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Elizabeth Low

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# KEEPING CULTURAL BIAS OUT OF THE COURTROOM: HOW ICWA “QUALIFIED EXPERT WITNESSES” MAKE A DIFFERENCE

*Elizabeth Low\**

## *I. Introduction*

For centuries, Indians were regarded as an inferior people causing the government to make efforts to assimilate—and later to dismantle—Indian families to improve and protect the identity of the United States. In the 1970s, the government embraced an era of self-determination for American Indians by creating laws that would simultaneously protect tribes and empower them to flourish without American government assistance.<sup>1</sup> In 1978, Congress promulgated the Indian Child Welfare Act (ICWA). The purpose of ICWA is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families . . . which will reflect the unique values of Indian culture.”<sup>2</sup> ICWA has proven effective in protecting children in many instances, but today courts continue to struggle to interpret and apply some provisions of ICWA.<sup>3</sup> As of 2016, American Indian children still represent a higher percentage of children in the foster care system than almost any other race although they represent a smaller percentage of the population than most races.<sup>4</sup>

One of the factors that contributes to a higher percentage of American Indian children in the foster care system is the inconsistent interpretation of the term “qualified expert witness.” According to 25 U.S.C. § 1912(e) and (f), neither foster care placement nor termination of parental rights may be ordered without testimony from a qualified expert witness “that the

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\* Third-year student, University of Oklahoma College of Law.

1. Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* 3 (John F. Kennedy School of Gov’t, Harv. Univ., HKS Faculty Research Working Paper Series RWP10-043, 2010).

2. Indian Child Welfare Act, 25 U.S.C. § 1902 (2012).

3. Ann E. MacEachron, Nora S. Gustavsson, Suzanne Cross & Allison Lewis, *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 SOC. SERV. REV. 451, 460 (1996).

4. *Racial Disproportionality and Disparity in Child Welfare*, ISSUE BRIEF (Child Welfare Info. Gateway, Washington, D.C.), Nov. 2016, at 1, 3, [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf).

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>5</sup> Neither Congress nor the courts have uniformly decided what requirements are necessary for a witness to be a “qualified expert witness.”

This Comment will explain how “qualified expert witness” has been interpreted and examine what requirements an expert witness should have to be considered qualified under 25 U.S.C. § 1912(e) and (f). Part I of this Comment will review the history of the Indian family structure necessary to understand the creation, purpose, and application of the qualified expert witness provision. Part II will explain the historical background of ICWA. Part III will explain the qualified expert witness (QEW) provisions of ICWA and the relevant Bureau of Indian Affairs (BIA) guidelines. Part IV will discuss the various problems presented by ICWA and the BIA guidelines. Part V will explore the benefits and disadvantages of states’ solutions to the problems of 25 U.S.C. § 1912(e) and (f) and will discuss other appropriate solutions to the problems of the qualified expert witness provision.

## *II. Historical Background*

The overrepresentation of Indian children in the foster care and adoption system lives on because of a continued historical belief that Indians are an inferior race. In the late nineteenth century, the United States implemented several programs designed to assimilate Indians into white culture.<sup>6</sup> One program that promoted assimilation was the transport of Indian children to boarding schools. Fearing tribal extinction, some parents sent their children to these schools in hopes that assimilation would ensure survival; other parents were coerced.<sup>7</sup> Whites who promoted the boarding schools hoped that Indians would become civilized by absorption into mainstream American culture.

Eager to “civilize” Indians, Herbert Welsh and Henry Pancoast founded the first boarding school for Indian children in 1860 on the Yakima reservation in Washington.<sup>8</sup> To civilize Indian children, Welsh and

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5. Indian Child Welfare Act, 25 U.S.C. § 1912(e)–(f).

6. *History and Culture: Boarding Schools*, PARTNERSHIP WITH NATIVE AM., [http://www.nativepartnership.org/site/PageServer?pagename=airc\\_hist\\_boardingschools](http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools) (last visited Oct. 7, 2018).

7. *Id.*

8. Richard Walker, *Seattle Continues Healing ‘Deep Wounds’ with Boarding School Resolution*, INDIAN COUNTRY TODAY (Oct. 20, 2015), <https://newsmaven.io/indian>

Pancoast implemented programs designed to compel children to adopt the values of the mainstream white society.<sup>9</sup> These values included the importance of Christianity, private property, material wealth, and monogamous nuclear families.<sup>10</sup> Assimilation progress moved rapidly as the government approved the establishment of more schools—both boarding and day schools. By the 1880s, the United States operated sixty on-reservation schools with 6200 Indian students.<sup>11</sup>

In the following decade, pro-assimilationists realized that on-reservation schools had not efficiently assimilated Indians into white culture. Thus, a movement to build off-reservation schools began.<sup>12</sup> In 1879, Army Lieutenant Richard Henry Pratt received approval from the U.S. Indian Office to found the first off-reservation boarding school in Carlisle, Pennsylvania.<sup>13</sup> Pratt subsequently became the superintendent of Carlisle Indian Industrial School.<sup>14</sup> Based on furthering his mission of absolute assimilation, Pratt famously said, “Kill the Indian, save the man.”<sup>15</sup> In other words, Indians could only be saved through erasing their birth culture and conforming to American values.

The moment that children set foot on the school grounds, they were stripped of their cultural identities and externally Americanized. The children had their braids cut off, their traditional clothing exchanged for uniforms, their names Anglicized, their diet changed, and their native languages forbidden.<sup>16</sup> When the children were not working on their academics, they were learning to do work that conformed to the normal gender roles of Americans.<sup>17</sup> Girls cooked, cleaned, sewed, and laundered; boys learned blacksmithing, shoemaking, and farming.<sup>18</sup> In the summers,

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countrytoday/archive/seattle-continues-healing-deep-wounds-with-boarding-school-resolution-mTsCyHPip0K7HgRCBE0uuQ.

9. *History and Culture: Boarding Schools*, *supra* note 6.

10. *Id.*

11. *Id.*

12. *Id.*

13. Angelique EagleWoman (Wambdi A. WasteWin) & G. William Rice, *American Indian Children and U.S. Indian Policy*, 16 TRIBAL L.J., 2015-2016, at 1, 3–4, [http://law.school.unm.edu/tlj/volumes/vol16/TLJ\\_16\\_1\\_EagleWoman\\_Rice.pdf](http://law.school.unm.edu/tlj/volumes/vol16/TLJ_16_1_EagleWoman_Rice.pdf).

14. *History and Culture: Boarding Schools*, *supra* note 6.

15. “Kill the Indian, and Save the Man”: Capt. Richard H. Pratt on the Education of Native Americans, HISTORY MATTERS: THE U.S. SURVEY COURSE ON THE WEB, <http://historymatters.gmu.edu/d/4929> (last visited Oct. 9, 2018).

16. *History and Culture: Boarding Schools*, *supra* note 6.

17. *Id.*

18. *Id.*

the children were placed with white families for further assimilative learning of the same kind.<sup>19</sup> White families who housed students in the summer for assimilative learning purposes often used girls for domestic labor and boys for harvesting.<sup>20</sup> Many times, the children were unsupervised and subjected to danger.<sup>21</sup>

Not only were they forced to adopt white culture outside the classroom, but they were also made to celebrate white culture inside the classroom. History was taught from a biased white perspective: Columbus was heralded as a hero who brought civilization to Indians; Thanksgiving was taught to highlight the “good” Indians who helped the Pilgrims; New Year’s was taught as a time tracking measurement; and Memorial Day honored fallen soldiers, many of whom had killed family members of the children in the school.<sup>22</sup> Religion was also a mandatory subject for student learning.<sup>23</sup> This class focused on basic Christian fundamentals, such as the Ten Commandments, the Beatitudes, and the Psalms.<sup>24</sup> Conceptions of sin and shame, with a concentration on sexual purity, were also imparted on students.<sup>25</sup>

Within two decades, twenty-three more schools with the same fundamental principles had been created.<sup>26</sup> These schools worked to achieve complete assimilation just as Carlisle had; however, they often employed harsher methods.<sup>27</sup> For example, Indian children at these schools “had their mouths washed out with lye soap when they spoke their Native languages.”<sup>28</sup> Confinement, deprivation of privileges, corporal punishment, and diet restriction were just some of the other penalties exacted for expressing native cultural traits.<sup>29</sup> Among their other impurities, these schools also lacked sufficient education. Many schools struggled to teach

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19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. EagleWoman & Rice, *supra* note 13, at 4.

27. *Id.*

28. *Id.*

29. Tabatha Toney Booth, *Cheaper Than Bullets: American Indian Boarding Schools and Assimilation Policy, 1890–1930*, *Native American Symposium*, in *IMAGES, IMAGINATIONS, AND BEYOND: PROCEEDINGS OF THE EIGHTH NATIVE AMERICAN SYMPOSIUM* 46, 54 (Mark B. Spencer ed., 2010), <https://www.se.edu/native-american/wp-content/uploads/sites/49/2019/09/NAS-2009-Proceedings-Booth.pdf>.

basic English, for they did not know how to teach the English language when the Indian language did not translate perfectly.<sup>30</sup>

Harsh punishment for cultural offenses was only one form of trauma Indian children experienced while at boarding school. In addition to emotional damage caused by the separation from their families, physical and sexual abuse were also rampant.<sup>31</sup> Students reported being severely abused by teachers, administrators, and other students.<sup>32</sup> What had started as a mission to assimilate became a method to destroy.

