TRIBAL/STATE COLLABORATIVE ROUND TABLE

April 23, 2014

Livingston, Texas

Children's Commission

SUPREME COURT OF TEXAS PERMANENT JUDICIAL COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

Tribal/State Collaborative Round Table

On April 23, 2014 the Alabama-Coushatta Tribe of Texas and the Permanent Judicial Commission for Children, Youth and Families (the Commission) co-hosted a Tribal/State Collaborative Round Table discussion (Round Table) in Livingston, Texas, at the Alabama-Coushatta Reservation. The Round Table brought together tribal and state court judges, state leaders, subject matter experts, and policymakers to discuss the Indian Child Welfare Act (ICWA) and issues affecting Native American children and families in the courts.

Judge Darlene Byrne facilitated the Round Table. As the presiding judge of the 126th District Court, the Vice Chair of the Children's Commission, the Vice President of the National Council of Juvenile and Family Court Judges (NCJFCJ), and the President-elect of NCJFCJ, she brought great insight to the Round Table and opened with this stated goal:

> ***To develop a plan so that our Indian children can remain connected with their family and tribe while going through a child welfare case with an informed court and community about the important promise made in ICWA.***

The Children's Commission is committed to improving compliance with the letter and spirit of ICWA through improved judicial handling of child protection cases. Court practices have a profound impact on a child's ability to exit the foster care system in a timely manner with the best outcomes. Courts are also responsible for ensuring that parties have good legal representation and meaningful court hearings. For children and families of native heritage, courts not only have the charge of ensuring safety, permanency and well-being, but also a heightened duty to safeguard that Native American children have every opportunity to remain connected to their families and tribes.

To support courts in this important work, the Children's Commission has partnered with Texas tribes to develop judicial education that provides judges with the foundational knowledge they need to understand why the law is necessary and how they can become judicial leaders for tribal communities. This Round Table was held in conjunction with the 4th Annual Alabama-Coushatta Judicial Symposium. The day and a half Symposium featured nationally-recognized speakers who shared their experiences from representing the Cherokee Nation in *Adoptive Couple v. Baby Girl*[1] (Baby Veronica case), incorporating Peacemaking Court principles into state courts,[2] and borrowing from other states to create new and inventive state/tribal collaborations for improving outcomes for children and families.[3] Both the Round Table and the Symposium offered judges, peacemakers, and the many stakeholders an

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[1] Adoptive Couple v. Baby Girl, a minor child under the age of fourteen years, Birth Father, and the Cherokee Nation, 570 U.S. ____ (2013), 133 S. Ct. 2552.

[2] Tim Connors, *Our Children are Sacred, Why the Indian Child Welfare Act Matters.* AMERICAN BAR ASSOCIATION JUDGES JOURNAL (Spring 2011).

[3] See Agenda for 4th Annual Alabama-Coushatta Judicial Symposium (2014), available at http://icwa.narf.org/wordpress/wpcontent/uploads/2014/03/20040424Alabama_Coushatta_Judicial_symposium.pdf (showcasing speakers from New Mexico, Ohio and California including Hon. Monica Zamora, Justice of the New Mexico Court of Appeals, and Co-Chair of the New Mexico Tribal-State Consortium, Hon. Tim Connors, Tribal STAR representatives Tom Lidot and Rose-Margaret Orrantia, Judge Richard Blake, Chief Judge of the Hoopa Valley Tribe and Vice President of the National American Indian Court Judges Association, and Hon. David E. Stucki, President, National Council of Juvenile and Family Court Judges).

opportunity to build mutually respectful relationships and create a blueprint for tribal and state collaboration in Texas.

Historical Context

ICWA was written in response to a long history of political and social policy that resulted in the destruction of American Indian culture.[4] The Bureau of Indian Affairs (BIA), one of the oldest bureaus in the Federal government, was established in 1824 as part of the War Department to oversee and carry out the federal government's trade and treaty relations with the Native American tribes.[5] By 1879, the first of 26 military-styled boarding schools was opened to "civilize" Indian children. Col. Richard H. Pratt founded the Carlisle Indian School based on the philosophy, according to a speech he made, "kill the Indian . . . save the man."[6] Children were often removed after parents were coerced by the threat of starvation. All cultural and tribal influences were removed by cutting the children's hair, and forbidding Indian children from speaking their native languages or practicing their religions. Reading and writing was prohibited, and children spent their days training to be domestic workers or farmers. Mortality rates were as high as 50% and abuse was widespread.[7] This period between the 1870s and 1950s where Indian children were commonly removed from their tribes and raised as white children became known as the "Boarding School Era." In 1958, the Indian Adoption Project was established to provide adoptive placement for American Indian children whose parents were deemed unable to provide a "suitable" home. It is estimated that in certain states, these practices resulted in 25-35% of all Indian children being removed from their homes.[8]

Over time, federal policies originally designed to subjugate and assimilate American Indians and Alaska Natives have changed to policies that promote Indian self-determination.[9] ICWA, the most significant act designed to promote Indian self-determination, was passed in 1978 by Congress expressly in response to this alarmingly high number of Indian children being removed from their homes and placed with non-Indian families.[10] ICWA establishes minimum federal standards for the removal of Indian children from their families and promotes the stability and security of Indian tribes and families.

