err on the side over asking. And as you point out, it's an ongoing duty.

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Judge Mark Vezzola

And that's something that we can all agree on. So, we are waiting to see what what the court says in this case. But I think there are a lot of compelling reasons why, you know, this needs to be figured out. And of course, the tribes are clued into it because it really does affect their members and perhaps their rights.

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Judge Mark Vezzola

But by the time a tribe gets involved in a dependency matter, you know, presumably this has already been worked out. There has been notice. Tribes often do assert their rights under the Indian Child Welfare Act. But we're talking about what happens in the beginning and so I'm eager to see the outcome.

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Judge Shawna Schwarz

I am also actually and notwithstanding my my friend's assertion of, well, why does it matter? You should be trying to not make error in the first place. I have to believe that if we have an arena where there are five different legal tests, finding out what the right one is has got to give



us a good indication of of how to continue moving forward, in what direction to move.

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Judge Shawna Schwarz

And I think it'll be kind of nice to know and have that specificity. So, let's see. Well, maybe by September of 2023, we will have some information about Dezi C. There are a couple of other appellate cases that are on hold pending the analysis in Dezi C.. So speaking of not making error, what can we do to to minimize?

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Judge Shawna Schwarz

And, you know, initially we talk. Well, the agenda said to minimize negative outcomes. Well, I'm just going to call it a reversal I think is a negative outcome. So how do we minimize reversals? Well, first of all, if you will turn to Ezekiel G. Ezekiel basically makes clear that everybody, all of the participants to this proceeding, to these child protective proceedings, have an obligation to help the court get ICWA right. That includes child protective agencies, parents, all counsel and the juvenile court.

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Judge Shawna Schwarz

So, what can we all do to try to. And I mean, why do we not want reversals? Because it results in delays for kids. It results in delays, which is not obviously not good for kids, but certainly not good for family members also. So what can we do to do a better job of of this ICWA inquiry? Well, I would say, first of all, for the judge, create an environment where all of the justice partners are willing to take responsibility and do their part.

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Judge Shawna Schwarz

And then that really has to do with a judge creating an environment where folks feel comfortable doing that and know what the expectations are. It is critical for the judge to know who is in the courtroom. And that means you have to have an environment, you have to have a system where you can be informed not only of the names of the people who are there, but also the relationships.

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Judge Shawna Schwarz

I have for years insisted that that I know do we have paternal or maternal relatives and, you know, maybe I could not always articulate why that was important, but I felt like I needed to know. And now it is absolutely important that the court know which, you know, is are we talking about Mom's relatives or Dad's relatives? So, you as a judge have to know who's in the courtroom and you have to have a system about how you can be informed of that.

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Judge Shawna Schwarz

And that may depend on how big your county is. I mean, if you have a small county, maybe your deputy is the one checking folks in. We have an online system where we have folks who are who are indicating who's there. And it means is a judge being a pest and reminding people, is that a maternal aunt or is it a paternal aunt?

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Judge Shawna Schwarz

You need to know that. And it's best if you know before they come into the courtroom. Once you do have folks in the courtroom, you need to ask you have to ask about the heritage. And that means you have to have a way to track not only who you've asked, but what their answers are. And that could be in your case management system.

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Judge Shawna Schwarz

It should also be in your minute orders or minute orders should reflect the who has been asked and what their answers are. One of the things I would suggest if you know, for example, a lot of courts use Odyssey and if you use the note taking in Odyssey, it's kind of a pain, right? Because it's only one note for every time you take the every hearing create one note that is that says ICWA and then keep all of your ICWA notes in there.

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Judge Shawna Schwarz

So you have it all in one place. But basically that there's a bigger responsibility on the judge here, to, and bigger than than there ever used to be pre 2019 to keep track of who you've asked and and what their answers are. What I would ask of counsel if your clients relatives come to court, ask them when they're waiting out in the hallway and you're talking to the mother and mother's sister

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Judge Shawna Schwarz

is there. I would encourage counsel for the parents, counsel for the kids to ask those relatives. And then once you have information, communicate to the court, Well, you've got to be able to communicate to the court who's in the courtroom. So hopefully your your court has your judges set up a system where you can easily communicate who will be participating.

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Judge Shawna Schwarz

And then I know sometimes judges were not so great when you tell us we're not doing our jobs, or we forgot something. Figure out a way to tell the judge if you have information. Your Honor, my client's mother has additional ICWA information they would like to share. Remind us. I mean, I know you all are multitasking, but so are judges.