Even if children were fortunate enough to attend schools not run harshly, they were subject to overcrowding, poor sanitation, malnutrition, stress, and emotional trauma.<sup>33</sup> These conditions led to high rates of tuberculosis, trachoma, and other afflictions.<sup>34</sup> For example, in 1899, the Phoenix Indian School had 325 cases of measles, sixty cases of pneumonia, and nine deaths in just ten days.<sup>35</sup> Eventually, sanatoriums and cemeteries<sup>36</sup> were built solely to deal with the consequences these schools created.

Finally, in 1928, a comprehensive study on the social, economic, and health conditions of Indian life, known as the Meriam Report, was published.<sup>37</sup> The study brought the impurities of boarding schools to light, *inter alia*, noting that boarding schools were generally facilities that made children do labor-intensive chores; taught mostly vocational classes; and abused children physically and emotionally.<sup>38</sup>

These cultural troubles, coupled with troubles from the past, have translated to the court system today. In the post-World War II era, the government still considered Indians' divergence from white American middle-class norms problematic.<sup>39</sup> This period in United States history was marked by values of wealth and the nuclear family, but Indian values differed in many tribes. The disparity between the values of whites and

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30. *History and Culture: Boarding Schools*, *supra* note 6.

31. Gretchen Millich, *Survivors of Indian Boarding Schools Tell Their Stories*, WKAR, <http://www.wkar.org/post/survivors-indian-boarding-schools-tell-their-stories#stream/0> (last visited Oct. 11, 2019).

32. *Id.*

33. Booth, *supra* note 29, at 53.

34. *Id.*

35. *History and Culture: Boarding Schools*, *supra* note 6.

36. Booth, *supra* note 29, at 53.

37. EagleWoman & Rice, *supra* note 13, at 5.

38. *Id.*

39. Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. (SPECIAL ISSUE) 136, 140 (2013).

Indians remained. Because the whites viewed Indian values as inferior, Indian children were permanently moved to homes with white families who promoted the more mainstream values.<sup>40</sup>

To achieve a picturesque life, white couples who had trouble creating the nuclear family on their own began adopting Indian children. In the 1950s and 60s, contraception, abortion clinics, and a fading stigma of unwed mothers all contributed to the lack of white children available for adoption.<sup>41</sup> This, coupled with an emotional appeal from the government, caused couples to consider adopting American Indian children. As Thomas Lyslo, a former BIA employee, said, "During the past decade there have been many programs designed to promote the adoption of all children . . . . But the Indian child has remained the 'forgotten child,' left unloved and uncared for on the reservation, without a home or parents he can call his own."<sup>42</sup>

Answering the needs of non-nuclear white families, the government crafted a new policy of forced adoption that was portrayed as a symbiotic relationship, giving white parents a nuclear family and Indian children a nourishing home life. Instead of nudging Indians toward whiteness, the government pushed them directly into it by taking Indian children from their families and placing them with white families.<sup>43</sup> To execute this new policy of forced adoption, the government created the Indian Adoption Project (IAP) in 1958.<sup>44</sup> On the record, the IAP was a program designed to break down racial barriers that prevented whites from adopting American Indian children.<sup>45</sup> In reality, the IAP unnecessarily broke up Indian families under the guise of benevolence.

With the demand for adopted children high, Lyslo, the Director of the IAP, and his associates moved to increase the "supply of adoptable children."<sup>46</sup> He enlisted the BIA and state social workers to convince Indian mothers to relinquish their infants at birth and intervened in Indian families to remove older children they claimed were neglected.<sup>47</sup> Lyslo embellished the struggles of Indian families and popularized them as units plagued by unwed parents, deviant extended families, and crushingly impoverished and

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40. *Id.* at 147.

41. *Id.* at 142.

42. *Id.* at 143.

43. *See id.* at 149.

44. *Id.* at 140.

45. *Id.*

46. *Id.* at 144.

47. *Id.*

alcoholic parents.<sup>48</sup> As a result, many Indian children were removed from their homes, not because of danger to the child, but because of cultural biases and misunderstandings.

One of the most commonly maligned and misunderstood cultural traits of Indian life is the cohesiveness of the extended family. For example, the Choctaw concept of family demonstrates the close extended family relationship.<sup>49</sup> In this tribe, the mother's brother was generally the person who made marriage arrangements and educated the sister's children.<sup>50</sup> Aunts, uncles, and grandparents were usually the disciplinarians.<sup>51</sup> This traditional Indian concept of extended family was rejected and ignored in favor of the nuclear family, which was considered to be the "correct" form of home to raise a child in.<sup>52</sup> Lyslo promoted pessimistic visions of such family structures,

[I]llegitimacy among Indian peoples is frequently acceptable, and the extended family is by no means extinct. The unwed mother may bring her child home to be cared for by herself, her family, or some relative, and he may be successfully absorbed by the tribe. [F]or [only] a small percentage of these children, a plan can be developed on the reservation for their care . . . for the majority, resources outside the reservation must be found.<sup>53</sup>

The BIA and state social workers believed that the tribes' extended kin networks were rarely effective or appropriate for raising children.<sup>54</sup> Thus, many Indian children were removed from the care of extended family members, and courts routinely denied custody to extended family members, believing unfamiliar married couples to be more suitable parents than relatives of the child.<sup>55</sup>

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48. *Id.*

49. See *Marriage*, CHOCTAW NATION, <https://www.choctawnation.com/history-culture/heritage-traditions/marriage> (last visited Jan. 8, 2019).

50. Suzianne D. Painter-Thorne, *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, 336 (2008–2009).

51. Jacobs, *supra* note 39, at 147.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*



Not only did America value the nuclear family, but Americans also valued affluence.<sup>56</sup> In a tragic twist of irony, the government began removing children from homes because of poverty that it had itself caused through different policies and laws that made Indian livelihoods obsolete. Although poverty was a consequence of history, people in charge of state and federal agencies responsible for the welfare of children saw it as a moral and cultural failing.<sup>57</sup> For instance, sharing beds or sleeping in the same room as a parent was thought to stunt the development of children, which was a moral failing.<sup>58</sup> Another standard demanded of American Indians—but not whites—was indoor plumbing.<sup>59</sup> Furthermore, even when families attempted to seek financial assistance, they risked alerting government officials of their impoverished status. One case is illustrative of this scenario: a grandmother caring for six children whose parents had died<sup>60</sup> sought financial aid from local welfare authorities, who responded by removing the four youngest children from the home.<sup>61</sup>

Removing children because of cultural differences and poverty was detrimental to children and their tribes then and now. Indian children who were removed from their homes and placed in boarding schools or with white families generally felt as if they did not belong.<sup>62</sup> Thus, many of the children placed with white families questioned their identities and developed negative views about the culture from which they were removed.<sup>63</sup> If the children ever returned home, they often no longer felt like they belonged there either.<sup>64</sup> Stripped of their cultural identity and language, it was difficult to connect with their family members.<sup>65</sup> As adults, the loss of identity is difficult to regain. These experiences affected the way they raised their children as well. Those who had been in boarding schools had little knowledge about parenting and were overwhelmed by raising children.<sup>66</sup> Furthermore, the tribes' loss of generations left them unable to

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56. *See id.* at 148.

57. *Id.*

58. *See id.*

59. *See id.*

60. *Id.* at 147.

61. *Id.*

62. *See* Kacy Wothe, Note, *The Ambiguity of Culture as a Best Interests Factor: Finding Guidance in the Indian Child Welfare Act's Qualified Expert Witness*, 35 HAMLIN L. REV. 729, 744 (2012).

63. *Id.* at 761.

64. *Id.*

65. *Id.* at 744.

66. Millich, *supra* note 31.

effectively continue their traditions and customs as they had for so many decades. Too, the loss of the children itself was difficult for tribes to bear because many tribes believed that children were sacred.<sup>67</sup>

As time progressed the tribes became more politically active and tribal leaders, Indian communities, and Indian activists demanded change. They attempted to bring light to the public of just how harmful the government had been to Indian children and their families. The tribes' concerns were finally heard by Congress in the 1970s. When Congress became aware that significantly more Indian children were being removed from their homes than white children, Congress directed a statistical assessment of Indian adoption and foster placement.<sup>68</sup> In 1973, Congress conducted a statistical analysis revealing that states were removing twenty-five to thirty-five percent of all Indian children from their homes.<sup>69</sup> Of these, eighty-five percent were placed in non-tribal homes, even when suitable and willing tribal relatives were available.<sup>70</sup>

In 1978, the federal government took action to remedy the overrepresentation of Indian children in the foster care system.<sup>71</sup> To combat the removal of children from a home that was fit, but culturally and socially different from mainstream Americans', Congress promulgated the Indian Child Welfare Act because "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." The sponsors of ICWA believed that the removal of Indian children was disproportionate because of a misunderstanding of cultural and social differences between Indian and non-Indian households.<sup>72</sup> The House Committee concluded that

[There is] a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming

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67. Delphine Red Shirt, *The Lakota Children Are Called Wakanyeja 'Little Sacred Ones'*, NATIVE TIMES (Feb. 9, 2015), <https://www.nativetimes.com/46-life/commentary/11125-the-lakota-children-are-called-wakanyeja-little-sacred-ones>.

