

Representing Indian Children and Parents in ICWA cases:

What can ICWA do for you?

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Learning Objectives in ICWA Cases

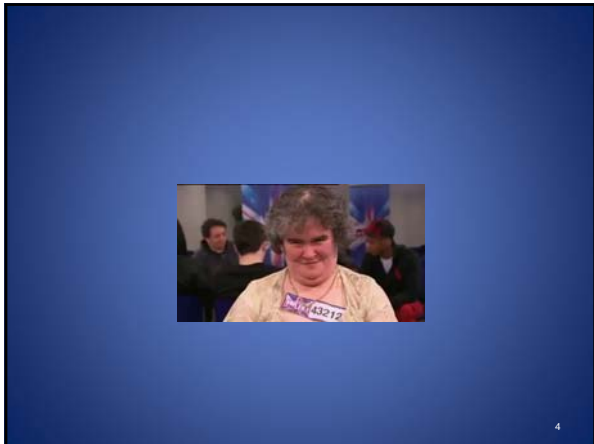
- Appreciate the importance of tribal culture and relations in evaluating the best interests of an Indian child
- Understand the substantive requirements of ICWA and what they mean for you and your client as a minor or parent's attorney
- Recognizing and preserving issues for appeal.
- Demonstrating ability to recognize appealable issues
- Understanding how ICWA can benefit your client
- Understanding the relationship between ICWA compliance and effective advocacy

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Bias

- Implicit Bias
 - What is implicit bias?
 - How might it affect your work?
 - How might it affect an ICWA case?
 - How do you recognize and avoid implicit bias?
- Legal Bias

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ICWA & the best interests of the Indian Child

- What factors do you consider when assessing the “best interests” of the child?
- How does this change in an ICWA case?

ICWA

- 25 USC 1901 ... Congress finds --
 - (4) 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...
 - (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families

W&IC § 317
APPOINTMENT OF COUNSEL

- (a)(1) Court MAY appoint for indigent parent.
- (a)(2) Parent of Indian custodian of Indian child who cannot afford counsel: ICWA §1912 applies.
- (b) If child is in placement or petitioner recommends placement, court MUST appoint for indigent parent .
- (c) Court MUST appoint for a child unless finds child would not benefit.

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RULE OF COURT 5.660(b)

To find child would not benefit, court must find ALL of the following:

- Child understands the nature of the proceedings;
- Child able to communicate and advocate effectively (with court, other counsel and other parties and professionals in the case;)
- Child would not gain ANY benefit.

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Welfare & Institutions Code

§317: Sets forth the responsibilities and duties of attorney appointed to represent child.

§317.5: (a) All parties with counsel are entitled to *competent* counsel.
(b) The child is a party.

§317.6: Rules and procedures for training and qualifying competent counsel in dependency proceedings.

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What makes a counsel “competent” in an ICWA case?

- Let’s make a list....



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ICWA requirements

- What are they??
 - Inquiry
 - Notice
 - Transfer to tribal court
 - Intervention
 - Active efforts
 - Evidentiary Standards
 - Qualified Expert Witness Testimony
 - Placement preferences / permanency planning

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Inquiry

- WIC 224.3 (a) The court, county welfare department ... have an affirmative and continuing duty to inquire whether a child ... is or may be an Indian child.
- What does this have to do with you?
 - As parents’ attorney?
 - As minor’s attorney?
- What if your client says they don’t want the tribe involved?

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- Any person who knowingly falsifies or conceals facts regarding a child's Indian status shall be subject to court sanctions. (Welf. & Inst. Code § 224.3 (e).)

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Notice

- In re S.B. 174 Cal.App.4th 808, 94 Cal. Rptr.3d 645

An attorney practicing dependency law in the juvenile court should be sufficiently familiar with ICWA notice requirements to point out a flaw in notice if the record shows that there is one – especially when specifically asked to do so.

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Notice

- What responsibilities do parents attorney have?
- What responsibilities to minor's attorney have?
- What do you look for in Notice?
- When would you contact a tribe?

