

Respect for the Indian Child Welfare Act and Its Reflection on Tribal Sovereignty

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Introduction

There is a direct tie between a court's or agency respect for federal and state Indian Child Welfare Act (ICWA) laws and their understanding of Tribal sovereignty. A review of state court proceedings involving Native American children reflects that states' lack of understanding and respect for Tribal sovereignty. That understanding is represented through the actions and failures to act by state agencies, governmental representatives, and the judiciary. The ICWA requires the United States, every state, every Indian tribe, and territories of the United States to give "full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records and judicial proceedings of any other entity."¹

Most of the scholarship on the ICWA attacks state court resistance as unreasonably hostile to the statutory goals at best and anti-Indian at worst.² Barbara Ann Atwood, in her law review article, *Flashpoints Under The Indian child Welfare Act: Toward A New Understanding of State Court Resistance*, reviews aspects of the state court resistance to ICWA and strives to present a more nuanced understanding of the reactions of state court judges to the unique aspects of ICWA. In addition to Atwood in her article, Professor Christine Metteer has argued forcefully that state courts have defied the plain language of the federal and state ICWA because of their deep distrust of tribal courts and their entrenched resistance to the concept of tribal sovereignty.³ The legislative history of the Act is replete with examples of state courts employing white, middle-class values as universal truths in assessing the fitness of Indian parents.⁴ State courts have formulated many theories to demonstrate "Good Cause" to not recognize or acknowledge the Indianness of a child, the child not being found to be part of an "Indian community" or not part of an "existing Indian family." State courts have consistently applied the incorrect rules of evidence and burden of proof in moving an Indian child to foster care or moving for termination of parental rights. State courts have incorrectly applied rulings that give the Adoption and Safe

¹ 25 U.S.C. section 1912(d) (1988).

² Atwood, Barbara Ann, *Flashpoints Under The Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J 587, (Spring, 2002)

³ Metteer, Christine, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38, Santa Clara L.Rev. 419, 429 (1998)

⁴ *Ibid*, 421

Families Act (ASFA) a priority over the state or federal ICWA. The South Dakota appellate court endorsed the distinct objectives underlying ICWA and ASFA and agreed that ICWA's more demanding standard controls.⁵ Testimony before Congress in 1978, leading up to the ICWA, suggested that state courts suffered from ignorance, poor training, and cultural bias in deciding Indian child welfare matters.⁶

It is the premise of this writer that the findings of congressional hearings of 1978 still have validity in the functioning of state courts in 2011. A detailed case review of nine court cases involving the Indian Child Welfare Act in the State of Nebraska reflects a lack of compliance with state and federal law, a failure of agencies to train their people; and a significant lack of understanding on the part of state agencies and judicial representatives. A review of court rulings indicates a consistent effort to disregard the clear intent of state and federal ICWA law to avoid involvement of the tribes, a flippant use of the concept of "Good Cause" and seeking and creating new exceptions not to follow ICWA. Creativity has gone into the creation of exceptions such as the Indian child "Not Involved in Indian Culture" or not part of an "Existing Indian Family."

This presentation reflects the case reviews of social service providers, selected judicial decisions and court action related to the Indian Child Welfare Act. The presentation in conclusion reviews the actions of one organization and group of professionals in an effort to train traditional tribal elders as expert witnesses on ICWA. They strive to provide the training so as to require their use in state court proceedings. Such a program can promote greater understanding and recognition of tribal sovereignty. It remains to be seen if the state courts understand and will honor the plain language standards of the ICWA and Tribal sovereignty.

SOVEREIGNTY

Black's Law Dictionary defines Sovereignty: The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.⁷

DEFINING AMERICAN INDIAN TRIBAL SOVEREIGNTY

"The Indians were here first. Then much later came foreign settlers from a continent across the ocean. The primary objects of the settlers were trade and land acquisition. The principal means

⁵ Atwood, Barbara, Achieving Permanency For American Indian and Alaska Native Children: Lessons From Tribal Traditions, 37 Cap. U.L. Rev. 239, Winter, (2008)

⁶ See 1974 Hearings, supra note 56; American Indian Policy Review Commission, Report on Federal, State, and Tribal Jurisdiction 79-80 (Comm. Print 1976) ("1976 Report"). The formal findings included in the Act itself provide that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901 (5) (2000).