68. RACHEL BENNETT, NAT'L RESOURCE CTR. FOR FOSTER CARE & PERMANENCY PLANNING, INFORMATION PACKET: AMERICAN INDIAN CHILDREN IN FOSTER CARE (May 2003), <http://centerforchildwelfare.org/kb/ICWA/american-indian-children-in-fc.pdf>.

69. *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N, <https://www.nicwa.org/about-icwa/> (last visited Jan. 14, 2019).

70. *Id.*

71. *Id.*

72. Denise L. Stiffarm, Comment, *The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart from the Statutory Placement Preferences*, 70 WASH. L. REV. 1151, 1153 (1995).

rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future. . . . [Congress] feel[s] the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family, and the Indian tribe.<sup>73</sup>

ICWA was thus intended as a congressional fix for the abusive state practices and procedures regarding Indian children, and it provided federal standards to determine whether Indian children could be subjected to foster care or adoptive placement under state law.<sup>74</sup>

ICWA's standards apply to child custody proceedings, which include most legal processes in which an Indian child is subjected to non-voluntary foster care or adoptive placement. ICWA also establishes minimal procedures that a state must follow in child custody cases involving Indian children.<sup>75</sup> For example, this ICWA section codifies basic human rights, such as notice of proceedings.<sup>76</sup> Likewise, sufficient time to prepare for the proceedings must be given.<sup>77</sup> Parents and other caretakers must have an opportunity to be heard, and Indian parents have a right to professional counsel.<sup>78</sup> This part of the statute also requires that parties seeking to maintain custody have access to all documents that a judge will use to make a decision.<sup>79</sup> This section also mandates that parties seeking placement or termination must make active efforts to preserve the family.<sup>80</sup> Finally, and most importantly for the purposes of this Comment, this section of ICWA

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73. COMM. ON INTERIOR AND INSULAR AFFAIRS, 95TH CONG., 2D. SESS., ESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES, H.R. REP. NO. 1386, at 19 (1978).

74. *State Statutes Related to the Indian Child Welfare Act*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 16, 2018), <http://www.ncsl.org/research/human-services/state-statutes-related-to-indian-child-welfare.aspx>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

demands that a qualified expert witness be used in foster care placement and termination of parental rights proceedings.<sup>81</sup>

Congress did not create ICWA to ensure that protections which Indians already had remained in place. Rather, it created ICWA to correct the abuses that had separated families for decades. As highlighted previously, the history of the Indian family is a saddening one. Children were ripped from their homes and transported to boarding schools in an effort to assimilate them. Others were taken from their parents and placed in adoptive homes because the government believed that Indians were inherently poor at parenting. The implementation of ICWA has been instrumental in preserving Indian families, but the application and interpretation of ICWA has not been perfect.

### III. “Qualified Expert Witnesses” Under ICWA

One standard of ICWA that has been applied and interpreted differently across the country is the requirement of qualified expert witness testimony in foster care and adoptive placements. Qualified expert witness testimony is a mandatory piece of evidence that the court requires in foster care placement and parental rights termination proceedings.<sup>82</sup> According to the federal ICWA statute, the testimony of at least one qualified expert witness must support the court’s determination that the ICWA burden of proof has been met in foster care and termination proceedings.<sup>83</sup> For foster care proceedings, the standard for the burden of proof is by clear and convincing evidence.<sup>84</sup> For termination proceedings, the standard for the burden of proof is beyond a reasonable doubt.<sup>85</sup> Even though the standards of proof are different, the applicable qualified expert witness requirements and guidelines are the same.

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81. Indian Child Welfare Act, 25 U.S.C. § 1902 (2012).

82. *Id.* § 1912(e)–(f).

83. *Id.*

84. *Topic 14. Expert Witnesses*, NAT’L INDIAN L. LIBR., <https://narf.org/nill/documents/icwa/faq/expert.html> (last visited Jan. 14, 2019).

85. *Id.* (“In a termination of parental rights proceeding, the court will use the applicable state burden of proof to determine if the state factors have been met to terminate the parental rights to an Indian child. Then, under 1912(f), it will use the higher the ICWA ‘beyond a reasonable doubt’ burden of proof to determine whether ‘the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.’ In those states where a dual burden of proof is not used, the court will use only the ICWA burden of proof in either type of proceeding.”).

Scholars and lawyers debate what qualifications Congress intended an expert witness in this context to have. It is clear from Congress's stated purpose that it intended to reduce the number of Indian children removed from their homes due to cultural bias or misunderstanding.<sup>86</sup> In 1979, just after the creation of ICWA, the BIA set guidelines for a "qualified expert witness." According to the BIA, the purpose of a qualified expert witness is to provide "competent testimony . . . to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child."<sup>87</sup> Explaining how the purpose should be implemented in practice, the BIA listed in Section D.4 of the Federal Guidelines the following people as possible candidates for qualified expert witnesses:

- (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 practice;
- (2) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe; and
- (3) A professional person having substantial education and experience in the area of his or her specialty.<sup>88</sup>

Some scholars argue that experts must be uniquely qualified to determine whether court proceedings implicate cultural bias, and, therefore, must be Indian.<sup>89</sup> Others argue that ICWA's language makes no requirement that qualified expert witnesses be Indian, and, therefore, the expert witness may be white or Indian.<sup>90</sup> Chiming in on this debate, the BIA has interpreted the statute to prefer Indians, but it does not require that qualified expert witnesses be Indians. States usually follow the BIA guidelines<sup>91</sup>—sometimes with resistance—but, because ICWA and the BIA guidelines are

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86. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 649 (2013).

87. *Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings*, TRIBAL CT. CLEARINGHOUSE, [http://www.tribal-institute.org/lists/state\\_guidelines.htm](http://www.tribal-institute.org/lists/state_guidelines.htm) (last visited Oct. 17, 2019).

88. *Id.*

89. Paul David Kouri, Note, *In re M.J.J., J.P.L., & J.P.G.: The "Qualified Expert Witness" Requirements of the Indian Child Welfare Act*, 29 AM. INDIAN L. REV. 403, 407–08 (2004–2005).

90. *Id.* at 408–09.

91. *See infra* note 92.

not exactly clear, states do not uniformly agree on what qualifications a qualified expert witness should have.

In 2015, the BIA revised its stance on who may be a qualified expert witness in light of written and oral comments received during a review of the Guidelines for State Courts in Indian Child Custody Proceedings.<sup>92</sup> Many of these comments criticized the ICWA for not requiring that the qualified expert witness have specialized knowledge of the Indian child's tribal culture and customs.<sup>93</sup> In this set of comments, the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence made recommendations on updating the BIA guidelines concerning ICWA and its development in jurisprudence since its inception.<sup>94</sup> The updated BIA guidelines for a qualified expert witness are as follows:

(a) A qualified expert witness should have specific knowledge of the Indian tribe's culture and customs.

(b) Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:

(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) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.

(3) A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural

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92. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015).

93. *Id.* at 10,149.

94. *Id.* at 10,146.

standards and childrearing practices within the Indian child's tribe.

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.<sup>95</sup>

The only other BIA requirement is that the expert witness should have more qualifications than an average social worker, whether the social worker is employed by the tribe or employed by the state.

#### *IV. Difficulties Presented by ICWA and the BIA Guidelines*

##### *A. Finding a Qualified Expert Witness*

###### *1. The Small Population Problem*

A qualified expert witness must be available for proceedings involving foster care placement or termination of parental rights of an Indian child according to ICWA.<sup>96</sup> The requirement of an expert witness is designed to protect the child from being removed from his home because of cultural bias or misunderstanding; however, it can be difficult to find a qualified expert witness to testify as required by the BIA guidelines or state statutes.<sup>97</sup> If no qualified expert witness testimony is available, the case will not meet the burden of proof required by 25 U.S.C. § 1912(e) or (f).<sup>98</sup> Too, no qualified expert testimony is grounds for mandatory reversal under 25 U.S.C. § 1914.<sup>99</sup>

For both the State and parents, finding a qualified expert witness can be difficult.<sup>100</sup> Although a qualified expert witness is one who may satisfy any of the four provisions provided by the BIA—and potentially even other requirements because the BIA provisions are not an exhaustive list—it can

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95. *Id.* at 10,157 (section D.4(a)–(c)).

96. Indian Child Welfare Act, 25 U.S.C. § 1912(e)–(f) (2012).

97. Telephone Interview with Steve Hager, Dir. of Litig., Okla. Indian Law Servs. (Nov. 14, 2018).

98. 25 U.S.C. § 1912(e)–(f).

99. *Id.* § 1914 (“[A]ny parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.”); see *In re N.L.*, 754 P.2d 863, 868 (Okla. 1988); *In re M.H.*, 691 N.W.2d 622, 627 (S.D. 2005).

100. *Id.*

be difficult to find a person with the credentials necessary to fit into one of the four categories and other state law requirements.<sup>101</sup>

Many tribes have small populations, making it extremely difficult to find someone with knowledge of the tribe who can testify as a qualified expert witness.<sup>102</sup> Because of small tribal populations, it is quite possible that no one within the tribe may fit the credentials required under D.4(b)(1) of the BIA guidelines. Tribal members may not have the required childrearing knowledge, may be inhibited by a language barrier, or may be prevented from traveling to the court on the day of the proceeding. There are endless reasons why the tribe may not be able to produce a qualified expert witness, and these reasons are exacerbated if the tribe is small in size.