ICWA applies when an Indian child is the subject of a child custody proceeding. An Indian child is any unmarried person who is under age 18, and is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.[11]

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[4] NAT'L CHILD WELFARE RESOURCE CENTER ON LEGAL AND JUDICIAL ISSUES & NAT'L CHILD WELFARE RESOURCE CENTER FOR TRIBES, Model ICWA Judicial Curriculum, (2014) at 59.

[5] U.S. DEP'T OF THE INTERIOR, Bureau of Indian Affairs' website, http://www.bia.gov/WhoWeAre/BIA/.

[6] Model Curriculum, *supra* note 4 at 59. *See also* Richard Henry Pratt, *Battlefield and Classroom: Four Decades with the American Indian* (New Haven: Yale University Press 1964).

[7] Model Curriculum, *supra* note 4 at 59. *See also* David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1926* (Lawrence: University Press of Kansas, 1995).

[8] AMERICAN CIVIL LIBERTIES UNION, *United States' Compliance with the International Convention on the Elimination of all Forms of Racial Discrimination, American Civil Liberties Union Shadow Report to the 7th-9th Periodic Reports of the United States* (July 2014) at 56.

[9] BIA website, *supra* note 5.

[10] INDIAN CHILD WELFARE ACT OF 1978, 25 U.S.C. § 1901, *et. seq.*

[11] *Id*. at § 1903(4).

A child custody proceeding is one that involves foster care placements, termination of parental rights, pre-adoptive placement or adoptive placement.[12]

ICWA affects the court's jurisdiction, evidentiary requirements and the child's placement. ICWA requires a higher standard of proof in order to terminate parental rights. The burden of proof is beyond a reasonable doubt. There is also a requirement that the court make a determination supported by evidence beyond a reasonable doubt, including testimony of a qualified expert, that active efforts have been made to prevent the breakup of the Indian family and, in spite of those efforts, the child cannot be returned to the parent without a substantial risk of serious physical or emotional harm.[13] Consequences of failing to comply with ICWA include invalidation of state court proceedings after appeal either by the child or the parent, the possible disruption of a long-standing foster care placement, the voiding of an adoption order, and malpractice actions.

Over the past 36 years, many national organizations have worked to educate the public about both the mechanics and the historical context of ICWA. Despite these efforts, ICWA is still largely misunderstood, and even ignored. Recently, the urgency of better ICWA education was brought to light by the Baby Veronica case, exemplifying the dire results of failing to notify a named tribe with accurate information. Although the biological mother told her attorney that the father was a member of the Cherokee Nation, the notice misspelled the father's name and misstated his date of birth, leading to the mistaken conclusion that ICWA did not apply.[14] ICWA has also received recent media attention regarding alleged due process violations while removing Indian children in South Dakota. At the 85th Session of the United Nations Committee on the Elimination of Racial Discrimination, the Committee was presented with 2010 data that reflected that "an American Indian child in South Dakota is 11 times more likely to be sent to foster care than a non-Indian child."[15] The brief submitted by the ACLU noted that South Dakota was used as a case study, but "the disintegration of the Native American family as a result of racially-biased child custody practices is a ubiquitous issue across the United States."[16]

National Efforts

Current national efforts to educate judges on ICWA include technical guides and resource publications from the NCJFCJ and the development of a Model ICWA Judicial Curriculum (Model Curriculum) by the National Child Welfare Resource Center on Legal and Judicial Issues & National Child Welfare Resource Center for Tribes. The plan is for this Model Curriculum to be deployed through the Court Improvement Programs across the nation. In August of 2014, a delegation from Texas traveled to Minnesota to a Court Improvement Program ICWA Peer-to-Peer Meeting sponsored by the Children's Bureau of the Administration for Children and Families to review the Model Curriculum, share state experiences with ICWA, and to provide feedback about the Model Curriculum.

This past April, Kevin Washburn, the Assistant Secretary of Indian Affairs of the United States Department of the Interior held listening sessions in response to the heightened profile and confirmed importance of ICWA. Noting that neither the federal law nor its official guidelines, the *Bureau of Indian*

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[12] *Id*. at § 1903(1).
[13] *Id*. at § 1912(d),(f).
[14] *See Baby Girl,* 570 U.S. at ____, 133 S. Ct. at 2558.
[15] ACLU Shadow Report at 57.
[16] *Id*. at 61.

Affairs Guidelines for State Courts: Indian Child Custody Proceedings[17] (Guidelines), have been amended since their inception in 1978 and 1979, Assistant Secretary Washburn invited tribal leaders to offer feedback regarding the Guidelines, how well they are working, and what revisions might be helpful.[18] In May, the National Indian Child Welfare Association (NICWA), the National Congress of American Indians, the Native American Rights Fund (NARF) and the Association on American Indian Affairs (AAIA) worked together to submit official comments on suggestions to improve the Guidelines.[19] These comments are instructive on where the Guidelines conflict with ICWA and where changes could be made to enhance the purpose of the law.

