



Topic 14. Expert Witnesses

Disclaimer: A *Practical Guide to the Indian Child Welfare Act* is intended to facilitate compliance with the letter and spirit of ICWA and is intended for educational and informational purposes only. It is not legal advice. You should consult competent legal counsel for legal advice, rather than rely on the *Practical Guide*.

APPLICABLE FEDERAL LAW

25 U.S.C. § 1912. Pending court proceedings

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Disclaimer: The above provisions of the Indian Child Welfare Act are set forth to facilitate consideration of this particular topic. Additional federal, state or tribal law may be applicable. Independent research is necessary to make that determination.

EXPERT WITNESSES

[Applicable Federal Law](#)
[Questions & Answers](#)
[Court Opinions](#)

ICWA TOPICS

1. [Application](#)
2. [Jurisdiction](#)
3. [Who has rights under the Act](#)
4. [Notice](#)
5. [Intervention](#)
6. [Emergency removal](#)
7. [Transfer](#)
8. [Role of tribal courts](#)
9. [Recognition of tribal law](#)
10. [Tribal-state agreements](#)
11. [Foster placement & removal](#)
12. [Active efforts requirement](#)
13. [Termination of parental rights](#)
14. [Expert witnesses](#)
15. [Access to records](#)
16. [Placement](#)

- 14.1 - When is an expert witness required in an ICWA case?
- 14.2 - Who may be qualified as an expert witness under this section?
- 14.3 - What qualifications must a qualified expert witness possess?
- 14.4 - How many experts are required?
- 14.5 - Can the qualifications of an expert be challenged?
- 14.6 - What is the effect of failing to use a qualified expert?
- 14.7 - Does a state social worker qualify as an expert witness?
- 14.8 - Does a tribal social worker qualify as an expert witness?
- 14.9 - Must expert witness testimony be based on direct personal contact with the relevant parties?
- 14.10 - How is expert testimony used in cases involving ICWA and the state law burden of proof?
- 14.11 - How can one locate an expert witness?

14.1 - When is an expert witness required in an ICWA case?

The use of a "qualified expert witness" is required in foster care placements and actions for termination of parental rights. Under 1912(e), the party attempting a foster care placement must prove by clear and convincing evidence, including testimony of a qualified expert witness, that a parent's or Indian custodian's continued custody of the Indian child will result in serious emotional or physical damage. Under 1912(f), the party attempting a termination of parental rights must prove beyond a reasonable doubt, including testimony of a qualified expert witness, that a parent's or Indian custodian's continued custody of the Indian child will result in serious emotional or physical damage.

Courts have also required a qualified expert witness to testify in support of a deviation from the placement preferences under 1915(a) and (b) based upon the extraordinary emotional and physical needs of the child. *In re Baby Girl B.*, 2003 OK CIV APP 24, 56-61, 67 P.2d 359, 370.

[Back to Question List](#)

14.2 - Who may be qualified as an expert witness under this section?

The ICWA does not define the term, but the [BIA Guidelines](#), although non-binding, list three types of experts who would be qualified under the Act. The Guidelines state:

(b) [P]ersons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings: (i) 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 or organization in childrearing practices. (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians and an extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe. (iii) A professional having substantial education and experience in the area of his or her specialty.

Indian Child Custody Proceedings, 44 Fed. Reg. 67,583, 67,593 (Nov. 26, 1979) (guidelines for state courts). Some states, for example Minnesota and Iowa, have enacted more stringent laws or guidelines that an individual must meet to qualify as an expert witness possessing expertise in Indian child-rearing practices. See MINN. DEPT OF HUMAN SERVS., MINNESOTA SOCIAL SERVICES MANUAL, XIII-3586 (1999); IOWA CODE 232B.10 (2000 & Supp. 2004).

[Back to Question List](#)

14.3 - What qualifications must a qualified expert witness possess?

A qualified expert witness must possess expertise beyond the normal social worker. Most courts have required all categories of expert witnesses to have knowledge of and experience with Indian culture "to provide the Court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias." *In re N.L.*, 754 P.2d 863, 867 (Okla. 1988). The term "expert" was intended to include those individuals capable of rendering an opinion on whether an Indian child is suffering emotional or physical harm because of the actions or inactions of the parents or caretaker. Indian family structure and child rearing customs or practices differ and the expert must be qualified with this knowledge. Also, the remedial active efforts to cure the behavior of the parents or caretaker may be different due to cultural differences; for example, where a child's symptoms of illness are being treated by a medicine man, rather than a doctor.