In Oklahoma alone, there are thirty-eight federally recognized tribes.<sup>103</sup> In accordance with the general notion, many of these tribes have small populations.<sup>104</sup> For example, as of 2011, the Delaware Nation had a population of 1440, the Fort Sill Apache Tribe 650, the Iowa Tribe 697, the Kialegee Tribe 439, and the Modoc Tribe 200.<sup>105</sup> The in-state enrolled members were even less.<sup>106</sup> These numbers provide a snapshot of tribal enrollment across the United States. Many tribes even have populations of less than 100.<sup>107</sup> Thus, locating a qualified expert witness could take hours of searching, many phone calls, and plenty of rejections; even then, the party seeking a qualified expert witness may not end up with one. Furthermore, if parents are seeking a qualified expert witness, they may run into heightened challenges. For instance, the only available qualified expert witness in the jurisdiction may already be testifying for the State.

If the tribe cannot offer a qualified expert witness under D.4(b)(1), the State may look to provision D.4(b)(2), which allows the testimony of a member of another tribe that the Indian child's tribe recognizes as qualified. This provision poses its own challenges. It may be difficult to find someone from another tribe that the Indian child's tribe recognizes as knowledgeable

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101. *Id.*

102. *2010 Census CPH-T-6. American Indian and Alaska Native Tribes in the United States and Puerto Rico: 2010*, U.S. CENSUS BUREAU tbl. 1 (Dec. 2013), <http://www.census.gov/population/www/cen2010/cph-t/t-6tables/TABLE%20%281%29.pdf>.

103. OKLA. INDIAN AFFAIRS COMM'N, 2011 OKLAHOMA INDIAN NATIONS POCKET PICTORIAL DIRECTORY (n.d.), <https://www.digitalprairie.ok.gov/digital/collection/stgovpub/id/5215>.

104. *Id.*

105. *Id.* at 12, 15, 16, 18, 22.

106. *Id.*

107. *2010 Census CPH-T-6. American Indian and Alaska Native Tribes in the United States and Puerto Rico: 2010*, *supra* note 102.



about childrearing practices in the Indian child's tribe. Cultural differences can vary greatly from tribe to tribe, so if the Indian child's tribe has unique customs, it may not be willing to qualify someone from another tribe. Even if the Indian child's tribe is willing to recognize someone from another tribe as qualified to be an ICWA expert witness, there may not be any qualified expert witnesses available from that tribe.

If the first two types of qualified expert witnesses are unavailable, the State can look to provision D.4(b)(3), which allows a layperson to testify. Again, it may be extremely difficult to find a layperson with enough knowledge about a specific tribe who is willing to testify. If a tribe is small, the number of laypeople who have dealt with that tribe is likely small as well. Furthermore, tribes may be mostly confined to reservations where they work amongst themselves, so laypeople may not have the opportunity to become familiar with a tribe.

Finally, the State may look to provision D.4(b)(4), which allows a professional with substantial education and experience with the Indian child's tribe to testify. Again, if a tribe is small, it may be challenging to find someone with tribal education and experience. If someone has education, it may be personal, limited mostly to tribal members themselves. Formal education outside the tribe may not exist. Also, tribal experience will be less likely if the tribe is small and/or isolated.

## 2. Compensation

Another problem with finding qualified expert witnesses is finding willing witnesses because of compensation. Qualified expert witnesses may demand compensation for their services.<sup>108</sup> If the tribe offers the qualified expert witness, then compensation is likely unnecessary; however, if the qualified expert witness is privately retained, compensation is likely necessary.<sup>109</sup> Compensation creates more of a problem for the parents than the State. Generally, the State presents the qualified expert witness because the State has more resources at its disposal to pay for the qualified expert witness's services. The State's witness presumably testifies in favor of the State's decision to remove the child from her home. Thus, parents will often want to present their own qualified expert witness to dispute that testimony if they can find and afford one.<sup>110</sup>

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108. Telephone Interview with Steve Hager, *supra* note 97.

109. E-mail from Steve Hager, Dir. of Litig., Okla. Indian Law Servs., to Elizabeth Low, Student at Univ. of Okla. Coll. of Law (Dec. 31, 2018, 16:37 CST) (on file with author).

110. Telephone Interview with Steve Hager, *supra* note 97.

The State and the parents can reach out to a number of resources to find a qualified expert witness. D.4(c) of the BIA guidelines states, “The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.”<sup>111</sup> The National Indian Law Library website provides links to state and tribal associations that may be of help in finding a qualified expert witness.<sup>112</sup> The site also lists several national child welfare organizations that can help locate qualified expert witnesses.<sup>113</sup> These resources, along with the Bureau of Indian Affairs and the tribe, may be of help, but for those tribes that are small, there may be no avail in locating a qualified expert witness.

Once a party finds a qualified expert witness, it will need to assess the cost of that witness. Adding another element to the challenge, the modern tribal population struggles with poverty.<sup>114</sup> According to the United States Census Bureau, as of 2016, those identifying as solely American Indian or Alaskan Native were at a greater risk of being in poverty than the rest of the population.<sup>115</sup> The median household income for American Indians and Alaskan Natives was \$39,719, compared to \$57,617 for the nation as a whole.<sup>116</sup> The percentage of the nation living in poverty was fourteen percent while the percentage of American Indians and Alaskan Natives living in poverty was twenty-six percent.<sup>117</sup>

The cost of an expert witness alone could constitute a large percentage of the average income for an American Indian family. For non-medical expert witnesses, the 2017 average fee for initial review was \$267. The 2017 average deposition fee was \$317.<sup>118</sup> The 2017 average court fee was \$328, showing the steepest increase of all non-medical expert fees—six percent from 2016.<sup>119</sup> Even the lowest average expert witness fee could be a significant blow to someone's savings. On average, Alaska has the least expensive expert witness fees in the country, with the average hourly cost

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111. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(c)).

112. *Topic 14. Expert Witnesses*, *supra* note 84.

113. *Id.*

114. *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html>.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

of initial review being \$183.13,<sup>120</sup> average hourly cost of deposition being \$269.38,<sup>121</sup> and average hourly cost of trial being \$310.625.<sup>122</sup> South Dakota has the second least expensive expert witness fees in the country, with the average hourly cost of initial review being \$233.64,<sup>123</sup> average hourly cost of deposition being \$315.45,<sup>124</sup> and average hourly cost of trial being \$278.61.<sup>125</sup> These statistics do not include travel costs, which can be especially great if a party requires a person to travel a great distance from their residence.<sup>126</sup> There is a lack of data on the costs of ICWA expert witnesses, but one attorney has stated that it can cost up to \$500 to present a qualified expert witness in the ICWA context.<sup>127</sup>

To put this into perspective, just two hours of non-medical testimony work could cost an American Indian almost 1.5% of their household income.<sup>128</sup> Of course, this is in addition to paying the attorney fees that are probably being charged.<sup>129</sup> Little research has been done on the trouble finding ICWA experts, but experts in the field know that parents have trouble paying for these qualified expert witnesses that ICWA requires.<sup>130</sup>

### B. Cultural Bias

While the current BIA guidelines provide more clarity than those from 1979, they still do not delineate the exact qualifications required of an ICWA expert witness.<sup>131</sup> Without specific requirements, ICWA and the BIA guidelines may be interpreted broadly, inviting the opportunity for cultural bias in foster care placement and parental termination proceedings.

While it is preferable that an expert witness has “specific knowledge of the Indian tribe’s culture and customs,” he does not necessarily need to have specific knowledge.<sup>132</sup> Congress prefers qualified expert witnesses who have specific knowledge of the Indian tribe’s culture and customs, for

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. E-mail from Steve Hager, *supra* note 109.

128. *Id.*

129. *Id.*

130. Telephone Interview with Steve Hager, *supra* note 97.

131. *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(a)–(c)).

132. *Id.* (section D.4(a)).

it lists those more closely associated with tribes first in the descending order of preference.<sup>133</sup> However, any expert witness that fits into one of the four categories is presumed to be qualified.<sup>134</sup> Because there is no specific educational or career requirement to be a qualified expert witness, anyone ranging from a tribal citizen to a marginal tribal scholar can be a qualified expert witness. Common qualified expert witnesses include tribal elders, college professors, tribal appointed individuals, teachers, tribal professionals, certain Child Protective Service workers, tribal council members, retired Human Service Workers, traditional healers, healthcare professionals, tribal chiefs, and members of tribal organizations.<sup>135</sup> Because ICWA and the BIA guidelines allow people with a wide variety of experience to testify, a qualified expert witness need not have any knowledge of the child's specific tribe.

Congress purposely chose not to require that the expert witness have specific knowledge of the Indian child's tribe's customs and culture.<sup>136</sup> The qualified expert witness need not have specific knowledge of the Indian child tribe's customs and culture because this knowledge may be irrelevant to the reasons that the child was removed from the home.<sup>137</sup> In response to comments from the public about D.4(a)'s use of the term "should" instead of "must," the BIA stated, "[A] leading expert . . . may not need to know about specific Tribal social and cultural standards in order to testify . . . whether return of a child to a parent [with] a history of sexual abus[e] . . . is likely to result in serious emotional or physical damage to the child."<sup>138</sup>

Furthermore, because the expert witness does not need to have knowledge of the Indian child's tribe's customs and culture, it is presumably easier to locate an expert witness. It is much easier to locate someone who can testify about the generally acceptable forms of childrearing than it is to find someone who can testify about the Indian child's tribe's childrearing practices. This laxity in requirements opens up the availability of people who may serve as witnesses. If the Indian child's

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133. *Id.* (section D.4(b)(1)).