In a study of 164 Texas child welfare hearings, ICWA inquiries were made in only 4% of hearings, or were otherwise reflected in about 39% of the case files.

Texas Data

In the summer of 2013, Judge Robin Sage, Jurist in Residence for the Children's Commission, traveled across Texas to observe and collect data from 164 child welfare hearings held in several jurisdictions for the Hearing Quality Observation Project (the Hearing Project). The primary purpose of the Hearing Project was to establish a baseline about the quality of court hearings occurring in child welfare cases. Texas is decentralized and there is a great deal of variation in the judicial handling of child welfare cases across its 254 counties. The courts which were observed in the Hearing Project included (i) urban and rural areas, (ii) district courts, county courts at law, and Child Protection Courts, and (iii) district judges, associate judges, and assigned judges.

Generally, the Hearing Project revealed that the majority of Texas child welfare courts address statutorily required issues at some point in the case and many courts are sufficiently assessing most aspects of the child's well-being while in foster care. However, there were some statutorily-required and national best practices that, if applied more regularly, would likely result in better outcomes for children and families.

Data from the Hearing Project reflected that ICWA compliance was an area in need of great attention. In 60% of cases observed, ICWA was not addressed in court or indicated in the court's file. Only 4% of hearings addressed ICWA and only 39% of the case files mentioned ICWA. Also, in those case files that

[17] Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67 (1979). The BIA Guidelines for State Courts were originally published in the Federal Register in 1979. They have never been formally adopted as regulations of the Bureau of Indian Affairs and thus are not binding. Rather, the Guidelines are a non-binding resource regarding interpretation of ICWA.

[18] Letter from Kevin Washburn, OFFICE OF THE SECRETARY, U.S. GOV'T DEPARTMENT OF THE INTERIOR, to Tribal Leaders, (April 9, 2014).

19 NICWA, NAT'L CONGRESS OF AMERICAN INDIAN, NATIVE AMERICAN RIGHTS FUND AND THE ASSOC. OF AMERICAN INDIAN AFFAIRS, *Comments on Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings, May 13, 2014.*

indicated some consideration of ICWA, there were problematic practices. For example, some case files indicated the child was not Native American due to their identification as African American, Hispanic, or Caucasian. In other cases, notes about ICWA were evident, but did not necessarily mean that the judge, the parties, or the attorneys were fully informed about the issue or that the information was correct and up to date. These faulty assumptions can lead an entire case askew. The Hearing Project report stated:

> Judges appeared to be unaware of ICWA or were relying on the case files to establish ICWA information. Failure to address ICWA can have serious ramifications for the child and the family because discovering a child's Native American status late in the case can cause traumatic placement disruptions and delay permanency. Relying on agency data may also be detrimental to the case. Observations revealed that often the caseworker had incomplete or incorrect data, i.e., information from only one parent or from a caseworker who filled out the required forms based on the visual appearance of the child. These assumptions are problematic because the appearance of the child is not necessarily indicative of the child's heritage. Since CPS data should not be relied on exclusively, it is imperative that judges take the initiative to ask about ICWA early on in the case, preferably at the Adversary Hearing and note in the court's order and file that the question was asked and answered.[20]

The full recommendations from the Hearing Project highlight areas of inquiry that should be discussed more often in the courtroom. See Appendix B. Although the recommendations were intended to address a broad range of goals including safety, well-being and permanency, many of the recommendations are best practices which encourage meaningful discussions and thoughtful hearings, which can help fulfill the ICWA promise.

Additional survey results gathered by the Children's Commission in 2013 and 2014 from Texas attorneys who represent the child welfare agency, parents and children, indicated that at least half of those surveyed were unfamiliar with the federal law and many attorneys requested more Continuing Legal Education on ICWA.

Current Efforts in Texas

In 2013, the Supreme Court appointed Jo Ann Battise, Senior Peacemaker for the Alabama-Coushatta Tribal Nation, to the Children's Commission. Senior Peacemaker Battise has shared with the Children's Commission her rich experiences serving as a Peacemaking Judge, Tribal Council Member, Tribal Administrator, and liaison to the NCJFCJ.

The Children's Commission has begun to establish relationships with representatives from each of the three federally recognized tribes through collaboration with the Department of Family and Protective Services (DFPS), the Center for the Elimination of Disproportionality and Disparities (CEDD), and the Native American Section of the State Bar of Texas. In 2013, Children's Commissioner and Senior Peacemaker Jo Ann Battise began a monthly call with a small workgroup made up of Collaborative

[20] Supreme Court Children's Commission, *Hearing Quality Observation Project Report* (March 2014) at 21, available at http://texaschildrenscommission.gov/media/21238/HOP%205-14-14%20at%20338pm.pdf

Council member Larry Williams, Tribal Law expert Judge Cheryl Fairbanks of New Mexico, DFPS Disproportionality Manager Tanya Rollins and DFPS Disproportionality Specialist Michael Martinez. The workgroup helped to plan this Round Table. The group meets monthly and has committed to ongoing meetings with national experts, state court judges, tribal judges, and child welfare leaders to continue to find solutions and raise awareness of these issues that touch many of the lives of our state's children and families.