⁷ Black's Law Dictionary, 5th edition, 1979, p 1252.

of interactions between the colonies and the Indian tribes were diplomacy and war.”⁸ Diplomacy and war often resulted in a treaty to settle the issue. Treaties are law. Treaties are binding contracts between two sovereign entities. After the colonies became the successor to the European states, the treaties were between the United States government and the individual sovereign tribes.

The foundation of the relationship between the government and the Indian tribes can be identified within the treaties, the Indian Commerce Clause of the Constitution, and the provisions to exclude “Indians not taxed” from citizenship and determining the number of representatives that each state was entitled. The interaction between the United States government and the Indian tribes resulted in more than 350 treaties. The common focus of the treaties was land acquisition and commerce agreements.⁹

Throughout history the United States government, in the form of Congressional legislation, Executive branch executive orders, and Supreme Court decisions, has formulated laws and policies that have set the framework for the interaction of tribal, federal, and state government. The primary relationship between the Indian tribes and various governmental entities was established in the Constitution within the Commerce Clause which reserved interactions and agreements with the various tribes to a relationship between the federal government and those Indian tribes.

The United States Supreme Court has ruled on one case directly involving the application of the federal Indian Child Welfare Act (ICWA). That case was *Mississippi Band of Choctaw Indians v. Holyfield*.¹⁰ Justice Brennan, in his opinion, affirmed the necessity to consider the case based upon a federal standard and identified two reasons why. First, there was Congress’s desire for nationwide uniformity in the application of domicile. Second, and more important was Congress’s intent to limit (not expand) state judicial authority in dealing with Indian children.¹¹ Frank Pommersheim in his volume, *Broken Landscape*, addresses the courts consideration of the Indian Child Welfare Act.¹²

Many state court decisions reflect and generate a result that mirrors original testimony that was a foundation for the ICWA. Testimony before Congress in hearings prior to the 1978 ICWA legislation identified:

The disparity in placement rates for Indians and non-Indians children is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster care placement is at least 13 times greater. In South Dakota 40 percent of all adoptions made by the South Dakota Department of Public Welfare since 1967-1968 are Indian children in a state in which Indians

⁸ Pommersheim, *Broken Landscapes, Indians, Indian Tribes, and the Constitution*, Oxford Press, 2009.

⁹ *Ibid.*, 3.

¹⁰ 490 U.S. 30 (1989)

¹¹ *Ibid.*

¹² Pommersheim, *Broken Landscapes, Indians, Indian Tribes, and the Constitution*, Oxford Press, 2009 242-246.

represent 7 percent of the population. In 16 states surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes.¹³

For some, this is not at all new, but rather the latest update that harkened back to the era of (federal) boarding schools, when the primary goal, in the words of William Pratt, a leading educator and spokesman, was “to kill the Indian and save the man.”¹⁴

The federal and state ICWAs focus on three interlocking structural approaches to the jurisdictional problems. The statute is jurisdictionally stringent in favor of tribal court jurisdiction, creates minimum federal standards for the removal of Indian children from their homes by the state, and establishes strict placement preferences that must be followed by state courts. The ICWA expressly rests on Congress’s authority under the Indian Commerce Clause, plenary power, and its “responsibility for the protection and preservation of Indian tribes and their resources.”¹⁵

EXPERT WITNESSES IN ICWA CASES

The minimum federal standards for the removal of Indian children from the parental home by state courts include the necessity of expert testimony, the provision of rehabilitative services, and the enhanced burden of proof.¹⁶ Federal Guidelines suggest the following persons are most likely to meet the requirements for qualified expert witnesses: (1) A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practice; (2) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe; and (3) A professional person having substantial education and experience in the area of his or her specialty. The Federal Guidelines should be considered in determining whether a witness is a qualified expert witness. Congress intended "qualified expert witnesses" to refer to experts with particular and significant knowledge of sensitivity to Indian culture, and knowledge of social and cultural aspects of Indian life. The phrase "qualified expert witness" in Indian Child Welfare Act cases is meant to apply to expertise beyond the normal social worker qualifications.¹⁷

