

## 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 – one, the testimony of a “qualified expert witness” which supports 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;” two, 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.”<sup>264</sup> The ICWA applies these two requirements to all actions within its definition of “foster care placement” (foster care placements, guardianships, conservatorships, and placements in an “institution,” 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.”<sup>265</sup>

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.”<sup>266</sup>

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.<sup>267</sup>

In order to ensure better compliance with the ICWA, California incorporated the above requirements for active remedial/rehabilitative 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.<sup>268</sup>

#### 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.”<sup>269</sup> Subsection (c) of the same section also provides a list of the characteristics of those most likely to qualify as expert witnesses:

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<sup>264</sup> 25 U.S.C. §§ 1912(d)-(f).

<sup>265</sup> 25 U.S.C. § 1903(1).

<sup>266</sup> 25 U.S.C. § 1903(9); *In re Riva M.*, 235 Cal. App. 3d 403, 411, n.6 (1991).

<sup>267</sup> *In re Crystal K.*, 226 Cal. App. 3d 655, 667-668 (1990), *cert denied*, 520 U.S. 862 (1991).

<sup>268</sup> 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.

<sup>269</sup> WELF. & INST. CODE § 224.6(a).

- (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.<sup>270</sup> 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.<sup>271</sup>

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.<sup>272</sup>

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."<sup>273</sup> 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.<sup>274</sup>

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.<sup>275</sup>

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<sup>270</sup> WELF. & INST. CODE § 224.6(a).

<sup>271</sup> WELF. & INST. CODE § 224.6(d); BIA Guidelines § D.4 and Commentary thereto.

<sup>272</sup> 1 U.S.C. § 1; *In re Riva M.*, 235 Cal. App. 3d 403, 411 (1991); *In re Brandon T.*, 164 Cal. App. 4th 1400, 1411-1412 (2008); BIA Guidelines § D.4.

<sup>273</sup> 25 U.S.C. § 1912(e), (f); WELF. & INST. CODE §§ 224.6(b)(1), 361.7(c).

<sup>274</sup> *In re Krystle D.*, 30 Cal. App. 4th 1778, 1801-1803 (1994) (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.*, 182 Cal. App. 4th 1496, 1503-1505 (2010) ("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 (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).

<sup>275</sup> 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*, 490 U.S. 30, 37 (1989) ("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").

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.<sup>276</sup> 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.<sup>277</sup>

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.<sup>278</sup>

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.<sup>279</sup> Unfamiliarity with culture and community standards

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<sup>276</sup> WELF. & INST. CODE § 366.26(c)(1)(B)(vi); CAL. RULES OF COURT, RULE 5.485(b).

<sup>277</sup> WELF. & INST. CODE § 224.6(b)(2); CAL. RULES OF COURT, RULE 5.484(a).

<sup>278</sup> See, e.g., *In re D.S.*, 577 N.E.2d 572 (Ind. 1991); *In re N.L.*, 754 P.2d 863 (Okla. 1988).

<sup>279</sup> See, McGoldrick, *Ethnicity and Family Therapy* (6th ed. 1986), 6. ("Problems (whether physical or mental) can

commonly results in misdiagnosis and tragic losses of Indian children from their Indian family and tribe.<sup>280</sup>

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 our children are at best ignorant of our 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.<sup>281</sup>

In commentary to Sections D.3 and D.4, the BIA Guidelines, cited by the Third District Court of Appeal in *In re Crystal K.*,<sup>282</sup> note 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 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...

...knowledge of tribal culture and child rearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves

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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 Different* (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.

<sup>280</sup> 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; reluctance to offer self-disclosure; and, selective performance of only those skills that contribute to the betterment of the group. Gibbs, *Children of Color, Psychological Interventions with Minority Youth*, 125 (1st ed. 1989).

<sup>281</sup> *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-35 (1989).

<sup>282</sup> 226 Cal. App. 3d 655, 667 (1990), *cert. denied*, 502 U.S. 862 (1991).

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.<sup>283</sup>

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.<sup>284</sup>

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.<sup>285</sup> Parents cannot waive the tribe's right to expert witness testimony, and the tribe cannot waive the parents' rights to the same.<sup>286</sup> 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. What Constitutes Active Efforts

The ICWA does not provide a definition of “active efforts.”<sup>287</sup> 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.”<sup>288</sup> 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.”<sup>289</sup>

California cases have made the following further 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.<sup>290</sup>

“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

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<sup>283</sup> BIA Guidelines §§ D.3 and D.4, Commentary.