Also, at the Annual Child Welfare Judges' Conference, held in June 2014, Judge Darlene Byrne presented "ICWA Made Easy" which emphasized why ICWA is important and how to apply ICWA in child protection cases. Also, at this annual conference of judges who hear child welfare cases the Children's Commission introduced a one-page bench-card on ICWA, which is currently being used in a Commission-sponsored pilot project to assess the use and usefulness of this bench card as well as others. See Appendix C.

The Children's Commission will soon embark on the development of a statewide strategic plan to help focus and coordinate the many efforts to educate judges and lawyers about the importance of ICWA, including the context of historical trauma, and tools to assist with the practical application. Additional plans for 2015 Tribal/State Collaboration include partnering with system stakeholders to promote ongoing knowledge and understanding of ICWA and its importance by engaging in the following action items:

a. Work with stakeholders to develop an ICWA Strategic Plan for Texas;
b. Continue to collaborate with the Children's Bureau and the participants of the CIP Peer-to-Peer Exchange to tailor the Model Curriculum and other best practices for Texas;
c. Update the ICWA Section of the Texas Child Protection Law Bench Book;
d. Continue to develop mutually respectful and ongoing relationships with Texas' three federally-recognized tribal nations;
e. Support Senior Peacemaker Battise in her role as a Commissioner;
f. Staff and monitor the Tribal/State Workgroup meetings, strategies, timelines, and work product for FY2015, including monthly strategy meetings with Senior Peacemaker Battise and DFPS;
g. Partner with the Alabama-Coushatta to support the 5th Annual Alabama-Coushatta Judicial Symposium with content and finances;
h. Assist with any CIP grant application, as requested and appropriate; and
i. Further connections with Ysleta del Sur Pueblo and Kickapoo tribes through the DFPS tribal/state meetings, Annual Conference of the Native American Section of the State Bar, and other networking opportunities.

The Work of the Round Table

The goal of the Round Table was to develop a plan so that our Indian children can remain connected with their family and tribe while going through a child welfare case with an information court and community about the important promise made in ICWA

Representatives from the state judiciary, peacemaking judges, DFPS, Court-Appointed Special Advocates (CASA), and Casey Family Programs, among others, attended the Round Table. See Appendix A. The Round Table was opened with the goal stated above and introductory discussions about the importance of tradition and culture in families. As a part of this deep respect for tradition, Senior Peacemaker Joanne Battise and Judge Darlene Byrne were honored with Pendleton blankets which were historically given to babies at birth. The Pendleton Woolen Mills in Pendleton, Oregon, began making geometric patterned robes (unfringed blankets) for Native American men and shawls (fringed blankets) for Native American women in 1893. These beautiful gifts reminded us all of the sacred purpose of our work that day.

Challenges and Possible Solutions

Round Table participants immediately took up the task of problem-solving by sharing their expertise on what was working well, and where Texas was missing the mark. The group discussed current challenges and proposed solutions with respect to (i) Cultural Awareness; (ii) Training/Education; and (iii) Effective Court Practice.

1. Cultural Awareness

The group recognized that culture is vital to understand why ICWA was written, and how to accurately comply with ICWA. For example, the many stakeholders involved with child welfare cases may not understand how the federal polices of the past were written to encourage "civilization" of native people and while Western European culture was encouraged, the Native languages, religious practices and traditions were all but destroyed. A lack of awareness of how these practices created long-lasting trauma that still affects native people today might contribute to a failure to identify Indian children as such. One participant noted that Texas has not experienced a high-profile ICWA case like the Baby Veronica case, which exemplified the tragic consequences of failing to apply ICWA. The Round Table participants agreed that education about the historical trauma helps to explain why ICWA is so important, and that this historical piece always needs to be included in education efforts. The Guidelines point out the value of culture when applying ICWA in Comment D.4 as follows:

> 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.[21]

Another common problem discussed was diminished interest when ICWA education efforts focus on culture. The participants discussed the availability and usefulness of training modules, guides, and technical assistance bulletins that are organized to help convey the spirit of ICWA and the importance of cultural awareness.

The Model Curriculum is very helpful as it sets out goals for any educator trying to include cultural awareness in an ICWA training:

- To identify government policies and practices that have purposefully undermined Indian people and families;
- To understand the historical and philosophical bases for ICWA;
- To understand that ICWA is intended to protect the long term best interests of Indian children, by maintaining the integrity of the Tribal family, the extended family and the child's Tribal relationship;
- To adapt the perspective that ICWA enhances the likelihood that a child's best interest will be served;
- To critically analyze data related to Indian youth in foster care; and
- To reflect on how the past has shaped current and future generations.