The Native American Rights Fund (NARF) generated guidelines to address the issues related to ICWA indicating that the use of an expert witness is required whenever a state court places an Indian child in foster care or is taking an action to terminate parental rights.¹⁸ The NARF Guidelines also affirm the requirement of an expert witness in efforts to deviate from the placement preferences that are laid out in ICWA. The Bureau of Indian Affairs has also generated guidelines for qualification of an expert witness in ICWA cases. The Iowa ICWA may be helpful in that it identifies the order of preference which is as follows:

¹³ U.S. Senate Rep., 93rd Cong. (2d Sess. 1974). 1978 U.S. Code Cong. At Ad News 7530-31 (Statement of William Byler, Executive Director of American Association of Indian Affairs)

¹⁴ *Ibid.*, 243

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 244.

¹⁷ Snyder, Michael, *An Overview of the Indian Child Welfare Act*, 7 St. Thomas L. Rev. 815 (1995)

¹⁸ Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act*. Sect. 14: Expert Witnesses (2007)

- a. A member of the child's Indian tribe who is recognized by the child's tribal community as knowledgeable regarding tribal customs as they pertain to family organization or child-rearing practices.
- b. A member of another tribe who is formally recognized by the Indian child's tribe as having the knowledge to be a qualified expert witness.
- c. A layperson having substantial experience in the delivery of child and family services to Indians, and substantial knowledge of the prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.
- d. A professional person having substantial education and experience in the person's professional specialty and substantial knowledge of the prevailing social and cultural standards and child-rearing practices within the Indian child's tribe. e. A professional person having substantial education and experience in the person's professional specialty and having extensive knowledge of the customs, traditions, and values of the Indian child's tribe as the customs, traditions, and values pertain to family organization and child-rearing practices.¹⁹

Before accepting testimony of the least preferred type of expert, the court must make and document efforts to procure an expert higher in the preferential order, including, but not limited to, contacting the tribe's governing body, the ICWA office, and the social service agency.

A paper written for the Native American Rights Fund in 2001 by Cedric Ian Hay reviews the foundation of the federal legislation known as the Indian Child Welfare Act. (The Act) The Act was formulated over a period of time with the “the expressed purpose of protecting the best interests of Indian children and to promote the stability and security of Indian tribes and families.”²⁰ The article goes on to state that “As a departure from prior assimilationist policies, and an affirmation of tribal sovereignty and self-determination, ICWA expressly recognized the vested interest that Indian tribes have in their children as essential to their collective existence and created the Act to protect this relationship.”²¹

Thirty-five states have passed state legislation that mirrors the federal law. Some states have strengthened the state legislation to further affirm the rights of Indian children and the tribes. Oklahoma and Iowa have strong Indian Child Welfare Act (ICWA) laws, however “Many states have attempted to circumvent the application of the Act continuing to remove Indian children from their homes.”²²

State courts have expanded on the “Good Cause” exception for not recognizing the tribal interests and retaining exclusive jurisdiction of a case that clearly falls under the terms of ICWA. Other exceptions have been formulated by state courts including the “Existing Indian Family”

¹⁹ Iowa Code 232B (3)(e)

²⁰ Hay, Cedric Ian, *The Indian Child Welfare Act; An Acknowledgement of Sovereignty In the Best Interest of the Child.*, Native American Rights , Spring 2001, p 2

²¹ *Ibid.*

²² *Ibid.*, 4

exception adopted by the Kansas courts.²³ State courts have also attempted to circumvent the intent of ICWA legislation in identifying a “Not Involved in Indian Culture” exception.