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Judge Shawna Schwarz

We're up there trying to take care of a zillion different things at the same time. If you haven't, the ICWA information, please remind us. Let us know so that we can do the ICWA inquiry in court. For the child welfare

folks, as you all know, you have the lion's share of the responsibility because you are talking to people not only at court but also outside of court.

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Judge Shawna Schwarz

You've got to ask the relatives. You've got to ask the NRFMs that's non-related extended family members. And just based on case law, as you all know, the where the parent who does not appear in court, they still have to be asked if you are able to talk to dad who is in prison because you know, but you're asking about a placement issue.

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Judge Shawna Schwarz

Don't forget to ask about the ICWA issue. Ask about the heritage issue. Also, don't forget to ask the relatives with whom a child is living. There are some cases where everybody was asked except for grandma, which is where her child was living. Of course, you've got to document the information and my hope is that different child welfare agencies have figured out good ways to document things and then provide the information to the court.

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Judge Shawna Schwarz

I know that we are now getting reports that are nothing but the ICWA inquiries, and so having that in a way that is organized and that is traceable can be really important to the court. Judge Vezzola can you give any suggestions how to minimize the ICWA reversals based on kind of what I've said here. Anything you'd like to add?

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Judge Mark Vezzola

Yes, thank you for that. I do think, including these inquiry efforts in the reports would be helpful. You know, one thing that I've argued or suggested a number of times as an attorney representing tribal clients and state dependency cases, is just including a separate section of the report to talk about active efforts. You know, there can always be an argument or a conversation on the record about what constitutes active efforts.

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Judge Mark Vezzola

You know, we can argue about that, but I think including that and including the efforts pointed towards inquiry in the report, will at least get people, attorneys and the judges an idea of what we're going to be talking about when we finally go on the record. I think that would be helpful to everybody if it could somehow be standardized.

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Judge Mark Vezzola

I think some counties do that. They they build it into their report templates, a section to address ICWA specific matters.

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Judge Shawna Schwarz

All right. So we're going to shift gears here and Judge Vezzola is going to talk to you about the new program for providing attorneys to California Indian tribes. Judge Vezzola.

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Judge Mark Vezzola

Thank you. So, this is an exciting program and it's really a good news good news situation. There's no bad news that I can see or have to report to you about it. But when you go into a dependency courtroom and there is a tribe involved, that tribe is going to be the only party to the case that is not entitled to state funded legal counsel.

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Judge Mark Vezzola

Okay. And yes, we live in California, where it may appear that all of California's tribes are tribes of means. They have substantial resources because we're so used to equating tribes with successful gaming casinos and those tribes that are successful are really in the minority. California has 109 federally recognized Indian tribes within the state, and it's only a small fraction of them that that are successful because of their gaming enterprises.

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Judge Mark Vezzola

But this program comes out of AB 124, which was passed in 2022 the Tribal Dependency Representation program. And it provides funding for California federally recognized tribes only. So even though we have people from tribes across the country living in the Golden State. Tribes outside of California are not eligible for this funding. This funding is specifically intended for California's federally recognized tribes, not unrecognized tribes.

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Judge Mark Vezzola

And it's really meant to redress this inequity that we've been talking about here. The money can be used retroactively to go back to the summer of 2022. It can cover the cost of in-house tribal counsel, spending their time on state dependency cases. It can cover the cost of contracting with private law firms or nonprofit law firms like CILS.

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Judge Mark Vezzola

The other bit of good news. In addition to the fairness, is that there is absolutely nothing for state court judges to do here. We just wanted you to be aware of this development. You don't need to get involved in the funding. You don't need to get involved in appointing legal counsel. The way it works is that there is a looming deadline for tribes to submit what they call a letter of interest to CDSS.

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Judge Mark Vezzola

The California Department of Social Services. I think that deadline is April 7th, and that would trigger the creation of an MOU. And once the

MOU is signed between the tribe and CDSS, that's when the money would start flowing and the money would go directly to the tribes and the tribes would decide how to use that to meet their legal needs for representation of state dependency cases.

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Judge Mark Vezzola

And it's hoped that this is a program that's going to continue in the future. I believe that there is funding there for 2024 anyway. And the money that we're talking about right now, I think is \$4.1 million across all tribes in the state. So, we're not talking about huge amounts of money, but every bit helps and like I said, it is important to keep in mind that the disparity of resources between tribes in California. Some of them do not assert their rights under the Indian Child Welfare Act or California state law because of the lack of resources.