Some state courts have allowed a person to qualify as an expert under the third category in the BIA Guidelines listed above even if he or she has no knowledge of, or experience with, Indian culture. See e.g., *Rachelle S. v. Ariz. Dep't of Econ. Sec.*, 958 P.2d 459 (Ariz. Ct. App. 1998); *In re Tucker*, 710 P.2d 793 (Or. Ct. App. 1985). Those courts justify such holdings on the basis that the given case fails to implicate Indian culture, such as where mental illness is involved, a child was the victim of shaken-baby syndrome, a parent is subject to long-term incarceration, or a child suffered severe physical or sexual abuse where the perpetrator was one or both of the Indian parents. Active efforts to remedy the situation, however, may implicate cultural differences, especially when it is possible for a tribe or family to use traditional Indian ceremonies or other unique cultural means as part of the remedial plan. Such possibilities may be only disclosed if a qualified expert witness testifies. However, there is no provision in the ICWA that requires that Indian culture be implicated before the ICWA becomes applicable and to allow a state court to require a determination that tribal culture is implicated before the Act applies runs contrary to the very assumption underlying the ICWA that state courts are not qualified to make such determinations. 25 U.S.C. 1901(5).

Practice Tip:

The practitioner should contact the tribe or other agencies to identify persons with knowledge about the cultural aspects of tribal life that may assist in determining whether a parent's or Indian custodian's continued custody of the Indian child will result in serious emotional or physical damage. Tribal personnel should offer assistance in identifying qualified personnel in this regard or who may qualify as expert witnesses. State court

judges are encouraged to call the tribal judge to enlist help in securing an expert witness. Having stated that, the tribal court may find it difficult to assist or cooperate with the state proceedings if termination or foster care placement are being considered. However, it is these very issues that the court or tribe should be involved with and provide the requested assistance. In the end, the qualified expert witness should not be called to testify as to the legal meaning of the ICWA, which often occurs. Rather, the testimony should go to whether a parent's or Indian custodian's continued custody of the Indian child will result in serious emotional or physical damage. The practitioner should note that in Minnesota there is an agreement between state and tribal courts on implementation of the ICWA.

[Back to Question List](#)

14.4 - How many experts are required?

Courts have held that a single qualified expert witness can establish the necessary proof. The use of the plural form "expert witnesses" in the ICWA has been held to mean a single qualified expert. See, e.g., *In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986); *In re Baby Boy Doe (Baby Boy Doe II)*, 902 P.2d 477 (Idaho 1995). In specific cases, depending on complexity, more than one expert may be required.

[Back to Question List](#)

14.5 - Can the qualifications of an expert be challenged?

Yes. *In re M.E.M.*, 635 P.2d 1313 (Mont. 1981). Some courts, however, have held that ICWA does not preempt a state's error preservation rules, unless a party has not had an opportunity to object. A party must timely challenge or object to the qualifications of a purported expert witness or a failure to use a qualified expert witness in accordance with local rules. *In re R.L.F.*, 437 N.W.2d 599 (Iowa Ct. App. 1989).

On appeal, appellate courts often utilize a deferential standard, mostly abuse of discretion, in reviewing a trial court's finding that a person is qualified as an expert witness. *In re O.S.*, 2005 SD 86, 701 N.W.2d 421. This may be a question of law, and if so appellate review is governed by a de novo standard; i.e., an appellate court exercising plenary, independent and non-deferential authority when reviewing a trial court's legal ruling.

[Back to Question List](#)

14.6 - What is the effect of failing to use a qualified expert?

The failure to use an expert witness deprives a court of authority to find that the statutory ICWA burden in 1912(e) and (f) has been met, and is grounds for a mandatory reversal under 1914. *In re N.L.*, 754 P.2d 863 (Okla. 1988); *In re M.H.*, 2005 SD 4, 691 N.W.2d 622.

[Back to Question List](#)

14.7 - Does a state social worker qualify as an expert witness?

Yes. So long as the individual possesses expertise beyond the normal social worker qualifications, that is, knowledge of and experience with Indian culture, including Indian childrearing practices. See, e.g., *In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986).

Practice Tip:

Although not prohibited by the ICWA, an employee of the agency seeking foster care placement or termination of parental rights should not be utilized as an expert witness because of conflicts of interests.

[Back to Question List](#)

14.8 - Does a tribal social worker qualify as an expert witness?

Yes. So long as the individual possesses expertise beyond the normal social worker qualifications, that is, knowledge of and experience with Indian culture, including Indian childrearing practices. *In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991); but cf. *In re M.H.*, 2005 SD 4, 691 N.W.2d 622.

Practice Tip:

The practitioner should be aware that a qualified tribal social worker may be used by the state to show there is no need for a qualified expert witness under the ICWA because Indian culture is not implicated (see [FAQ 14.3](#) above) by phrasing questions that can lead to the conclusion that the harmful actions or inactions of the parent(s) are not part of Indian culture. Indian culture should rarely, if ever, be offered as a defense to abuse or harmful actions of Indian parents. The practitioner should be aware that remedial measures to correct such action or inaction does implicate Indian culture which the tribal social worker, as a qualified expert witness, can testify about, especially where such knowledge and experience is critical to the outcome of the case.