Suziannne D. Painter-Thorne, Associate Professor of Law at Mercer University School of Law, in her article *One Step Forward, Two Giant Steps Back: How the Existing Indian Family Exception (Re) Imposes Anglo American Legal Values on American Indian Tribes To the Detriment of Cultural Autonomy*, reviews the varied attacks on tribal self-determination and especially the various exceptions challenging the ICWA. “One exception is the so-called “existing Indian family” exception. Under this exception, courts refuse to apply ICWA in situations where a court deems the child is not part of a sufficiently Indian family. In relying on this exception, these state courts ignore ICWA’s plain language and Supreme Court precedent.”²⁴

A trial court in Michigan held that expert testimony in an ICWA case was not needed because the mother and child were “not involved in Indian culture”. The Court of Appeals of Michigan held that the trial court erred when it found that no expert testimony was needed when terminating parental rights under ICWA.²⁵ The case reflects the lack of knowledge and understanding of both ICWA and Native American culture that are required in order to testify as an expert witness in ICWA cases.

A review of the State of Nebraska Department of Health and Human Services conducted in 1999 reported that “state workers did not utilize a lay person with substantial education and knowledge of the social and cultural standards of child rearing practices of the child’s tribe in ninety percent of the cases reviewed. They also do not utilize a professional person who has knowledge of the social standards and child rearing practices in the Indian community in ninety-five percent of the cases.”²⁶ Nebraska passed the Nebraska Indian Child Welfare Act in 1986.²⁷ In 2007 Nebraska ranked as the second highest state in terms of disproportionality of Indian children in foster care.²⁸

A 2010 Kansas Supreme Court ruling held that the lack of testimony by a qualified expert witness cannot be considered harmless.²⁹ The district court in Kansas had ruled that the state failed to comply with ICWA standards for termination of parental rights by proving beyond a reasonable doubt that termination of parental rights was necessary, including the testimony of a qualified expert witness, **but** that it was “harmless error” not to have testimony of an expert witness in an ICWA termination of parental rights proceeding.³⁰ The Kansas Supreme Court held that a harmless error analysis is inappropriate when the court does not comply with ICWA.³¹ In

²³ *In re Baby Boy L.*, 231 Kan 199, 643 P.2d 168 (Kan 1982)

²⁴ Painter-Thorne, Suziannne D., *One Step Forward, Two Giant Steps Back: How The Existing Indian Family Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes To The Detriment of Cultural Autonomy*, 33 Am. Indian L. Rev. 329, (2008-2009)

²⁵ McEwen, Robert, *ICWA Enforcement: Is It Losing Its Teeth in Nebraska*, UNL 2008

²⁶ Morrison, Belva, *Indian Child Welfare Act Compliance Review*, Nebraska Department of Health and Human Services, July, 1999

²⁷ Neb. Rev. Stat Sec 1501 et seq. (1986)

²⁸ National Indian Child Welfare Association, *Time for Reform: A matter of Justice for American Indian and Alaskan native Children* (2007)

²⁹ *In re S.M.H.*, 33 Kan. App. 2d 424, 103 P.3d 976 (2005)

³⁰ *In re M.F.*, 290 Kan. 142, 225 P.3d 1177 (Kan. 2010)

³¹ *Ibid.* 1187-88

the Kansas case the district court accepted the testimony of a social worker with no knowledge of Native American culture and one year of experience as a social worker, as an “expert witness”. The Kansas Supreme Court subsequently overruled the lower court and affirmed the necessity of having a qualified expert witness testify in the case of termination of parental rights of an Indian child’s parent.

FAILURE TO FOLLOW ICWA REQUIREMENTS

Having interviewed adult Native Americans who were removed from their Indian homes and placed in non-Indian homes to be reared, have often stated that in their latter teens and young adult years that they looked into the mirror and saw an Indian, but did not understand what that meant. This paper is not designed to address the high rate of teen suicide among Native American youth, the over representation of Native American youth in our dominant culture justice system, nor the other failures to respect tribal sovereignty and ICWA. Interviews with traditional elders of the reservations and with parents of children involved in the system have articulated a universal sense that the youth being removed from knowledge and access to their Native traditions lacked an understanding of who they were. This lack of knowledge and understanding has created more than one lost generation of Native American youth.