Other ideas discussed at the Round Table that can help fully communicate the importance of cultural awareness included:

- Developing one judicial leader per county to serve as ambassador for ICWA compliance and understanding;
- Explaining how unintentional bias affects people with native heritage;[22]
- Remembering to include historical trauma, and the importance of Indian heritage rather than just technical issues such as eligibility for membership;
- Including teachings about issues such as sovereignty, relocation of tribes and the perspective that ICWA enhances the likelihood that the child's best interest will be served;
- Using cross-training opportunities by remembering where ICWA fits in with trainings focused on topics other than ICWA; and
- Promoting positive public relations, possibly by creating a YouTube video with positive native leaders and relatable experiences of culture such as holidays.

2. Training and Education

[21] BIA Guidelines, *supra* note 17 at D.4.

[22] In California, Tom Lidot and Rose-Margaret Orrantia of Tribal STAR are currently developing training similar to the work of Project Implicit, an international collaborative of researchers who study the unconscious thoughts and feelings that contribute to disproportionately negative outcomes for people of color.

Much of the work needed to improve ICWA compliance involves training and education. The Round Table had several recommendations regarding education, including identifying specific areas where more education is needed. For example, education is needed regarding when ICWA applies. It was noted that because there are only three federally recognized tribes in Texas, there is often the misunderstanding that there are not many Indian children in jurisdictions where there are no tribal reservations. There also seems to be a great deal of confusion about who determines tribal membership. A common mistake by stakeholders is to presume that a child needs to be a member of a tribe, rather than just eligible to be a member. Another common misperception is that the court should determine if a child is a member or eligible for membership in a tribe. Only a tribe can determine the membership of a child for the purposes of ICWA.[23]

The Round Table naturally included a discussion about how to best deliver this education, and how to increase accessibility of such training. Suggestions included:

- Focusing on judicial education. New judges' school may present an opportunity to introduce ICWA;
- Creating statutory minimum education requirements for attorneys ad litem. In Oklahoma six hours are statutorily required for attorneys who take child protection cases. In the alternative, judges could require attorneys ad litem in their courts to train on ICWA and better understand the pitfalls of missing ICWA malpractice;
- Promoting use of national publications like the NCJFCJ's Facts vs. Fiction publication to help correct misinformation, and tools or resources that offer specific information on how to ask about native heritage;
- Collaborating on a state-wide level when planning trainings, using opportunities to cross-train with other disciplines, or other education efforts such as family finding or permanency work;
- Using creativity in teaching about ICWA. For example, at a tribal/state forum in California there was a presentation with about 30 slides with photos of people and the audience guessed if the person was native or not;
- Considering whether a question about ICWA can be added to the state bar exam and social worker certification exam; and
- Evaluating and surveying participants who have been through ICWA trainings.

3. Effective Court Practice

Round Table members discussed problems they have encountered with court practices, including the following:

a) Lack of accurate information

Often all parties to the case rely on the caseworkers to determine if ICWA applies. From the Hearing Observation Project, it was noted that there can be faulty assumptions by an individual as to whether a child is an Indian child because he is African American. Another example discussed at the Round Table was a court from another state marking files "N/A" which was assumed to mean that ICWA was

[23] *See, e.g., In re A.G.*, 109 P.3d 756; *In re A.L.W.*, 32 P.3d 297 (Wash Ct. App. 2001).

"not applicable" but was later revealed to mean "not asked." Suggestions for gathering accurate information:

- Asking who is the family's historian, and then following-up with that person to gather better information;
- Asking about native heritage early and often because at the time of removal families are in crisis and may not be in the best place to offer accurate information. The recommendation is to always ask again when the family is not in crisis; and
- Developing a detailed form for ICWA inquiry including such questions as the grandparents' birthplace.

b) Notice

ICWA states: "In any involuntary child custody proceeding in a State court where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement, or termination of parental rights to, an Indian child shall notify. . . the Indian child's tribe."[24] In Texas, it is DFPS that is responsible for notifying tribes in child custody proceedings where they are seeking foster care placement or termination of parental rights of an Indian child. One concern discussed at the Round Table was that caseworkers are often unsure of how to give notice and to whom, and the courts are unsure of how to monitor this notice. DFPS policy is clear about what the agency's duties are, so it seems the confusion on the agency's part about who does what and when is a training issue for DFPS. For this training, the Guidelines might be helpful in delineating what information should be contained in notice to the tribe and parents or Indian custodians.[25]

Another problem is determining what kind of delivery of notice is necessary. There is a conflict between the language of ICWA and the Guidelines. ICWA requires that notice be sent by "registered mail with return receipt requested.[26] The Guidelines state "Notice may be personally served on any person entitled to receive notice in lieu of mail service."[27] In *Comments on Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings,* four leading tribal organizations highlighted this conflict and recommended that this provision of the Guidelines be stricken. The Comments to the Guidelines noted:

> Personal service is often complicated for tribes. Although there is a designated service recipient, service is sometimes made to any tribal representative or administrative assistant. This makes it difficult for tribes to engage their response process effectively. [28]

c) Procedural concerns

- **Case transfers**

Round Table participants identified procedural problems with transferring cases from state court to tribal court. ICWA provides that:

[24] INDIAN CHILD WELFARE ACT, 25 U.S.C. at § 1912 (a).
[25] BIA Guidelines, *supra* note 17 at B.5.
[26] INDIAN CHILD WELFARE ACT, 25 U.S.C. at § 1912 (a).
[27] BIA Guidelines, *supra* note 17 at B.5c.
[28] NICWA Comments on BIA Guidelines, *supra* note 19 at 2.