[Back to Question List](#)

14.9 - Must expert witness testimony be based on direct personal contact with the relevant parties?

It depends on the jurisdiction where the proceeding occurs. Depending on the circumstances, an expert may testify based solely on the reading of personal files without personal interviews, or more, as a Montana Court found. *In re A.N.*, 2005 MT 19, 325 Mont. 379, 106 P.3d 556.

Practice Tip:

Consider the use of telephonic testimony by an expert witness, especially if the expert is based on an Indian reservation or resources limit physical participation in a proceeding. Any party seeking to utilize the use of telephonic testimony should seek permission of the court prior to the proceeding.

14.10 - How is expert testimony used in cases involving ICWA and the state law burden of proof?

Some states apply a dual burden of proof. In a foster care placement, the court will use the applicable state burden of proof to determine if the state factors have been met to place the Indian child in foster care. Then, under 1912(e), it will use the higher ICWA "clear and convincing" 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." Among other things, the BIA ICWA Guidelines make it clear that socio-economic conditions are not to be considered. [Indian Child Custody Proceedings](#), 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979) (guidelines for state courts).

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 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.

States following dual burden of proof; 1912(e); Foster Care

California, [In re Bridget R.](#), 49 Cal. Rptr. 2d 507 (Ct. App. 1996)
New York, [In re Oscar C., Jr. \(Oscar II\)](#), 600 N.Y.S.2d 957 (App. Div. 1993)
Washington, [In re Mahaney](#), 51 P.3d 776 (Wash. 2002).

State following only ICWA burden of proof; 1912(e); Foster Care

Oklahoma, [Uniform Jury Instructions](#), 2005 OK 12, 116 P.3d 119 (juvenile cases).

States following dual burden of proof; 1912(f); Termination of Parental Rights

Alaska, [C.J. v. State](#), 18 P.3d 1214 (Alaska 2001)
California, [In re Matthew Z.](#), 95 Cal. Rptr. 2d 343 (Ct. App. 2000) (certified for partial publication).
Kansas, [In re A.P.](#), 961 P.2d 706 (Kan. Ct. App. 1998)
Maine, [In re Denise F.](#), 658 A.2d 1070 (Me. 1995)
Michigan, [In re Dougherty](#), 599 N.W.2d 772 (Mich. Ct. App. 1999)
North Carolina, [In re Williams](#), 563 S.E.2d 202 (N.C. Ct. App. 2002)
North Dakota, [In re M.S.](#), 2001 ND 68, 624 N.W.2d 678
South Dakota, [In re N.S.](#), 474 N.W.2d 96 (S.D. 1991)
Utah, [In re S.A.E.](#), 912 P.2d 1002 (Utah Ct. App. 1996)
Washington, [In re Roberts](#), 732 P.2d 528 (Wash. Ct. App. 1987)

Wisconsin, *In re Daniel R.S.*, 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269.

States following only ICWA burden of proof; 1912(f); Termination of Parental Rights

Nebraska, NEB. REV. STAT. 43-1505(5)-(6) (1987)

New Mexico, *In re Laurie R.*, 760 P.2d 1295 (N.M. Ct. App. 1988)

Oklahoma, *Uniform Jury Instructions*, 2005 OK 12, 116 P.3d 119 (juvenile cases)

Texas, *In re W.D.H., III*, 43 S.W.3d 30 (Tex. App. 2001).

Practice Tip:

If the ICWA burden has not been met, even where a court uses a dual burden of proof and only the state burden is met, the petition for placement in foster care or termination of parental rights must be denied.

[Back to Question List](#)

14.11 - How can one locate an expert witness?

The best resource is the tribe involved in the child custody proceeding because it will generally have the personnel or know of tribal members who can speak to the issue of tribal-specific social and cultural norms and practices, including family organization and tribal childrearing practices. *In re O.S.*, 2005 SD 86, 701 N.W.2d 421. Another resource is the Bureau of Indian Affairs' (BIA) case worker or social worker. They frequently work in tandem with local tribal ICWA programs or tribal social services departments. In addition, the [list of BIA and tribal and urban organizations](#), provided in the Resource Section of this Guide, is a useful starting point to identify an expert because an organization may have a referral system leading to an expert. It includes national Indian organizations and urban Indian organizations. In addition, a practitioner should consider social workers employed by Indian Health Services hospitals or clinics, treatment facilities and Native American Rehabilitation Association clinics. Lastly, tribal courts can also help locate an expert witness.

[Back to Question List](#)

[Hours & Location](#) | [Contact Us](#)

[DISCLAIMER](#) | [PRIVACY STATEMENT](#) | [NARF](#)