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Judge Mark Vezzola

So, this is this program, the Tribal Dependency Representation program, will hopefully, hopefully get more tribes involved in that sense. And it doesn't affect tribal rights in any way, shape or form. Tribes can continue to choose their own legal counsel whether or not to get involved, to assert their rights and how much they want to be involved in these cases.

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Judge Mark Vezzola

It's also important to to point out that under California law, the government code and rules of conduct excuse me, rules of court that pro hac vice rules do not apply the same way to tribal legal counsel appearing in ICWA cases in California as they might apply to other attorneys from out of state. For example, California Government Code Section 70617(e)(3) waives the pro hac vice fees for attorneys representing tribes in ICWA matters and rule of court.

00:35:12:21 - 00:35:38:15

Judge Mark Vezzola

9.40(g) eliminates the requirement for tribal legal counsel to associate with local counsel when appearing in ICWA matters in California. So, I think this is a step in the right direction, and I'm hopeful that it's going to result in more tribes asserting their rights to participate in ICWA matters involving their children.

00:35:38:15 - 00:35:57:19

Judge Shawna Schwarz

Judge Vezzola, So, let's shift gears and talk about Brackeen. And Brackeen is sort of the elephant in the room that I think a lot of folks are waiting to find out what's going to happen. So, can you give us some background? I mean, what is Brackeen about?

00:35:58:11 - 00:36:25:24

Judge Mark Vezzola

Absolutely. So, Brackeen right now is a case before the United States Supreme Court. And we are expecting a decision probably near the end of

the court's term in late June. The case started years ago. It involves a couple, a Caucasian couple that was seeking to adopt two children who are Native American. The children have Navajo and Cherokee ancestry.

00:36:26:19 - 00:36:55:11

Judge Mark Vezzola

And the couple, the Brackeens are from Texas and I do want to point out that the children are in the Brackeen's care right now. Okay. So this case very quickly became bigger than one family. And these two adoptive children. So in fact, it became so complicated. It's a very high drama situation that involves now three states, five Indian tribes as parties.

00:36:56:10 - 00:37:31:05

Judge Mark Vezzola

And it's essentially like a law school exam question. But the Brackeens, when they became aware of the Indian Child Welfare Act and its requirements, namely the requirements that we've been talking about, special provisions that are triggered when you know or when you believe that there are Indian children involved in the case. The Brackeens felt these requirement, particularly the placement preferences that are enumerated in the Indian Child Welfare Act, are discriminatory.

00:37:32:04 - 00:38:08:13

Judge Mark Vezzola

Reverse discrimination, if you will, because if you recall, the placement preferences under the Act go as follows: extended family members, other members of the child's tribe, and then other Indian families. So, Brackeens felt that their chance of adopting these children whom they had fostered, I believe, was jeopardized by these placement preferences in the Act. Of course, other people agreed with the Brackeens.

00:38:08:23 - 00:38:51:10

Judge Mark Vezzola

I know that the Goldwater Institute, plays a very large behind the scenes role in this case. And as I said, three states Texas, Indiana, and Louisiana have both or excuse me, have all come out on the side of the Brackeens arguing that the Indian Child Welfare Act is in fact discriminatory to non-Indians. Enter the tribes. So, we have the Oneida Nation, we have the Morongo Band of Mission Indians, we have the Quinault Nation, we have the Cherokee Nation of Oklahoma, and then later the Navajo Nation.

00:38:51:20 - 00:39:31:17

Judge Mark Vezzola

All intervened as parties to this case in defense of the Indian Child Welfare Act. There have been a number of amicus briefs filed by law professors, by tribes, by states attorneys general, I believe 24 of which came out in defense of the Indian Child Welfare Act, including California. And it's also worth noting that California's tribes, every single one of them, all 109 California federally recognized tribes, signed on to an amicus brief in this case defending the Indian child Welfare Act.

00:39:32:01 - 00:40:00:07

Judge Mark Vezzola

And it's very rare for for us to see such a turnout of tribes in cases because different acts affect different tribes differently. But here they were or excuse me, here they are presenting a united front. And there are also policy considered nations that play. The Indian Child Welfare Act came out of Congress in 1978. As most of you probably know, it creates a lot of work.

00:40:00:15 - 00:40:30:00

Judge Mark Vezzola

A lot of expensive work for people. Social services agencies have to send notice to any and every Indian tribe who might be connected to the children in the case. That could be dozens of tribes. You know, if you have someone who says he or she may be Apache, there are 12 federally recognized Apache tribes, and the act requires registered mail for ICWA notice purposes.

