



CDSS

JOHN A. WAGNER
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES

744 P Street • Sacramento, CA 95814 • www.cdss.ca.gov



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.

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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