Indian Child Welfare Act: Legal Update Webinar June 4, 2024

Slide 1

Ann Gilmour: Hi, good afternoon everyone. We know that people are slowly joining. My name is Ann Gilmour. I'm an attorney in the Tribal State programs unit at the Judicial Council of California. And we're very pleased today to present this ICWA - Indian Child Welfare Act legal update webinar. Our panelists today are Judge Shauna Schwartz, supervising judge of the Juvenile Dependency Court in Santa Clara County, and Judge Dean Stout, who currently sits as the chief judge for the Bishop Paiute Tribal Court and was for many years the supervising judge of the Inyo County Superior Court.

Ann Gilmour: Just by way of housekeeping. You will all be muted throughout the presentation today. But I'll be monitoring the chat and the questions. So, if you have any questions, you can put them there, and we'll get to them as we can if time permits, and if not, we'll do our best to answer any questions after afterwards and get those out to you.

Ann Gilmour: If you want MCLE, or other education credits, you will receive an email from my colleague, Amanda Morris, following the presentation, and you need to follow her instructions in order to get those credits. And now I will turn it over to our esteemed panelists.

Slide 2

Judge Dean Stout: Good afternoon I am Judge Stout, and we're going to embark here on a very quick and perhaps oversimplified discussion of the Brackeen case. The emphasis will be a little bit on the tribal perspective, or the pro-ICWA perspective, and perhaps, of course, some bias of a State Court judge turned a tribal court judge. The Brakeen…

Judge Shawna Schwarz: Sorry. I'm sorry to interrupt. Do you want to go over the agenda and the… or do you want me to do that before you jump into Brackeen?

Judge Dean Stout: Oh, why don't you go ahead? Thank you. I'm sorry.

Judge Shawna Schwarz: Okay. So just to give everybody a roadmap, we're going to talk about Brackeen v. Haaland. Then we'll talk about the ICWA appeals and update on that, strategies to avoid appeals which I think we would all like. We'll talk about discretionary tribal participation and the rules about that. There's a new rule. And then also the tribal dependency representation program. So that's sort of the roadmap for today.

Slide 3

Judge Shawna Schwarz: And then in terms of objectives. We want you to be able to describe the outcome of Brackeen v Haaland, discuss the main points of the ICWA appeals, describe the steps to take to avoid appeals, describe the new rules regarding discretionary participation, and then just have a good understanding of the tribal dependency representation program. And with that we'll jump into Brackeen. So sorry about that, Judge Stout. Go ahead.

Slide 4

Judge Dean Stout: Thank you very much.

Judge Dean Stout: The Brackeen decision was a facial challenge to the constitutionality of the 1978 Federal Indian Child Welfare act, or I'll refer to it as ICWA. It was a case out of Texas. The Brackeen family who are anglo adopted an Indian boy and girl with Cherokee and Navajo parents. The States of Texas, Louisiana, and Indiana were also plaintiffs. Plaintiffs argued that the white adoptive parents are being discriminated against on the basis of race due to the ICWA placement preferences. On June 15th of last year and a 7 to 2 decision the US. Supreme Court held that ICWA was, in fact, constitutional.
Slide 5

Judge Dean Stout: Some of the issues and outcomes. First, the Court held that ICWA was not beyond the scope of Congressional authority to regulate commerce with the Indian tribe. They also held that ICWA does not unlawfully commandeer State resources - Courts and agencies to implement Federal law and policy, largely because it applies equally to private and public agencies. As an aside here, I think we need to remember that the provisions of ICWA apply, in other case types besides dependency, including probate guardianships, family law and adoption.

Judge Dean Stout: The significant issue from a tribal perspective in the Brackeen case was whether the Indian Child Welfare Act violates equal protection and the non-delegation doctrine of the 10th Amendment. More specifically, the question was, do the ICWA placement preferences violate equal protection? And this was, I think - this issue posed the most concern, and perhaps, as we'll discuss, still does present the most concern to pro-ICWA proponents or tribes. The specific issue really is, is the definition of Indian child as defined in ICWA racial rather than political, thereby in violation of the equal protection clause? The plaintiffs argue that the hierarchical placement preferences suggest that it is, in fact, racial. They point out the placement with non-native or anglo families is the last preference. Their legal argument really focuses on the 3rd preference for adoptive placement, and that is with quote another Indian family. And does not necessarily - that family does not necessarily have to be a family of the child's tribe or a family who resides on the child's reservation. Therefore, they're arguing that it could just be any other Native American family that indicates is racial and not political and I won't drill into the weeds on, some of the proposed answers to that. But there are many discussions out there about if that argument has any traction in the future, there are some quick remedies to that including amending the act to provide that the other Indian family is one that is approved by the child's tribe.