00:40:30:00 - 00:41:07:14

Judge Mark Vezzola

That's expensive. And then we we, of course, have been talking about all of these appeals trying to comply with the requirements of the Indian Child Welfare Act. So, I get it there, There is a lot going on here. There's a lot to do. And some people, some prospective adoptive parents may feel discriminated against. But on the other side, we have to recognize that there is a history of Native American children being adopted out to non-native homes and essentially being cut off from their tribal and cultural families.

00:41:08:08 - 00:41:20:06

Judge Shawna Schwarz

So, Judge Vezzola, I assume that the folks who are saying ICWAs unconstitutional are not arguing things like it's inconvenient and expensive. What are the actual legal issues that they are arguing?

00:41:21:12 - 00:41:58:14

Judge Mark Vezzola

Correct. That was more on the side of, you know, why is it inconvenient? Why do we have to do this? And of course, those are the those are points I would expect to hear County social services make. The legal arguments being used to attack the ICWA are the non-delegation doctrine. The idea that law makers are punting their duties to others to make the laws. Anti-commandeering the idea that the federal government is directing states to take action without providing funding.

00:41:58:14 - 00:42:28:18

Judge Mark Vezzola

So basically, the state of California. So, the argument would go, would be tasked with carrying out a federal directive. Equal protection. The idea that people are not being treated equally under the law. And I think this is probably the argument that the Brackeens would most identify with. The idea that an Indian child, which is a defined term under the act, is a racial rather than a political classification.

00:42:29:24 - 00:42:59:17

Judge Mark Vezzola

So that is something that's on the table that the Supreme Court will have to decide. And then the regulation of commerce. So where does this come from? You know, I don't want to get into a whole separate discussion of federal Indian law and its origins, but Article one, Section eight, of the United States Constitution gives Congress the power to regulate commerce between foreign nations, the states, and Indian tribes.

00:43:00:03 - 00:43:16:17

Judge Mark Vezzola

So, whether passing the Indian Child Welfare Act in 1978 was even within Congress's Indian Commerce Clause power. That's the final argument against the Act and its constitutionality.

00:43:16:17 - 00:43:26:13

Judge Shawna Schwarz

In terms of how this affects California, though, it seems to me that we were a little different in terms of our approach to ICWA here in California. What would you have to say about that?

00:43:27:05 - 00:44:24:21

Judge Mark Vezzola

We are very different. I think, for one thing, California has a demonstrated, well-documented commitment to working with tribes rather than against them. To consulting with tribes. And we can see this in Executive Orders B-10-11 and N-15-19, which were both signed by California Governors, Governor Brown and then Governor Newsom. We also have in the Foster Youth Bill of Rights a commitment to protecting and preserving foster children's connections to their tribes, if any, as well as a requirement that a tribal representative be permitted to participate in hearings involving Native American foster children here in California.

00:44:24:21 - 00:45:02:19

Judge Mark Vezzola

And, you know, California has actually adopted the provisions of the Federal Indian Child Welfare Act. Most notably in SB 678 back in 2006, and then subsequently in AB 1325 and AB 3176. And it's worth noting that as we have, the Brackeen case looming on the horizon. I've seen more states kind of beef up their Indian Child Welfare laws to kind of brace for any possible adverse decision from the Supreme Court.

00:45:02:19 - 00:45:15:12

Judge Mark Vezzola

I've seen this happen in North Dakota. I've seen it happen in Wyoming. And these are states like California that tend to have larger Native American populations.

00:45:15:12 - 00:45:31:12

Judge Shawna Schwarz

But I think we're all waiting to find out what's going to happen. And it's it's sort of hard to predict. But based on the different arguments that are being made against ICWA, do you have any input on how those could impact or how they would land in California?



00:45:32:10 - 00:46:08:09

Judge Mark Vezzola

Yes. So, with respect to the non-delegation doctrine, and I think, you know, the slides are going to go argument by argument, those that have been lobbed against the ICWA. But the non-delegation doctrine really focuses on two specific provisions of the Indian Child Welfare Act §1903(2) and §1915(c). The first one deals with a tribe's right to define extended family member because very often tribes have different definitions of family member.

00:46:09:24 - 00:46:41:02

Judge Mark Vezzola

A cousin might be considered more like an aunt and uncle, and therefore a closer relationship in a tribal community under the tribe's customs and traditions. The second provision I mentioned deals with the tribe's ability to create its own set of placement preferences in place of those that are articulated in the Indian Child Welfare Act. So, I don't see a very big risk there.