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, 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.[29]

The Guidelines differ slightly by requiring a prompt filing of the transfer:

> Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. *The request shall be made promptly* after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made part of the record.[30]

Transfers of any sort are fraught with pitfalls. When cases are transferred, the work of the prior court can be lost or delayed files can languish between courts. Currently, Judge Byrne is engaging in a project with the Children's Commission and DFPS to develop court procedures that will create more seamless transitions with county to county transfers for cases in DFPS' conservatorship. Although this project is in the preliminary stages, all involved agree that communication between the two judges involved is a must before any transfer occurs to help ensure deadlines are not missed. Court Clerks also play a critical role in transferring and receiving case files and appropriately and timely docketing cases so that parties stay on track with statutory deadlines. Round table participants noted that when transferring from state to tribal courts where entirely different nations, laws, and customs are involved there is a greater need for collaboration to ensure timely and effective transfers. Perhaps the work of Judge Byrne's project could be modeled for better procedures when transferring from state court to tribal courts.

- **Active Efforts**

Another procedural concern discussed at the Round Table was related to the concept of Active Efforts. Participants noted that it is difficult to discern how active efforts differ from reasonable efforts and when to apply active efforts. Section 1912 (d) of ICWA states:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Active efforts are not defined by ICWA or the Guidelines. Experts in the field suggest that active efforts require more engagement with the family, involvement with the tribe, an understanding of the historical trauma of Native Americans, and an appreciation of tribal values and customs. All of these considerations should be integrated into the best services for each family. An Alaska court cited an ICWA commentator who distinguished between active and passive efforts: "passive efforts entail merely drawing up a reunification plan and requiring the 'client' to use 'his or her own resources to . .

[29] INDIAN CHILD WELFARE ACT, 25 U.S.C. at § 1911(c).
[30] BIA Guidelines, *supra* note 17 at C.1.

. bring . . . it to fruition. . . . Active efforts, on the other hand, include 'tak[ing] the client through the steps of the plan rather than requiring the plan to be performed on its own.'"[31] The Model Curriculum and Tribal STAR, a program of the Academy for Professional Excellence at the San Diego State University School of Social Work, compare active efforts and reasonable efforts this way:

Reasonable Efforts	**Active Efforts**
Referring for services but leaves family to seek out assistance on their own	**Arranging services and helping families engage in those services** (*e.g*., giving the mother a ride to her drug testing appointment, inform the client of the days and times of local AA/NA meetings)
Managing a case	**Proactively engaging in diligent casework activities** (*e.g.,* contact the manager of the apartment complex to inquire about an apartment for rent for the family, contact the client every week while she is in rehab)(The Model Curriculum adds that caseworkers should develop a case plan jointly with the tribe and the assistance of the parent or Indian custodian and any older siblings, and should involve the use of tribal or Indian community resources.)
Meeting the minimum requirements set by policy	**Creatively meeting the needs of children and families** (*e.g*., ask the local tribe for a referral for Native American service providers, have the children's father use the phone on your desk to make a doctor's appointment)

It is also difficult to determine exactly when active efforts are required in a case. ICWA notice is required when a court *knows or has reason to know* an Indian child is involved, but it is easy to envision the situation where it is unclear as to whether ICWA applies and a removal is necessary. It may be impractical in such an emergency removal to use active efforts when the ICWA status is unresolved, but borrowing from the notice provision would lead a court to use active efforts as soon as it knows or has reason to know that the child is an Indian child.

Some ICWA advocates urge courts and child welfare agencies to go a step further and proactively apply the active efforts standard. For example, if Native heritage is suspected but not confirmed, the suggestion would be to use active efforts until an ICWA determination is made. Minnesota has recently adopted this view of the timing of active efforts. The 2014 Minnesota Supreme Court Advisory Committee amended the comments to Rule 34.03 of its Rules of Juvenile Protection Procedure as follows:

[31] *A.M. v. State*, 945 P.2d 296, 306 (Alaska 1997) (citing CRAIG J. DORSAY, THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES 157-58 (1984)).

> With respect to subdivision 1(j) and(l), in cases where the application of the Indian Child Welfare Act (ICWA) is unclear, such as when it is not yet known whether the child is or is not an Indian child, *it is advisable to proceed pursuant to the requirements of the ICWA unless or until a determination is otherwise made* in order to fulfill the Congressional purposes of the ICWA, to ensure that the child's Indian tribe is involved, and to avoid invalidation of the action pursuant to 25 U.S.C. § 1914 and Rule 46.03.[32]

These discussions about procedural concerns led to several ideas for innovative solutions:

- Accommodating for practical concerns that may be preventing participation from a tribe. For example, the different time zones should be noted when setting hearings, especially with Alaskan tribes;
- Using standard forms for the court file or for orders that prompt a judge to make findings regarding ICWA;
- Considering the use of active efforts to provide remedial services and rehabilitative programs if Indian heritage is indicated, but perhaps not yet confirmed or tribe is unknown; and
- Developing IV E Program in Tribes to bring more resources to bear and encourage better efforts for reunification. The Alabama-Coushatta are currently working on their IV E Program with an interim solution in place that allows placement with the state until more resources are available.