134. *Id.* (section D.4(b)).

135. *Qualified Expert Witnesses (QEWs) and the Indian Child Welfare Act (ICWA)*, UNIV. OF N.D.: CHILD. & FAM. SERVS. TRAINING CTR., <https://web.archive.org/web/20171124125003/http://www1.und.edu/centers/children-and-family-services-training-center/icwa/qew-quicksheet.pdf> (last visited Jan. 14, 2019).

136. *See* Indian Child Welfare Act Proceedings—Final Rule, 88 Fed. Reg. 38,778, 38,829 (June 14, 2016).

137. *Id.* at 38,830.

138. *Id.*

tribe's culture and customs are irrelevant to the issue, then time and money spent finding an expert witness who is knowledgeable about the Indian child's tribe may be a waste of resources.

While the language of D.4(a) was purposefully chosen, the flexibility it provides sacrifices protection from cultural bias. The decision of whether the qualified expert witness needs cultural knowledge of the Indian child's tribe is now up to the court, an entity that presumably does not have cultural knowledge about the tribe. To allow an uninformed court to make such an important decision begs for cultural bias. Although no cultural issue may be readily apparent, that does not mean there is no cultural issue in the case. For example, several tribes practice traditional medicine,<sup>139</sup> which some Americans would regard as negligent or immoral. If a qualified expert witness in a case involving traditional medicine practices is an average American physician and the court qualifies her as an expert witness, there is potential that the court may never hear any testimony regarding cultural medicinal practices.<sup>140</sup> Thus, the court may accept an unqualified expert witness because it assumes that there is no cultural issue of bias, and a child could be separated from its parents because of a misunderstanding.

Of all the expert witnesses presumed to be qualified, D.4(b)(1) leaves the least room for cultural bias. Its language is unambiguous.<sup>141</sup> Although it can sometimes be difficult to ascertain if a person is a member of a tribe,<sup>142</sup> ICWA defines "Indian child's tribe" to prevent too much debate over whether an expert witness is a member of the Indian child's tribe.<sup>143</sup> Once membership of the witness is confirmed, the tribe will decide whether to qualify the expert witness. Similar to the courts, most tribes will look at the

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139. Mary Koithan & Cynthia Farrell, *Indigenous Native American Healing Traditions*, 6 J. FOR NURSE PRAC. 477 (2010), [https://www.npjjournal.org/article/S1555-4155\(10\)00170-4/fulltext](https://www.npjjournal.org/article/S1555-4155(10)00170-4/fulltext).

140. *Topic 14. Expert Witnesses*, *supra* note 84.

141. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(b)(1)).

142. A person may have little evidence to prove his Indian blood or the degree of Indian blood necessary to be enrolled, which can be problematic because tribes have certain requirements for enrollment. For example, the Cherokee can have any blood quantum from a descendant of the tribe to be eligible for membership. The Ponca differ from the Cherokee by requiring at least ¼ degree of Indian blood and an enrolled parent. *Tribal Membership*, OKLA. INDIAN LEGAL SERVS., INC., <http://thorpe.ou.edu/OILS/blood.html> (last visited Jan. 14, 2019).

143. "Indian child's tribe" means either (1) "the Indian tribe in which an Indian child is a member or eligible for membership or" (2) when an "Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts." 25 U.S.C. § 1903(5) (1978).

accomplishments of an expert when deciding whether to qualify them as an ICWA expert witnesses.<sup>144</sup> These accomplishments include education, career, and length of experience.<sup>145</sup> *In re L.M.B.* presents a typical example of a qualified expert witness that fits D.4(b)(1).<sup>146</sup> In this case, the qualified expert witness was a member of the same tribe as the child, had a Ph.D. in Native American history, chaired and taught classes on indigenous American studies at Haskell Indian Nations University, and studied and taught classes on the Indian Child Welfare Act.<sup>147</sup> Because the expert witness must be approved by the tribe, there is little concern that expert witnesses falling under D.4(b)(1) would be unqualified.

The qualified expert witness described under D.4(b)(2) also leaves some but still little room for cultural bias.<sup>148</sup> The expert witness in this category does not need to have specific knowledge of the Indian child's tribe but only knowledge of family services delivered to the Indian child's tribe.<sup>149</sup> Just because a potential witness knows of the services available to a tribe does not mean that he knows the customs or childrearing practices of a tribe. For example, in *In re M.R.G.*, a member of the Blackfeet tribe was recognized as a suitable expert witness although she had no knowledge of the Confederation of Tribes of the Siletz Indians of Oregon, the tribe in which the child was a member.<sup>150</sup> The qualified expert witness was a family resource specialist of the Department of Public Health and Human Resources.<sup>151</sup> Tribal elders taught her their culture at a young age and allowed her to participate in Blackfeet culture.<sup>152</sup> After obtaining a Bachelor's degree in elementary education and a Master's in business administration, she worked as the tribal court clerk for the Blackfeet tribe.<sup>153</sup> As court clerk, she conducted home studies and wrote reports related to the adoption and foster care placement of children.<sup>154</sup> Eventually,

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144. E-mail from Dr. Karen Wynn, Exec. Dir., Am. Indian Educ. Consultants, Inc., to Elizabeth Low, Student, the Univ. of Okla. Coll. of Law (Dec. 31, 2018, 16:37 CST) (on file with author).

145. *Id.*

146. 54 Kan. App. 2d 285, 301 (Ct. App. 2017).

147. *Id.*

148. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(b)(2)).

149. *Id.*

150. *In re M.R.G.*, 66 P.3d 312, 315–16 (Mont. 2003).

151. *Id.* at 316.

152. *Id.* at 315.

153. *Id.* at 315–16.

154. *Id.* at 316.

she moved to Minnesota and taught at an Indian school for several years.<sup>155</sup> In this position, she came into contact with many Indian cultures besides the Blackfeet. At the time of the case, she worked as a department family resource specialist, working with teenagers, half of whom were Indian.<sup>156</sup> She had been trained as an ICWA expert and had served in that capacity in approximately ten other cases.<sup>157</sup>

Regarding the facts of the specific case, the child's parent contested the termination of his parental rights, arguing that the court had accepted an expert witness who was not qualified to testify about childrearing practices of the Siletz Indians.<sup>158</sup> The court disagreed and found the expert witness qualified based on her extensive knowledge of Indian services, although she had no particular knowledge of the child's tribe's customs and practices.<sup>159</sup> Perhaps no bias was specifically present in *In re M.R.G.*, but the simple lack of a requirement of knowledge of the Indian child's tribe's customs and practices allows for the potential for culturally biased testimony. Although the witness is a member of a tribe, this fact does not mean that she will understand the customs and practices of another tribe, for tribes have vastly different customs from one another.<sup>160</sup> D.4(b)(2) also demands that the expert witness be recognized by the Indian child's tribe. Although such a demand lessens the concern of cultural bias, it does not completely eradicate it.

The opportunity for cultural bias must be balanced with the need for access to expert witnesses. Broadening the witness requirements to members of all tribes instead of just the child's tribe increases the number of witnesses available. Because an expert witness can be difficult to locate, increasing the number of witnesses available is crucial to allow for ICWA compliance.

The language describing the third type of qualified expert witness listed in D.4(b)(3) of the BIA guidelines<sup>161</sup> is more vague than the language of D.4(b)(1) or (2).<sup>162</sup> This standard is ambiguous because "substantial" is an

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 314.

159. *Id.* at 316.

160. For example, the tribes may have different medicinal practices. See Koithan & Farrell, *supra* note 139.

161. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015) (section D.4(b)(3)).

162. *Id.* (section D.4(b)(1)-(2)).

unclear term. The guidelines do not specify a minimum number of months or years of experience needed with child and family services, nor does it outline the specific services necessary. Furthermore, the expert witness need not have specific experience with family services provided to the Indian child's tribe. For instance, delivery services available for one tribe may not be available for another, so the witness's specific experience may be of little use.

The knowledge needed for a layperson to serve as a qualified expert witnesses is more detailed because it includes not only sociocultural, but also childrearing knowledge.<sup>163</sup> The specificity of the knowledge requirement, combined with the broad experience requirement, squashes much concern for cultural bias, but it still does not erase the possibility. Furthermore, any vagueness in the guideline's language is less concerning because a qualified expert witness under this provision must be recognized by the tribe as qualified.<sup>164</sup> If the qualified expert witness is recognized by the tribe, then any gap in experience or knowledge is presumably of nominal importance. Like D.4(b)(2), D.4(b)(3) expands the pool of available witnesses. Thus, D.4(b)(3) attempts to strike a balance between the availability of expert witnesses and the requirement of necessary experience and knowledge of Indian customs.