00:46:41:02 - 00:47:11:13

Judge Mark Vezzola

With respect to the anti-commandeering doctrine, as I as I said earlier, California has already adopted the most of the provisions of the Federal Indian Child Welfare Act. So even if this argument were to be successful, if the Supreme Court were to find that there is or was an anti-commandeering violation in the Indian Child Welfare Act, I don't think it would have any impact in California because the state has adopted those provisions.

00:47:11:13 - 00:47:53:15

Judge Mark Vezzola

They are now part of California law. In terms of the scope of congressional authority under Congress's Article one powers. It doesn't clearly preclude California law. So, California can still pass its own laws to protect Indian child welfare and preserve the government-to-government relationship that exists now between the state and its tribes. That's very important. I do think it's worth noting, though, that we've we've already gotten kind of a preview of what might happen, at least with one Justice. Back in 2013

00:47:54:09 - 00:48:25:05

Judge Mark Vezzola

Clarence Thomas, in his concurring opinion in the Baby Girl Veronica decision, actually questioned the constitutionality of the Indian Child Welfare Act by analyzing or trying to analyze Congress's Indian Commerce Clause power. So, this isn't a new argument. This is one that's come up to the court before. But that case wasn't directly about the constitutionality of the Act.

00:48:25:05 - 00:48:40:07

Judge Mark Vezzola

So, I think we probably know how Justice Thomas is going to come out on this particular point. And it'll be interesting to see how his cohorts on the court decide.

00:48:41:04 - 00:48:45:01

Judge Shawna Schwarz

It seems like the equal protection argument is a pretty big one also, though.

00:48:45:18 - 00:49:22:04

Judge Mark Vezzola

Right? And in this one, I can't really speak to with any certainty here. I don't think anybody can right now. It really comes down to, I think the third in the list of placement preferences in the Indian Child Welfare Act. Extended family member, that number one slot for a placement preference, that's the same in all cases. County social services are, they're always going to look for extended family members before they they start looking for a foster homes. And then other members of the tribe.

00:49:22:04 - 00:49:50:07

Judge Mark Vezzola

You know, the tribe's point is that this is a political classification. Indian child is defined as a child, who is a member of a tribe or a child who is eligible to be a member and is the biological child of a member. But when you get down to the third preference, other Indian families, well, the argument goes that that that seems more of a racial classification than a political one.

00:49:50:13 - 00:50:26:11

Judge Mark Vezzola

And that's triggering this equal protection argument. This could have an impact on California law. If the Supreme Court decides that this is, in fact, an equal protection violation, that the this part of the placement preferences in the 1978 statute violates equal protection, then it's possible that California law will also fall in the same way. But it's important to note that, you know, California has an independent requirement to consult with tribes on placement.

00:50:26:11 - 00:51:00:00

Judge Mark Vezzola

I think that's Welfare and Institutions. Code 361.31(g). So, I think that coupled with the Executive Orders we have in California, the Foster Youth Bill of Rights, these other things. Cal-ICWA, I think comfort me a little bit that whatever happens at the Supreme Court, California's Indian Child Welfare law and the state's commitment to preserving it will be somewhat, if not mostly protected.

00:51:00:10 - 00:51:51:18

Judge Mark Vezzola

But we don't fully know. We don't know what's going to happen. So, I just mentioned the definition and that third placement preference that I think the plaintiffs in this case find so troublesome, other Indian families. What that means. You know, I also see the argument from another point of view that while it might sound like a racial classification, I do think there is a connectivity, perhaps a pan-Indian notion of connectedness or similarity between members of different Indian tribes, in which, you

know, maybe the drafters of the federal Indian Child Welfare Act were going when they listed that placement preference.

00:51:51:18 - 00:52:09:20

Judge Mark Vezzola

But it could impact California law. We just have to kind of see where the Supreme Court comes out and then analyze all of these things that are currently in place to protect and preserve Indian Child Welfare law in California.

00:52:11:04 - 00:52:47:08

Judge Shawna Schwarz

So, Judge Vezzola, it seems like kind of this slide in the one before it, are kind of your your assessment of of what could happen based on whether on which ground the Supreme Court might find ICWA unconstitutional or not. I guess I'm thinking about the next morning after the decision comes out. I know folks are planning and thinking and preparing and talking, but, you know, if any part falls based on any of these sections, where do we go from there?

00:52:48:10 - 00:53:09:15

Judge Mark Vezzola

Well, I do think we have certain state law provisions that would help. You know, the worst-case scenario from a tribe's point of view is that the entire Indian Child Welfare Act is gutted. You know, and are we just going to are some of us going to be out of our jobs or are we not going to need webinars or trainings like this anymore?