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NOTICE ISSUES

- ICWA §1912.
 - If court knows or *has reason to know* that child is an Indian child;
 - Petitioner **MUST** notify:
 - Parent or Indian Custodian
 - Child’s tribe
 - By registered mail, return receipt requested
 - No hearing to place child in foster care or to terminate parental rights until at least 10 days after notice is *received*.

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Enrollment

- If tribe says that child is not a member, but is eligible for enrollment...
 - Whose duty is it to enroll?

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QUESTION

- If a tribe responds that a child is “eligible for membership” and the tribe will not intervene unless and until the child is enrolled....
- Do “active efforts” require the agency to be responsible for pursuing the enrollment of the child?

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California Rules of Court

- 5.484(c): Efforts to provide services must include *pursuit of any steps necessary to secure tribal membership for an eligible child.*
- 5.482(c): If a tribe responds to notice that the child is eligible, the court must proceed as if the child is an Indian child, AND *direct the appropriate individual or agency to provide active efforts under rule 5.484(c) to secure tribal membership for the child.*

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Transfer to tribal court

- Who can seek a transfer?
- 25 U.S.C. 1911 (b)

In any State court proceeding for the foster care placement of, or termination of parental rights to, ... in the absence of good cause to the contrary, **shall** transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of **either parent** or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

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Transfer to Tribal Court

- When?
 - Rule 5.483 (d) (2) (B)
- Why?
 - What if your client is a non-Indian?
- How?
 - Judicial Council form ICWA-050

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Active Efforts

- When? – “prevent” the breakup of the Indian family;
- Active vs. Reasonable efforts:
 - Active rather than passive;
 - Must use available resources of tribe – ie. consultative
 - Must be culturally appropriate.
- Case plan review

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25 U.S.C. 1912(d)

- The party seeking to place a child or terminate parental rights must prove that *active efforts* have been made to provide services and programs to prevent the breakup of the Indian family and that these efforts were unsuccessful.

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W&IC § 361.7

- Same requirement as ICWA ...
- Plus:
 - What constitutes active efforts to be assessed on a case-by-case basis
 - Efforts to be made taking into account the prevailing social and cultural values, conditions, and way of life of the Indian child’s tribe
 - Must use available resources of the tribe (ie. consultation)

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In re C.B. 190 Cal.App.4th 102

- “We question whether rule 5.482(c) and rule 5.484(c) are consistent with the controlling statute.”
- However, under this case, it would appear that “active efforts” should include taking reasonable steps to enroll a child who is deemed eligible for membership.

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Concurrent planning

- When does it begin?
- What options are available in an ICWA case?
- As minor’s or parents’ attorney what role do you have in working with the tribe?
- What if the tribe is out of state?

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Placement Preferences

- What are they?
- Why do we have them?
- Why should you worry about them as
 - Parents’ counsel?
 - Minors’ counsel?
- Whose responsibility is it to ensure compliance with the placement preferences?
- How do the placement preferences relate to the “best interest of the [Indian] child”?

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Evidentiary Standards

- What is the standard for involuntary foster care order of an Indian child?
- What would this evidence look like? How is it different than a non-ICWA case?
- For Termination of Parental rights?

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Qualified Expert Witness Testimony

- When is it required?
- What issues does QEW speak to?
- What are the required qualifications in a particular case?
- What foundation should be laid before someone testifies as a QEW?

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Qualified Expert Witness

- How and on what basis would you challenge the selection of a QEW?
- How and on what basis would you challenge the testimony of a QEW?
- When would you call your own QEW?
- When would you stipulate to QEW by declaration rather than live testimony?

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Remedies for Non-Compliance with ICWA

- What remedies are available for non-compliance with ICWA in addition to writ and appeal procedures available in a non-ICWA case?
- 25 U.S.C. 1914 – Petition to invalidate
 - When and for what is it available?
 - How, where and when do you file?

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One last consideration...

- What are the reasons to preserve issues for appeal by objections, requests for offers of proof, trial briefs or other avenues?

AND

- What are the consequences of failing to do so?

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