For all of the state court proceedings involving the ICWA, only one court case testing the federal Indian Child Welfare Act has been presented to the United States Supreme Court. That case was *Mississippi Band of Choctaw Indians v. Holyfield*.³² The holding in the *Holyfield* case stressed the need to protect the interests of the Indian community in retaining its children within its society and reaffirmed the Act’s intent to establish some uniformity with regard to the state courts’ handling of adoption and placement of Indian children.³³

When proceedings involve Indian children not domiciled or residing within the reservation, ICWA mandates that the State court shall transfer the jurisdiction to the Indian child’s tribe under 25 U.S.C. 1911 (b). This transfer can be blocked by either parent, declination by the tribal court, or by a finding by the state court of good cause to the contrary.³⁴ If jurisdiction is retained by the State court, ICWA authorizes the tribal court to intervene as a party with an interest in the State court proceedings. It has been observed by the author that state courts have often misunderstood a tribal motion to intervene as a motion to transfer custody and denied the motion to intervene and become a party to the case.

The failure of state courts to understand the principles of the legislation that created the federal and state ICWA laws has led to state courts viewing either the motion to intervene or the motion to transfer as interference with the customary functioning of the state court. Such a position reflects what Jeanne Louise Carriere identified back in 1994 as “inherent biases and cultural hostility of state courts.”³⁵ Such perspectives are precisely why the ICWA laws were formulated

³² 490 U.S. 30, 104 L.Ed2d 29, (1989)

³³ *Ibid.* Hays, at 5

³⁴ *Ibid.*, at 27

³⁵ Carriere, Jeanne Louise, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 Iowa L. Rev. 585 (1994)

in the first place to stop state authorities from removing Indian children from their Indian homes and from their rightful participation in the tribe itself.

Observations in state court proceedings have demonstrated little or no understanding on the part of state social service workers, county attorneys or judges as to the fact that the ICWA laws are designed to protect the interests of the Indian child and family but also to protect the rights and the stability of the tribe. The ICWA law allows the tribe to intervene in a case to prevent the removal of their children from their rightful and natural cultural heritage as a member of the tribe.

It appears that state authorities, in the form of social service workers, their administration, the members of the state bar associations, and the judiciary fail to understand and recognize that if an Indian child needs to be removed from their parental home in the child's best interest, that child is still an Indian and whether formally enrolled, if eligible to enroll, is a member of that tribe no matter what action the state court may take.

Efforts to circumvent the intent of ICWA can be found in state courts seeking an exception to the placement preferences articulated through use of an exception that the child is not a member of an Indian community and thus is not subject to the cultural standards of the Indian community and extended family. The Kansas Supreme Court in *In re Baby Boy L*, the court attempted to assess whether the child had sufficient ties to the tribal culture or the reservation. The child was clearly identified as being an "Indian child" under the law but the court clearly failed to research, assess, or apply the concepts of tribal membership, extended family or the intent of ICWA.³⁶ It is interesting that the child, in this case, was not old enough to have experienced his Indian culture but the court denied him the opportunity to ever know his culture because he was deemed to not be part of an "Existing Indian Family". The child was born, relinquished to adoption the same day he was born, enrolled as a member of the Kiowa Tribe, claimed by his Tribe and extended family yet was viewed by the court as not being applicable to ICWA because he was not part of an "existing Indian family."

State courts have raised the concept of youth "not involved in Indian culture" as a justification for an exception to involvement of the tribes and not allowing either intervention of the tribe or transfer of a case from state court to tribal court. The dynamics of removing children under the rationale that they are "not involved in Indian culture" or are not part of an "existing Indian family" should be the precise reason to fully enforce ICWA laws and assist in affirming or re-establishing those children and families with their tribes. To rule that an Indian child is not, for this case, an Indian child defies logic and reason. When a state court so rules, such a ruling does not cause that child to stop being an Indian, nor does such a ruling mean that the child is not either traditionally or legally a member of the tribe. This failure of state courts is a direct reflection of a lack of knowledge of Indian cultures, the legislative intent of ICWA, and any concept of tribal sovereignty.