00:53:09:15 - 00:53:35:12

Judge Mark Vezzola

If there is no Indian Child Welfare Act? And I don't think that's going to be the case. For one thing, from a tribe's point of view, and this is good for, you know, the state court judges on the on the call to be aware of, you know, tribes might still have an opportunity, in fact, a legal right to exercise their own jurisdiction if in they have concurrent jurisdiction over a minor.

00:53:36:08 - 00:54:10:08

Judge Mark Vezzola

There are also provisions of the Welfare and Institutions Code that I haven't talked about yet, like §346 and §676 that actually permit parties with an interest in the outcome of a case. To participate, not parties, but entities can participate when they have an interest. And I think there is a strong argument to be made that Indian tribes do in fact have an interest in what becomes of their tribal member children.

00:54:10:08 - 00:54:44:14

Judge Mark Vezzola

You know, I think the water is less muddy when we are talking about tribal member children versus children who are eligible to be members of tribes. But, you know, we also have case law that says that determination is entirely up to the tribes themselves, whether or not a child is eligible to be a member. So, you know, I wish I could give more clear

predictions about what's going to happen and what the day after is going to be like.

00:54:45:02 - 00:55:15:24

Judge Mark Vezzola

We don't yet know that. But based on everything that's in place under California law, I think there's a good argument to be made for California, maintaining its dedication to preserving Indian families and keeping tribes connected in case in cases involving, Indian children.

00:55:15:24 - 00:55:29:22

Judge Shawna Schwarz

Thank you so much. So we've come to sort of the end of our sort of formal program here. And let me just ask Judge Vezzola if there's anything you want to do to talk about that that we haven't covered in the slides or on the outline.

00:55:31:11 - 00:56:28:17

Judge Mark Vezzola

Yeah, Thank you. There is one thing that I didn't mention, and that is if this doomsday scenario and you know, it's all relative, maybe it's doomsday from the tribe's point of view, but maybe not for the other people or entities involved. If the Supreme Court decides that, you know, passing the Indian Child Welfare Act was not ever within Congress's Article one authority, if it's outside the Indian Commerce Clause, power. Well, that would be or could be a slippery slope, because then the court would essentially be triggering an analysis of, you know, 200 plus years of federal statutes that have been addressing the rights of Indians and tribes over the last two-hundred and really 30 years.

00:56:28:17 - 00:57:17:03

Judge Mark Vezzola

I mean, Congress has passed laws that address Native American educational rights, Native American land use, the jurisdiction and the power of tribal courts. And if the Supreme Court in the Brackeen case comes down on the side of this is unconstitutional because it is outside Congress's Article one power, then we're going to have to start looking at all of these other statutes that have over the years created a body of federal trust, responsibility law. A body of law that that that tells tribes what the United States government is responsible to them for doing.

00:57:17:03 - 00:57:50:00

Judge Mark Vezzola

And I think that would be dangerous for them to do. It's kind of like pulling a loose thread. I mean, the whole fabric of federal Indian law could come undone and that that might be an unintended consequence of the Brackeen case. I hope that doesn't happen, but it could if they decide to gut the entire act. I think what's more likely is maybe attacking or eliminating certain provisions that that might be troublesome.

00:57:50:00 - 00:58:15:07

Judge Shawna Schwarz

Okay. So, thank you very much, Judge Vezzola. I think the information you provided is so critical to our understanding where we go from here. And

well, it's the end of March. Three months from now, we may be talking again to create another webinar to talk about next steps. We'll have to wait and see.

00:58:15:07 - 00:58:42:01

Ann Gilmour

If I may, Judge Schwarz and Judge Vezzola, there was just one comment in the chat that one of the attendees was pointing out that there is federal legislation pending that would put some of the ICWA requirements, if not all of them, into the Title IV-E. Where, you know, as we all know, our juvenile courts are bound to follow those federal requirements that they want the money that comes with Title IV-E of the social security act.

00:58:42:02 - 00:59:09:00

Ann Gilmour

So, there's a move to do that. Then that may also be a backstop in shoring up against a decision in Brackeen.

Judge Shawna Schwarz

Thank you for that. So, on behalf of myself and Judge Vezzola, we want to thank all of you for participating today and for your interest in this topic, and that will conclude today's webinar. Thank you and have a nice day.

00:59:10:00 - 00:59:10:10

Judge Shawna Schwarz

Bye bye.