The requirements for the fourth type of qualified expert listed in the BIA guidelines also use the word "substantial."<sup>165</sup> "Substantial" experience is no clearer in the context of a "professional" expert witness listed in D.4(b)(4). Again, there is not a time, experience, or education requirement. For instance, substantial education could mean a number of things. It is not clear whether a Bachelor's, Master's, or Doctorate degree would be sufficient. Regarding a specialty, education and experience are also unclear. The area of specialty can be anything, for the guidelines do not require that the area of specialty relate specifically to Indians. Too, substantial experience may mean that someone has worked in their field for ten years. It could also mean that someone has had adequate training to work in their field; that someone has worked in various capacities related to children; that someone specializes in some aspect of the medical profession. The possibilities for who may qualify as an ICWA expert witness are almost endless.

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163. *Id.* (section D.4(b)(3)).

164. *Id.* (section D.4(b)(1)).

165. *Id.* (section D.4(b)(2)–(3)).



While the word “substantial” allows for flexibility, it sacrifices clarity. The term substantial does not at all help the court ascertain whether someone is qualified to serve as an expert witness. As discussed, substantial can refer to a time period, a type of education, or a type of job. Because the tribe does not need to qualify the expert witness under this provision, a court decides what substantial means. When the court is given this power, it may inadvertently qualify someone that has had little education or experience for the sake of having a qualified expert witness present and expediting the case.

Like D.4(b)(1)–(3), D.4(b)(4) broadens the potential for qualified expert witnesses. The ambiguity of the term “substantial” allows for flexibility in deeming an expert witness qualified. As discussed previously, substantial may mean different things in different cases. For example, someone may need only to have substantial education and experience with tribal medicinal practices in one case, but in another case, they may need substantial knowledge about familial relations within the tribe. If ICWA specified the education or experience requirements for qualified expert witnesses, it would reduce cultural misunderstandings, but this would come at the price of limiting the number of people able to serve as qualified expert witnesses. Of course, the witnesses listed are only those presumed to be qualified,<sup>166</sup> the guidelines do not restrict others from being qualified. Again, this offers flexibility but also invites cultural bias.

### C. Attitude of Courts

Courts in the current era generally do not take a favorable view toward tribes. Courts have engaged in implicit divestiture, slowly dwindling tribal rights.<sup>167</sup> Perhaps the courts are unaware of the consequences of their opinions. Whatever the case, courts do not treat ICWA cases involving expert witnesses any more favorably.

In the following cases, each court has taken a casual attitude regarding expert witnesses. In *Kent K. v. Department of Health & Social Services, Office of Children's Services*,<sup>168</sup> relying on the 2015 BIA Guidelines, Kent argued that the trial court erroneously concluded that Dr. Rose was a qualified expert witness under the ICWA. Dr. Rose "is not a member of the children's tribe or of any tribe, and has no experience or expertise

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166. *Id.* (section D.4).

167. Samuel E. Ennis, *Implicit Divestiture and The Supreme Court's (Re)Construction of The Indian Canons*, 35 VT. L. REV. 623, 626 (2011).

168. *Kent K. v. Dep't of Health & Soc. Servs., Office of Children's Servs.*, No. S-15708, 2016 Alas. LEXIS 13, at \*14 (Alaska Feb. 3, 2016).

providing services to the children's tribe or any tribe." Because of his lack of experience with and knowledge of tribes, Kent asserted that Dr. Rose could not be qualified as an expert because Dr. Rose did not fall into any of the enumerated categories. Though the termination case happened before the BIA guidelines were finalized, the court did not recommend that this issue be considered upon remand.

In *In re L.M.B.*, the Court of Appeals of Kansas noted that the trial court should have expressly followed the 2015 BIA guidelines.<sup>169</sup> Although the trial court's expert witness did fall into one of the enumerated categories of expert witnesses presumed to be qualified, the court did not expressly state whether it relied on the 1979 or 2015 guidelines.<sup>170</sup> Moreover, it is clear that the court paid little attention to the major effects the guidelines can have on a case, as it stated, "the changes from the 1979 to the 2015 version are arguably minor . . . ."<sup>171</sup> The changes to the guidelines have not been minor but have majorly changed the requirements; however, the court still seems to treat the expert witness provision of ICWA as a procedural necessity rather than an important part of the process.

A subtler way to understand the court's casual attitude toward ICWA cases is to look at the sheer number of cases published. Many of the ICWA cases that reach state appellate courts go unpublished every year.<sup>172</sup> "Unpublished" does not mean that the opinion is classified but rather that it is marked by the court as not pressing enough to be published.<sup>173</sup> Federal unpublished opinions are easily accessible online via databases like Westlaw and LexisNexis.<sup>174</sup> Unpublished state cases can be much more difficult to locate.<sup>175</sup> For example, of the Tenth Circuit's six states, only Utah makes some of its unpublished cases available online.<sup>176</sup>

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169. *In re L.M.B.*, 54 Kan. App. 2d 285, 300 (Ct. App. 2017).

170. *Id.*

171. *Id.*

172. Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 7 AM. INDIAN L.J. 21, 27–28 (2019) [hereinafter Fort & Smith, *2019 ICRA Case Law Update*], <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1198&context=ailj>.

173. Anika C. Stucky, Comment, *Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 OKLA. L. REV. 403, 405–07 (2006).

174. *Id.* at 406.

175. *Id.*

176. *Id.*

Unpublished cases cannot be used as precedent.<sup>177</sup> In some instances, this is harmless. Opinions may be marked as unpublished because they repeat an issue that has been decided by the court many times over.<sup>178</sup> In those cases, the issue already has precedent, so it is unnecessary to publish new cases on the same issues. Furthermore, it saves the court's resources to forego repetitive opinions.<sup>179</sup> While unpublished opinions help reduce the plethora of redundant cases and the backlog of judicial resources such as time and money, they also cause some cases to fall by the wayside. For example, in Oklahoma, it is the judge who decides what cases will get published.<sup>180</sup> There are rules governing how these decisions are made, focusing on publishing cases that add to settled law.<sup>181</sup> However, judges may not necessarily follow these guidelines. If a judge strays from the guidelines, cases involving new issues of law or cases involving the same issues in a new set of circumstances could be set aside.

It is unknown why so many of the ICWA cases go unpublished or how many of the ICWA cases that go unpublished are cases involving qualified expert witnesses. While there is not an obvious reason for the number of unpublished ICWA cases, ignoring the ICWA cases understates the sizeable role they have on the appellate docket.<sup>182</sup> A vast majority of the unpublished opinions are about inquiry and notice, but there is not another clear pattern for published opinions.<sup>183</sup> For instance, "eight active efforts cases were unreported, as were three placement preference cases and three determinations regarding whether the case was a foster care proceeding under ICWA."<sup>184</sup>

In at least one case, Washington's appellate court spent considerable time discussing who may qualify as an expert witness in ICWA cases.<sup>185</sup> That opinion was never published however, so it set no legal precedent.<sup>186</sup> Undoubtedly, there are similar instances of other relevant cases that remain unpublished. Perhaps the issue of whether or not an expert witness is

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177. Fort & Smith, *2019 ICRA Case Law Update*, *supra* note 172, at 28.

178. Stucky, *supra* note 174, at 443.

179. *Id.*

180. *Id.* at 444.

181. *Id.*

182. Fort & Smith, *2019 ICRA Case Law Update*, *supra* note 172, at 28.

183. *Id.* at 29.

184. Kathryn E. Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 6 AM. INDIAN L.J. 32, 36 (2018), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1183&context=ailj>.

185. *Id.*

186. *Id.*

qualified seems as if it has already been decided, but the answer is vague; thus, cases regarding ICWA expert witnesses should be published to aid in answering the question of exactly who should serve as a qualified expert witness.

#### *D. Knowledge of the Case*

While the BIA guidelines alleviate some aspects of cultural bias, they could be improved even further by requiring that a witness have actual knowledge of the facts of the case. The current lack of specific knowledge is often a point of contention challenged by parents.<sup>187</sup> Under the BIA guidelines, a qualified expert witness need not have direct knowledge of the issue. Some state courts have said that a qualified expert witness should have knowledge of the case, but this is not binding precedent on all courts.<sup>188</sup> For example, in *C.J. v. Department of Health & Social Services*, the Supreme Court of Alaska found the expert witness unqualified because she based her testimony solely off the case file that had been given to her by the Division of Youth and Family Services.<sup>189</sup> She never had direct contact with the father or the children, and her assertions were mostly generalizations about harm that can happen to children with an absent father.<sup>190</sup> The qualified expert witness needs to have just enough information about the case so that he can speak in more than vague generalities.

Not requiring knowledge of the case may be harmless—and even beneficial. Of course, it is less time-consuming and less overwhelming to read a case file rather than do an in-depth investigation of a case. Also, a qualified expert witness may not need to know the specific case facts to answer the court's question of whether the child can return to the parents. For example, if the qualified expert witness is the parent's psychiatrist, she may not need to have case knowledge if she believes that there is a risk that the parent will continue to sexually abuse a child. Additionally, another example includes a doctor testifying that a child has been beaten so severely that returning to the home would be dangerous.

While no knowledge of the case facts may be permissible in some instances, the lack of knowledge reduces the credibility of the witness and the integrity of the court. If a qualified expert witness has no direct knowledge of the case, then he will not be able to provide a full picture of

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187. Telephone Interview with Steve Hager, *supra* note 97.

188. *C.J. v. Dep't of Health & Soc. Servs.*, 18 P.3d 1214, 1218 (2001).

189. 18 P.3d at 1218.