The interests of the tribes in ICWA cases, separate and apart from the parental interests, is not always recognized. The Utah Supreme Court did recognize that "The tribe has an interest in the child which is distinct from, but on parity with, the interests of the parents. This relationship

³⁶ *In re Baby Boy L.*, 643 P.2d 168, (Dan. 1982)

between Indian tribe and Indian children finds no parallel in other ethnic cultures found in the United States.³⁷ The court further emphasized the critical nature of the involvement of the tribe in the decision making processes of the courts noting that “Few matters are of more central interest to a tribe seeking to preserve its identity and traditions than the determination of who will have the care and custody of its children.”³⁸

SUMMATION

Nebraska law states that, “It shall be the policy of the state to cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced.”³⁹ The State of Nebraska shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that the state gives full faith and credit to the public acts, records, and judicial proceedings of any other entity.⁴⁰ In any case when federal law applicable to child custody proceeding provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under the Nebraska Indian Child Welfare Act, the state court shall apply the federal standard.⁴¹

As indicated previously, a review of the State of Nebraska Department of Health and Human Services conducted in 1999 reported that “state workers did not utilize a lay person with substantial education and knowledge of the social and cultural standards of child rearing practices of the child’s tribe in ninety percent of the cases reviewed. They also do not utilize a professional person who has knowledge of the social standards and child rearing practices in the Indian community in ninety-five percent of the cases.”⁴² Nebraska passed the Nebraska Indian Child Welfare Act in 1986.⁴³ In 2007 Nebraska ranked as the second highest state in terms of disproportionality of Indian children in foster care.⁴⁴ There is a major disconnect between the prescriptions of state law and the functioning of social services and the court system. In the State of Nebraska an effort has been undertaken to train elders from the reservations to become the recognized expert witnesses for cases related to their tribes.

The state of California, in April of 2010, identified that many people working in California ICWA proceedings do not understand the purpose of ICWA expert witnesses or how they are to be used and have expressed a desire for clarification. The California Governor’s directive goes on to affirm that no Indian child shall be removed 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.”⁴⁵ This

³⁷ *In re Adoption of Holloway*, 732 P. 2d 962 (Utah 1986)

³⁸ *Ibid.*, at 966

³⁹ Nebraska Revised Statutes 43-1502

⁴⁰ *Ibid.* 42-1504 (4)

⁴¹ *Ibid.* 43-1513

⁴² Morrison, Belva, Indian Child Welfare Act Compliance Review, Nebraska Department of Health and Human Services, July, 1999

⁴³ Neb. Rev. Stat Sec 1501 et seq. (1986)

⁴⁴ National Indian Child Welfare Association, *Time for Reform: A matter of Justice for American Indian and Alaskan native Children* (2007)

⁴⁵ California Department of Social Services Information Notice, No. 1-40-10, April, 2010

action by the governor of California affirms the lack of knowledge and understanding related to Native people and ICWA.

I have worked with reservations and Native American people for over thirty-five years. I have grand nephews and nieces who are members of the Rosebud Sioux Tribe. I have assisted the Nebraska Commission on Indian Affairs and the Nebraska Department of Health and Human Services in facilitating and writing the Native American Family Preservation plan for the state. Close friends and family are members of the Lakota Nation. I have spent more than twenty-years specifically seeking an understanding of traditional indigenous ways and indigenous justice. I realized after serving as a “qualified expert witness” for several years and testifying in the first seven of eleven cases for which I was called as a “qualified expert witness” that what I was actually testifying about was the lack of knowledge and understanding of ICWA. I was testifying as to the need for knowledge and understanding of the agencies and the court officers in regard to the failures of compliance related to the federal and state Indian Child Welfare Act. However no one, including me, knew enough about the law and the proper application of the law, to use the “expert witness” properly when accepted by the parties and the court as the qualified expert. I did provide testimony related to the extended family concept and customs. I spent more time on the stand educating the parties and the court in regard to definitions, terms and concepts of ICWA.