d) Use/availability of experts

Expert witnesses create unique problems in the administration of ICWA. Removing an Indian child from his or her family and placing that child in a foster home, or terminating parental rights require testimony from a qualified expert witness.[33] Typically in state courts the party presenting an expert witness must demonstrate that the witness is qualified by reason of background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by non-experts. For ICWA purposes, the Guidelines set out suggestions to help Courts determine who is a Qualified Expert Witness:

> Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

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[32] MINN. R. OF JUV. PROT. PROC. (2014), available at https://www.revisor.mn.gov/court_rules/rule.php?name=jurjpp-toh. Rule 34.03 1(j) and (l) require an "attempt to determine whether the child is an Indian child through review of the petition, other documents, and on-the-record inquiry. If the court is unable to determine whether the child is an Indian child, the court shall direct the petitioner to make further inquiry and provide to the court and parties additional information" and "attempt to determine the applicability of the ICWA, based on the information received from the tribe or tribes required to receive notice pursuant to 25 U.S.C. § 1912 (a). The court shall order the petitioner to make further inquiry of the tribe or tribes until the court can determine whether ICWA applies. *See also* Rule 46.03 which provides for the invalidation of actions for foster care placement or termination of parental rights where such action violates ICWA.

[33] INDIAN CHILD WELFARE ACT, 25 U.S.C. § 1912(e) states "No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses 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." 25 U.S.C. § 1912(f) sets out the expert witness requirement for terminating parental rights.

- 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.
- 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.
- A professional person having substantial education and experience in the area of his or her specialty.[34]

The ICWA requirement of an expert witness was intended to create extra protection for Indian children, but in fact creates several practical problems. First, the Guidelines state that the caseworker should not be the ICWA expert, but rather someone from the hierarchy stated above. However, some Round Table participants noted that in Texas the caseworker is often used as the ICWA expert which creates problems when preference is not given to tribal members. Different problems are created when the state agency calls members of the child's tribe to serve as an expert. For example, if the tribe disagrees with the state regarding the removal or termination, a conflict of interest might result. Further, the state may call an expert qualified to testify as to tribal customs and child rearing practices, but that same expert may be unfamiliar with the evidentiary rules and legal system complexities that govern testimony. Finally, it can be difficult for representatives of tribes to be at hearings because often the distance is too great, the costs are too high and county dockets are hard to predict, and are thereby very time-consuming. Possible solutions include:

- Creating a pool of readily available experts from neighboring tribes to serve as experts in trial when there is a conflict of interest, possibly recruiting from the Native American Bar Section; and
- Using best practices including (i) allowing child's tribe to identify the tribal expert (ii) giving preference to a tribal member when choosing an expert (iii) preparing the expert for trial, and (iv) giving the expert the opportunity to explain his/her knowledge and experience (even if not challenged).

Conclusion

The goal of the Round Table was to develop a plan to create more informed courts and communities so that our Indian Children can remain connected with their family and tribe while going through child welfare cases. The Round Table was a good start to building relationships and identifying where to focus our improvement efforts. At the Round Table there was respect, connection and much listening. From that listening came in-depth discussions of the strengths and weakness of both the state and tribal court systems and how they intersect. Participants from other states offered solutions that have worked well in their states, and the representatives from Texas added their ideas about what would help in their regions. The many innovative ideas that sprung forth from this meeting will be used to develop a statewide strategic plan to cultivate long-lasting changes in the way tribal and state courts work together for the important promise made in ICWA.

[34] BIA Guidelines, *supra* note 17 at D.4.