190. *Id.*

what happened. An expert will have a more complete picture if he has contact with the parents, observes interactions between the parent(s) and child, and meets with extended family members in the child's life.<sup>191</sup> Alternatively, an incomplete picture presented to the court may lack important facts, and these omissions may never be discovered if the witness does not bring such details to the court's attention. More importantly, the court's integrity is threatened if a qualified expert witness lacks specific knowledge. An expert's testimony is less credible without direct knowledge of the case. Less credible testimony serves as an injustice and uses the court as a means to an end rather than as a true decision-making body.

#### *V. Solutions for Clarifying "Qualified Expert Witness"*

##### *A. State Statute Solutions*

States generally use one of the expert witnesses described by the BIA guidelines. Many attorneys and courts lament the promulgation of ICWA, finding it cumbersome to comply with.<sup>192</sup> Other states have relished the opportunity to provide legal safeguards for Indian families, enacting their own versions of the ICWA. Several states have implemented stricter qualifications for qualified expert witnesses to deal with the problems created by the lack of clarity from ICWA and the BIA guidelines.<sup>193</sup> Eight states have their own Indian Child Welfare Acts: Iowa, Minnesota, Michigan, Nebraska, Oklahoma, Washington, Wisconsin, and California.<sup>194</sup> All of these, besides Oklahoma, (which has no provision on expert witness testimony different from that of 25 U.S.C. § 1912(e) or (f)) have distinct provisions about qualified expert witness testimony designed to fill in the gaps left by the ICWA and the BIA.<sup>195</sup>

##### *1. Demand for Cultural Knowledge*

One of the ways that states have created stricter standards is by demanding that the expert witness have cultural knowledge of the Indian

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191. *Adjudication of Involuntary Proceedings: Federal Regulations and Guidelines*, UNIV. OF N.D.: CHILD. & FAM. SERVS. TRAINING CTR., <http://www1.und.edu/centers/children-and-family-services-training-center/ICWA/aip-fedregsguides.cfm> (last visited Jan. 14, 2019).

192. Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 3 (2017).

193. See *infra* notes 197, 207.

194. *State Statutes Related to the Indian Child Welfare Act*, *supra* note 74.

195. See 10 OKLA. STAT. § 40.1–9 (2011).

child's tribe. This requirement helps fill in the gap left by the language of provision D.4(a), which says that the expert witness "should" have knowledge of the tribe, not "must." Iowa, Michigan, Wisconsin, and Nebraska all require that the expert witness have knowledge of the Indian child's tribe or be qualified by the Indian child's tribe.<sup>196</sup> Presumably, if the Indian child's tribe qualified the expert witness, she has knowledge of the Indian child's tribe or such knowledge is deemed unnecessary even by the child's tribe.

Many state courts have argued that a qualified expert witness need only have knowledge of Indian customs if there is a cultural issue, but the states listed in the previous paragraph require that all expert witnesses have knowledge of the Indian child's tribe—whether or not there is a cultural issue. Recognition by the Indian child's tribe greatly reduces the chances for cultural bias. Iowa's provision is the most extensive on its requirements for expert witnesses.<sup>197</sup>

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196. All of the witnesses listed in Iowa's ICWA statute must have substantial knowledge relating to the Indian child's particular tribe. Michigan, Nebraska, and Wisconsin have similar provisions about their expert witnesses needing knowledge of the Indian child's tribe. Michigan has a similar provision to (a) of Iowa's and then a combination of c, d, and e above as its second qualified expert witness. Nebraska has extremely similar provisions and only excludes e. Wisconsin is almost identical to Nebraska, also leaving out only e of Iowa's list of qualified expert witnesses. Presumably, Wisconsin and Nebraska leave out e because it is extremely similar to d.

197. IOWA CODE § 232B.10 (Westlaw through 2019 Reg. Sess.) (emphasis added). Iowa's ICWA provision, section 232.B10, is representative of the other states' laws, and it reads as follows:

1. For the purposes of this chapter, unless the context otherwise requires, a "qualified expert witness" may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, spiritual leader, historian, or elder. . . .

3. In the following descending order of preference, a qualified expert witness is a person who is one of the following:

a. A member of the *child's Indian tribe* who is recognized by the child's tribal community as knowledgeable regarding tribal customs as the customs 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 having substantial knowledge of the

Iowa's statutory provisions in section 232.B10 are beneficial for ICWA parental rights termination and foster care placement cases because they clear up portions of the BIA guidelines. First, the statute limits the qualified expert witnesses to those listed in the statute. The statute contains an exhaustive list of the available people who can be a qualified expert witness, unlike the BIA guidelines, and each person on the list must have some experience and/or knowledge of the Indian child's tribe (except for the witness listed in section 232.B10(3)(b) who must be recognized by the child's tribe).<sup>198</sup> The BIA guidelines only say that the expert witnesses listed are presumed qualified; others who do not fit into the four enumerated categories could still be qualified as an expert witness by the court. As stated above, the BIA guidelines also purport that the expert witness should have knowledge of the Indian child's tribe, but they are not necessarily required to do so. Iowa's statute does not aim to limit the qualified expert witness to an extremely narrow subset of people. Section 232.B10(1) lists several people that can be a qualified expert witness: social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, spiritual leader, historian, or elder.<sup>199</sup> The requirement that an expert witness be knowledgeable about the Indian child's tribe or be recognized by the tribe gives the court's decision more stability because it is then less vulnerable to appeals based on challenges of cultural bias.

*In re E.M.* exemplifies how a clause requiring the expert witness to have knowledge of the Indian child's tribe can strengthen the integrity of the justice system. In this case, a two-month-old child had several bone fractures.<sup>200</sup> In an attempt to reverse the trial court, the child's father argued that the expert witnesses were not qualified to testify against him.<sup>201</sup> The appellate court disagreed.<sup>202</sup> One expert witness was a clinical psychologist that had evaluated the father.<sup>203</sup> He testified that the father was a danger to

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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.

*Id.*

198. *Id.*

199. *Id.*

200. *In re England*, 314 Mich. App. 245, 262 (Ct. App. 2016).

201. *Id.*

202. *Id.*

203. *Id.* at 255.

children and that the child, E.M., should not return home. Another expert witness was a member of—and caseworker for—the child’s tribe and opined that the father posed a substantial risk to the child.<sup>204</sup> The caseworker for the tribe was involved at the outset of the proceedings and maintained regular contact with the child’s caseworker throughout the approximately eleven-month-long proceedings.<sup>205</sup> Using this testimony as part of the entire record, the court determined that the father’s rights should be terminated because the expert witnesses were reliable and culturally knowledgeable about the Indian child’s tribe.<sup>206</sup> If the doctor alone had testified, the testimony from expert witnesses would not have been as reliable.

While Iowa’s statute does seem to cure the defects left by D.4(a) of the BIA’s guidelines, it has its drawbacks. The statute is designed to broaden the qualifications for those able to serve as an expert witness, but it is still difficult to find a qualified expert witness that has knowledge of the child’s tribe. Another drawback is that there may not be a need to have a qualified expert witness that has cultural knowledge of the Indian child’s tribe because the issues involved in the case may not be culturally based. Despite these drawbacks, the Iowa statute gets closer to the overall goal of ICWA—which is to protect Indian children from being removed from their homes due to cultural bias.

## 2. Proof of Active Efforts

To supplement the preferred order provision, Minnesota’s ICWA law requires that when a lower preference qualified expert witness is used, active efforts to have obtained higher preference expert witnesses must be shown. The Minnesota Indian Family Preservation Act (MIFPA) lists requirements for proving that the state made diligent efforts to obtain a highly qualified expert witness.<sup>207</sup>

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204. *Id.*

205. *Id.* at 260.

206. *Id.* at 265.

207. MINN. STAT. ANN. § 260.771:

(b) The local social services agency or any other party shall make *diligent efforts* to locate and present to the court a qualified expert witness designated by the Indian child’s tribe. The qualifications of a qualified expert witness designated by the child’s tribe are not subject to a challenge in Indian child custody proceedings.

(c) If a party cannot obtain testimony from a tribally designated qualified expert witness, *the party shall submit to the court the diligent efforts made to obtain a tribally designated qualified expert witness.*



Minnesota has one of the stricter standards about what satisfies diligent efforts to find a qualified expert witness of higher preference. The court requires that diligent efforts to obtain a qualified expert witness of higher preference be proven at various stages.<sup>208</sup> First, the party obtaining the witness must prove to the court that it tried to obtain an expert witness designated by the tribe, and it must prove these efforts by clear and convincing evidence.<sup>209</sup> If no tribally designated expert witness is obtained, the party then has to prove by clear and convincing evidence that it tried to obtain the next highest preference of qualified expert witness.<sup>210</sup> Finally, if even the second-tier preference qualified expert witness was not obtained, the party must prove that diligent efforts were made to obtain one.<sup>211</sup>

Requiring active efforts to obtain the highest order preference of qualified expert witness ensures that cultural bias is avoided. First, it incentivizes the party using the qualified expert witness to obtain the highest-preference witness, who will have the fullest knowledge of the culture and customs of the Indian child's tribe. Another benefit of requiring active efforts is that it preserves the integrity of the court. Under MIFPA, it is clear that the party trying to obtain the qualified expert witness will not

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(d) If clear and convincing evidence establishes that a party's diligent efforts cannot produce testimony from a tribally designated qualified expert witness, the party shall demonstrate to the court that a proposed qualified expert witness is, in descending order of preference:

(1) a member of the child's tribe who is recognized by the Indian child's tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; or

(2) an Indian person from an Indian community who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and contemporary and traditional child-rearing practices of the Indian child's tribe.