The Nebraska effort to prepare tribal elders to serve as expert witnesses has been undertaken by the Nebraska ICWA Coalition and Sherri Eveleth, the ICWA Specialist for the Nebraska Department of Health and Human Services. Dynamics of this initiative have included preparation in helping the elders to feel at ease in the courtroom and familiarizing them with the parties and procedures in child welfare cases. The participants are given a brief overview of ICWA. Sherri Eveleth has indicated that some of the elders are uncomfortable with or intimidated by the term “expert.” Eveleth indicates that she tries to convey the message that they are the experts in their cultures; they know their culture – and what is appropriate or not appropriate in families – better than anyone else in the courtroom. She also lets them know that they do not need to be experts in the ICWAs or child welfare laws.⁴⁶

The participants are provided an overview that includes the types of cases to which ICWA applies - including cases of sexual abuse or physical abuse of a child to the point of serious physical injury. An area that the participants are advised that they do not have to testify to are child custody cases between biological parents. The training includes a summary of Nebraska ICWA cases law defining what the court means by the term qualified expert witnesses.

The training is designed to help elders become aware of issues that attorneys may bring up in court. One of the issues includes the determination of whether active efforts have been provided and that the testimony of a qualified expert witness is designed to assist the court in areas of knowledge and expertise that go beyond the common knowledge and the court’s expertise. In the experience of the trainers, most attorneys do not object to a qualified expert witness providing an opinion about whether active efforts have been provided. Conversations among those working on ICWA issues in Nebraska bring forward a consensus that there are probably no more than a

⁴⁶ Eveleth, Sherri, various conversations and correspondence 2010-2011

handful of attorneys and judges outside of the tribal courts who have any knowledge or understanding of Indian culture or ICWA.

In one training, an impromptu mock trial qualified expert witness assisted (through tendering the witness as a qualified expert witness). The training was held in the Winnebago Tribal Court, and Jerry Denney, a Santee Sioux elder and their ICWA Specialist, “testified.” Eveleth played the county attorney and testimony was elicited to establish his credentials. Danelle Smith and Roz Koob, attorneys for the Winnebago Tribe, assisted with cross-examination, and there was an opportunity to rehabilitate the witness after cross examination. The tribal attorneys questioned the witness about his residence off-reservation during his childhood years. Rehabilitation on cross-examination showed that he stayed connected to his tribe and has spent most of his 70+ years living on the reservation. For having this “court-in-action” mock hearing participants expressed an appreciation for being able to see a case in action. The training effort is designing further actives to replicate various situations for a full mock trial.

The effort to prepare tribal members to function as expert witnesses will continue with the premise that tribal members should be utilized as qualified expert witnesses. There are some cases and situations in which locating and providing the testimony of a tribal member is impossible. Tribal elders may hesitate to testify because of the precise understanding of the extended family and issues of respect.

Other considerations of the utilization of tribal elders as expert witnesses include:

- Many courts expect to have Qualified Expert Witness (QEW) testimony within 48 hours of removal. Locating tribal elders from geographically distant tribes who possess an evidence of recognition as an expert by the tribal community (in light of Ramon N. in which the court stated that there was no indication that Ramon’s mother was recognized by the Indian community as possessing the requisite expertise) is impossible in many cases.
- For tribes that do not recognize termination of parental rights, tribal members will not testify to support a Termination of Parental Rights (TPR). For such cases, it is strongly encouraged that a guardianship be established or working with the tribe for an alternate permanency plan that does not include TPR.
- In some cases, particularly when the child is related to a tribal council member or other person of authority, tribal members are not willing to testify.

It is hoped that a pool of qualified expert witnesses will emerge that is so large that there is never a need to call a “professional person” who is not a tribal member. Until that time, in those cases in which a tribal member is not available, work will continue to facilitate qualified expert witness testimony from professional persons who have knowledge and expertise of tribal cultures, the historical basis of Indian child welfare and an understanding of the needs of an Indian child.

The additional key to the effective application of the federal and state Indian Child Welfare Act legislation is increased understanding and awareness on the part of governmental agencies, human service agencies, and members of the court of the intent and philosophy of the law, the various Indian nations, the cultures and values of those nations and of tribal sovereignty.