Appendix A

List of Round Table Participants

Name	Title/Organization	
JoAnn Battise	Senior Peacemaker, Alabama-Coushatta Tribe of Texas	Facilitator Tribal Judiciary
Arnold Battise	Chairman, Native American Law Section, State Bar of Texas	Tribal Attorney
Richard Blake	Chief Judge, Hoopa Valley Tribe; Vice President of the National American Indian Court Judges Association	Tribal Judiciary
Darlene Byrne	Judge, 126th District Court	Facilitator State Judiciary
Daniel Capouch	CPS Director of Services, Texas Dept. of Family & Protective Services	State Agency
Timothy Connors	Judge, Washtenaw County Trial Court	State Judiciary
Cheryl Fairbanks	Attorney and Tribal Justice, Cuddy & McCarthy, LLP	Tribal Judiciary
Veronica Forsyth	Deputy CEO, Texas Court Appointed Special Advocates	Services/Advocacy
Dennise Jackson	Training & Outreach Manager, Texas Court Appointed Special Advocates	Services/Advocacy
Gina Jackson	Director ICW, IPA, Casey Family Programs	Services/Advocacy
Tim Lidot	Curriculum Coordinator, Tribal STAR/National Resource Center for Tribes	Tribal Advocate
Robert Mann	Chief Judge, Alabama-Coushatta Tribal Court	Tribal Advocate
Michael Martinez	Chair, Texas State-Tribal Quarterly Meeting;	State Agency
Mary Murphy	Judge, First Administrative Judicial Region	State Judiciary
Cynthia O'Keeffe	General Counsel, Texas Department of Family & Protective Services	State Agency
Rose-Margaret Orrantia	Tribal STAR Team Member, Academy for Professional Excellence	Tribal Advocate
Pam Parker	Special Projects Attorney, Dept. of Family & Protective Services	State Agency
Genevieve Rhinesmith	Peacemaker, Alabama-Coushatta Tribe of Texas	Tribal Judiciary
Chrissi Ross-Nimmo	Assistant Attorney General, Cherokee Nation	Tribal Attorney
Robin Sage	Senior District Judge, North East Texas Child Protection Court	State Judiciary
David Stucki	President, National Council of Juvenile and Family Court Judges	State Judiciary
Julie Williams	Peacemaker, Alabama-Coushatta Tribe of Texas	Tribal Judiciary
Larry Williams	Court Consultant for Indian Child Welfare, Alabama-Coushatta Tribe of Texas	Tribal Agency
Othelda Williams	Peacemaker, Alabama-Coushatta Tribe of Texas	Tribal Judiciary
Monica Zamora	Justice, New Mexico Court of Appeals; Co-Chair of the New Mexico State-Tribal Consortium	State Judiciary
Kristi Taylor	Program Attorney, Children's Commission	Staff State Attorney
Jessica Arguijo	Administrative Assistant, Children's Commission	Staff

Appendix B

HEARING QUALITY OBSERVATION PROJECT RECOMMENDATIONS

PROCESS AND STRUCTURE

- Consider using specialized judges
- Engage in or access more judicial training
- Use bench book, bench cards, and checklists
- Set smaller dockets
- Hold longer hearings, but at least 10 minutes in length
- Set hearings for specific times rather than at one time on a docket
- Consider using a uniform case management tool

FEDERAL MANDATES

- Make reasonable efforts findings from the bench
- Make an in-court inquiry regarding the applicability of ICWA

HEARING PROCEDURES AND REQUIREMENTS

- Frontload procedural issues
- Address service of parties at every hearing until resolved
- Admonish parents of right to an attorney at every statutory hearing
- Review court reports

CHILD AND FAMILY WELL-BEING

- Inquire about and consider alternative placements more often
- Review Permanency, Concurrent and Transitional Living Plans more often
- Require that youth attend court
- Address sibling visitation when siblings are not placed together
- Engage parents, family members, foster parents, and youth in hearings
- Discuss medical care and psychotropic medication in greater depth

CONTINUOUS QUALITY IMPROVEMENT

- Communicate findings with relevant stakeholders
- Promote training and education of indicators, the Hearing Observation Project and recommended changes
- Repeat the study every 2-3 years to measure improvement

Appendix C

When Does ICWA Apply?

- ☐ In a "child custody proceeding" defined as an action effecting foster care placement, termination of parental rights, pre-adoptive placement or adoptive placement; and
- ☐ Involving an "Indian child" defined as
  - Unmarried, under the age of 18, and a member of a federally recognized Indian Tribe or eligible for membership in a Tribe, as determined by the Tribe; or
  - Unmarried, under the age of 18, and is the biological child of a member of a federally recognized Indian Tribe, as determined by the Tribe.

  Each of the 500-plus federally-recognized tribes determines eligibility for membership or enrollment, not the court.

If ICWA applies, please refer to NCJFCJ ICWA Checklists
http://www.ncjfcj.org/resource-library/publications/tribal-work-and-icwa

Notice

- ☐ The child's parent, Indian Custodian, and Tribe have been notified by registered mail, return receipt requested.
- ☐ If Tribe cannot be determined, the court must ensure notice to the Secretary of the Interior and the Bureau of Indian Affairs by registered mail, return receipt requested.
- ☐ Finding on the record that timely notice was or was not provided as required.

If not sure, but Indian heritage is indicated or identified, NOTIFY!

Placement Preferences

- ☐ Placement according to ICWA Preferences, defined in descending order (extended family, tribal foster home, or tribal community) unless good cause shown for child to be moved

Special Evidentiary Rules

- ☐ **Threshold for Removal of the Child**
  - Clear and convincing evidence that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
  - Must include testimony of a "qualified expert witness" defined by ICWA in descending preferential order, with the highest preference given to a member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs in childrearing practices.
  - Finding of "Active Efforts" to prevent removal from the home.

- ☐ **Threshold for Termination of Parental Rights**
  - Evidence **beyond a reasonable doubt** that custody of the child by the parent of Indian custodian is likely to result in serious emotional or physical damage to the child.
  - Supported by testimony of a "qualified expert witness."
  - Finding that "Active Efforts" have been made to return the child to the home.

Best practices for Active Efforts include: (i) early contact and active engagement with the child's tribe; (ii) higher level of efforts using methods and providing services that are culturally appropriate; and, (ii) commitment to the spirit of ICWA in the context of the historical trauma.

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