If clear and convincing evidence establishes that diligent efforts have been made to obtain a qualified expert witness who meets the criteria in clause (1) or (2), but those efforts have not been successful, a party may use an expert witness, as defined by the Minnesota Rules of Evidence, rule 702, who has substantial experience in providing services to Indian families and who has substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.

*Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

be able to circumvent the law and obtain an expert witness that may be biased against American Indians.

To prove active efforts to obtain the preferred highest order, the party obtaining the expert witness may have to expend considerable time and money to try to find the highest-preference expert witness. If a qualified expert witness in D.4(b)(3) is readily available and one from D.4(b)(1) or (2) is not, the active efforts cause the party to lose time that may be better spent elsewhere.

### *3. Reviewability*

Third, another way that state courts have worked to prevent cultural bias in the court system is to prevent the reviewability of ICWA expert witnesses. Only Minnesota has a provision regarding the reviewability of qualified expert witnesses picked by the tribe. Minnesota's statute reads as follows:

The local social services agency or any other party shall make diligent efforts to locate and present to the court a qualified expert witness designated by the Indian child's tribe. The qualifications of a qualified expert witness designated by the child's tribe are not subject to a challenge in Indian child custody proceedings.<sup>212</sup>

While this provision does not necessarily help promote knowledge of the Indian child's tribe on its face, it does so in practice. First, precluding reviewability of the qualifications of a tribally designated witness prevents cultural bias. A reviewing court will not have the power to overturn a decision made by the tribe. The tribe, which is aware of the Indian child's tribes' customs and culture, is more suited to make the decision about who is a proper witness because it presumably values the protection of its members and understands culture and customs more than another court. Another benefit of precluding reviewability of tribally designated witnesses is that the parents also cannot object to the witness upon appeal. This is often a tactic used by parents, and it can be a waste of the court's resources. Thus, precluding reviewability of tribally designated witnesses both protects parties from cultural bias and saves the court's resources.

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212. MINN. STAT. ANN. § 260.771.

### *B. Other Recommended Solutions*

State Indian Child Welfare Acts do have stricter standards than ICWA itself. These state laws help strengthen ICWA and reduce the chance that a child will be removed from his home because of cultural bias. There are, however, solutions apart from those presented by the states.

Availability of witnesses has plagued parents in several cases. The BIA and tribes already offer resources to help parents locate witnesses. Otherwise, it is difficult to determine what can be done to increase the supply of witnesses available. One solution may be to require tribes to present at least one qualified expert witness for ICWA cases. This solution would help prevent mandatory reversal of cases under 25 U.S.C. § 1914. Mandating that the tribe have an available qualified expert witness would not allow both parties access to an expert witness, unfortunately. Another solution to the availability for expert witnesses may be to require that the tribe pay for some or all of an expert witness's fees. This solution would be especially helpful for parents trying to hire an expert witness to rebut that of the government. Depending on the tribe's funds available, this may not be a feasible solution. Many tribes are impoverished, so the likelihood that these tribes could offer payment to witnesses is slim.

To better protect the interests of the tribe, states could require that the qualified expert witness has specific knowledge of the Indian child's tribe unless the tribe accepts a qualified expert witness without such knowledge. Another measure which may address this issue may be to require that the tribe recognize the expert witness as suitable whether he has knowledge of the child's tribe or not. If no witness can be found that knows enough about the culture of the child's tribe and the facts of the case, multiple witnesses could be presented to complete these needs. Currently, multiple witnesses are allowed to testify; however, cultural proficiency is not required. The guidelines could demand that at least one witness have knowledge of the child's tribe. For example, one witness may have cultural knowledge while another knows of the issue in the particular case before the court. Thus, the two witnesses' testimony should be able to satisfy the ICWA requirements.

In many cases, a medical doctor is one of the qualified expert witnesses, if not the only qualified expert witness. Most doctors have no knowledge of Native American culture.<sup>213</sup> While they are very educated in their fields, they are not necessarily cognizant of a tribe's culture and customs. Sometimes this ignorance is harmless because an injury is so severe or traumatizing that it is clear the child should not return to the parents.

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213. See *In re England*, 314 Mich. App. 245, 261 (Ct. App. 2016).

However, there are other instances in which the Native American medicinal practices may be seen as neglectful because they are untraditional, and it is in these cases that it is dangerous to have a non-Indian doctor be the only expert witness.<sup>214</sup> In cases such as these, another qualified expert witness should be added to supplement the doctor's testimony regarding cultural practices. Such a requirement limits the risk of cultural bias in the testimony for experts like doctors that fall under no category in the guidelines or under D.4(b)(4).

Involving the tribe in the decision to qualify an expert witness is the best way to prevent cultural bias. This solution will involve more time spent, and will perhaps necessitate the proponents of a witness finding a different qualified expert witness if the tribe does not accept their first choice. Time, however, is a resource that can—and should—be spent when the breakup of a family is the issue. Furthermore, if the tribe is made aware of the issue, perhaps the tribe will be willing to find someone that can serve as an expert witness. If the tribe certifies the witness, the court will not need to rule on whether the expert witness has enough knowledge about the tribe; it is presumed that the expert witness does. Thus, a witness is less likely to testify discriminatorily or with unacknowledged bias.

Yet another way to rewrite the guidelines so that cultural bias cannot enter the courtroom is to demand specific experiential and educational requirements. As it is, D.4(b)(3) and (4) use the vague term “substantial” to describe the educational and experiential requirements necessary for the expert witness to be qualified. A witness under D.4(b)(3) must be recognized by the tribe, so cultural bias is less of a concern. Yet, a witness that falls under D.4(b)(4) need not be recognized by the tribe, so defining the terms “substantial” would greatly clarify who satisfies this provision. “Substantial” could be defined in several ways. For example, courts could use a sliding scale for the education and experience requirements. A sliding scale would provide clarity and flexibility. If the person's education is extensive, then the experience need not be as strong. If the experience is extensive, the education can be less expansive. More specificity may be necessary to help appropriately define this category of qualified expert witness. For instance, perhaps it is necessary to say that a witness should have a Bachelor's degree in something related to children or Native American studies and at least five years in experience with children and/or Native Americans. Another example of a specific educational and experiential requirement may be that a witness should have a Master's

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214. See *Topic 14. Expert Witnesses*, *supra* note 84.

degree in something related to children or Native American studies but only have a minimum of two years in experience with children and/or Native Americans. Such a detailed description may create too great of a limit on the availability of witnesses, but it is a valid option to consider for making the court less open to cultural bias.

Besides cultural bias, another issue for ICWA cases is that many courts do not take the difficulty of qualifying an expert witness seriously or see it as a minor problem. Because they see the qualification of an expert witness in ICWA cases as a box to be checked for the continuation of the case, the expert witness's credentials are rarely strictly evaluated or discussed. Little analysis of expert witnesses causes confusion and mystery in future cases facing similar problems. The easiest way to provide clarity would be to publish opinions addressing ICWA expert witnesses. While unpublished opinions can be used as persuasive authority, they are not binding. Furthermore, unpublished opinions tend to be less analytical than published ones, so using them as authority may be difficult. Publishing opinions does take more of the court's time; however, if courts can clarify the qualified expert witness issue in ICWA cases, less appeals on the issue will arise and save the court time in the long run.

The final problem discussed in this Comment is that the BIA guidelines do not require qualified expert witnesses to have knowledge of the specific facts of the case. This could easily be fixed by amending the BIA guidelines and adding a clause that requires the expert witness to have knowledge of the case. Many states already implement this requirement, but if the requirement were listed under the BIA guidelines, all states would be subject to the requirement. Because an unlimited number of ICWA experts may testify in one case, at least one expert witness should have knowledge of the case before the court. To have an expert witness familiar with the case prevents testimony that is incomplete or vague and will better accomplish the goal of providing an expert witness that can give a credible opinion on whether or not the child should be able to return to the parents.

#### *VI. Conclusion*

The question of what credentials a qualified expert witness for ICWA cases should have is a difficult one to answer. The BIA as well as certain states have attempted to address this question, but there is no clear answer. The potential for cultural bias must be balanced with availability of witnesses who know the specific facts of the case. Furthermore, it is difficult to enact meaningful change when many courts treat the issue of

expert witnesses in ICWA cases less seriously than they should. Some states have enacted their own ICWA legislation to give American Indian families protection from cultural bias in the courtroom, and some state courts have ruled that the expert witness must have knowledge of the specific facts of the case. Unfortunately, even these solutions have not explained what credentials an expert witness should have, nor do they entirely protect American Indian children from cultural bias. Cultural bias will likely always lurk in the courtroom because there must be some flexibility in the credentials necessary to be an ICWA expert witness. There are some solutions to address the current problems of cultural bias, but implementation is a difficult path that requires agency amendments, state statute amendments, and legal stamina. Ultimately, there is no answer to what specific credentials an ICWA expert witness should have, and it is up to the BIA, states, and courts to make changes that may extinguish the cultural bias that the ICWA is designed to prevent.