<sup>284</sup> WELF. & INST. CODE § 224.6(e).

<sup>285</sup> WELF. & INST. CODE § 361(c)(6)(A); CAL. RULES OF COURT, RULE 5.484(a)(2); *In re Jennifer A.*, 103 Cal. App. 4th 692, 707-708 (2002).

<sup>286</sup> *In re Jennifer A.*, 103 Cal. App. 4th 692, 706-707 (2002).

<sup>287</sup> 25 U.S.C. §§ 1903, 1912(d).

<sup>288</sup> WELF. & INST. CODE § 361.7(b); CAL. RULES OF COURT, RULE 5.484(c); *see* BIA Guidelines § D.2.

<sup>289</sup> CAL. RULES OF COURT, RULE 5.484(c)(2).

<sup>290</sup> *Letitia V. v. Superior Court*, 81 Cal. App. 4th 1009, 1016 (2000).

the state caseworker takes the client through the steps of the plan rather than 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.”<sup>291</sup>

The phrase “breakup of the Indian family,” the basis of which the active remedial services and rehabilitative programs must be directed at, 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.”<sup>292</sup>

Active efforts must be made “[n]otwithstanding Section 361.5 [of the Welfare and Institutions Code].”<sup>293</sup> However, in certain extreme situations, some courts have ruled that active 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.<sup>294</sup>

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.” The court found that “[the father’s] history clearly demonstrate[d] the futility of offering reunification services,” and that the mother had failed to benefit from the active efforts made during the prior and current dependency proceedings.<sup>295</sup>

Former California Rules of Court, rule 1439 provided conditions for a waiver of the active efforts requirement.<sup>296</sup> 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.

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<sup>291</sup> *In re K.B.*, 173 Cal. App. 4th 1275, 1287 (2009), citing *A.A. v. State*, 982 P.2d 256, 261 (Alaska 1999) (emphasis added).

<sup>292</sup> *In re Crystal K.*, 226 Cal. App. 3d 655, 666-667 (1990); BIA Guidelines § D.2 Commentary.

<sup>293</sup> WELF. & INST. CODE § 361.7(a).

<sup>294</sup> *Letitia V. v. Superior Court*, 81 Cal. App. 4th 1009, 1015-1018 (2000).

<sup>295</sup> *In re K.B.*, 173 Cal. App. 4th 1275, 1279-1288 (2009).

<sup>296</sup> *In re Jennifer A.*, 103 Cal. App. 4th 692, 708 (2002).

## B. Standards of Proof

For proceedings which fall under the ICWA's definition of "foster care placement" (i.e., foster care placements, guardianships, conservatorships, and placements in an "institution," when the parent or Indian custodian cannot have the child returned upon demand), the Act requires that there must be clear and convincing evidence to support the determination "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."<sup>297</sup> For all actions which result in termination of the parent-child relationship, the Act's standard of proof is elevated to evidence beyond a reasonable doubt in support of the same determination.<sup>298</sup>

California has incorporated these same standards of proof 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.<sup>299</sup>

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 terminating parental rights.<sup>300</sup>

As the Act is silent on the standard of proof required for the separate finding that active remedial/rehabilitative efforts were made and were unsuccessful, the standard for that finding is simply that of clear and convincing evidence, even in terminations of parental rights.<sup>301</sup>

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.<sup>302</sup> 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.<sup>303</sup> This addition demonstrates yet again the Legislature's intent to protect the connection between an Indian child and his or her tribe.

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<sup>297</sup> 25 U.S.C. §§ 1903(1), 1912(e).

<sup>298</sup> 25 U.S.C. §§ 1903(1), 1912(f).

<sup>299</sup> FAM. CODE §§ 170(c), 177, 3041(e), and 7892.5(b); PROB. CODE § 1459.5; WELF. & INST. CODE §§ 224.1(c), 361(c), 361.7(c), and 366.26(c)(2)(B)(ii); CAL. RULES OF COURT, RULES 5.480, 5.484, 5.485.

<sup>300</sup> BIA Guidelines § D.3(c).

<sup>301</sup> FAM. CODE § 7892.5(a); CAL. RULES OF COURT, RULE 5.485(a)(1); *In re Michael G.*, 63 Cal. App. 4th 700, 709-712 (1998).

<sup>302</sup> 25 U.S.C. § 1921.

<sup>303</sup> FAM. CODE § 175(d); PROB. CODE § 1459(d); WELF. & INST. CODE § 224(d).