There's also recognition that for good cause the State Court can deviate from placement preferences, and the act provides that the tribe can alter the preferences, for example, by resolution. They could find that another Indian family is the 1st preference but that goes to the heart of the plaintiffs non-delegation argument being whether ICWA violates the non-delegation doctrine by allowing tribes to alter statutory placement preferences.

The court held that none of the parties before the court had standing to raise the non-delegation and equal protection issues. So, the court did not reach the merits of those contentions.

If you're wondering the Brackeen were able to finalize their adoption the Navajo family and nation withdrew their opposition, so their lack of standing turned on completion of their adoption. The key argument of the plaintiffs is that again, it was race based, and therefore requiring strict scrutiny standard as opposed to being a remedial statute between sovereign nations citizens of federally recognized tribes.

Of course, the plaintiffs argued. It was unfair to nonnative American white families wishing to adopt Indian children. From a tribal perspective there was a very strong undertone of colonization and assimilation efforts that had given rise to Congress enacting ICWA as a remedial statute.

The plaintiffs argue, children have horrible lives, Native American communities are fundamentally flawed and so forth, and that the ICWA -- getting rid of ICWA would save native American children. Again, from a tribal perspective instead of talking about, for example, poverty, pro-ICWA supporters would rather discuss the failure of the Federal Government to keep its promises to promote tribal sovereignty and self-sufficiency. They don't want to make the Government's failure reason to threaten tribal sovereignty.

Slide 6 - Brackeen v. Haaland: What's Next?

So, what's next? While the court held the parties did not have standing to raise equal protection, in his brief concurring opinion Justice Kavanaugh expressed the view that the equal protection issue is serious. He stated that under the act a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child's race even if placement is otherwise determined to be in the child's best interest. Justice Kavanaugh provided an example of a party who would have standing, that being by a prospective foster, or adoptive parent or child in a case arising out of a State court, foster care or adoption proceeding. Again, Justice Kavanaugh appears to be siding with the race-based argument as opposed to remedial statute between sovereigns. Justice Kavanaugh also appears to believe that best interest standards is applicable under ICWA. And of course, States have traditionally in family law matters applied a best interest standard, but it was argued that the best interest test really does not apply, and some analogies to Hague Convention that may dictate placement at the State Court might not believe to be in the best interest of the child.

Judge Dean Stout: Scholars, including one of the law professors who argued the case on behalf of the tribe, believe there's room for tribal optimism. Believing that Justice Kavanaugh may be in a very small minority on the equal protection issue in part because Justice Alito did not join in Justice Kavanaugh's concurring opinion. And they also believe that the majority of the justices recognize that if the act were declared unconstitutional on equal protection grounds that about 200 years of Federal Indian law would have to be re-examined. But time will tell. Justice Schwartz – Judge Schwartz.

Judge Shawna Schwarz: Thank you.

Judge Dean Stout: Promoted you.

Slide 7 – Initial Inquiry

Judge Shawna Schwarz: I'm not sure that's a good thing. Okay, I'm going to do a quick overview of you know what the what the process looks like now, and I know many of you have seen this. So, I'm not going to spend a lot of time on it. But just to kind of give us. You know, a starting place. As you all know, the law changed in January of 2019, as a result of AB 3176. And now we have to do an initial inquiry. There's a further inquiry, and only after kind of all of that inquiry. Do we actually get to notice. You'll remember, before January 2,019, it was all about notice. It was all about sending reams of paper to the tribes. You know, to try to figure out if the child was an Indian child.

Now, what happens is we have a child who may be experiencing abuse or neglect. Social worker comes in and investigates the referral, and the social worker upfront is supposed to inquire of the parents, guardians, extended family members, person who reported the abuse, and the Indian custodian. There's some question about under what circumstances the social worker needs to do that kind of inquiry which we'll talk about a little bit later. Once the social worker files a petition, and you show up in court at the initial hearing, the court has a lot of information to start with. First of all however, the court has the report from the social worker, but then the judge has to inquire of all of the participants and direct the participants to tell us in the future if they have additional information. So, the judge takes all of this information and then makes some findings. Either there's no reason to believe the child is an Indian child, there's reason to believe there's reason to know, and this is a known Indian child.

Judge Shawna Schwarz: I don't know about you all, but in our county, we have a lot of reason to believe. So. What happens as a result of this is, if the child. If you have a reason to know, or the child is a known Indian child, then ICWA applies, and then we jump to formal notice. You treat the child as an Indian child. If there's reason to believe which is a lot of the cases, then the Department has to do further inquiry. And that's supposed to be as soon as practicable.

Judge Shawna Schwarz: Now, if based on further inquiry, there's reason to know. Then we're back to ICWA applies. The reality, though -- and if there's no reason to know, after there's adequate investigation, inquiry, and due diligence, then the court can say ICWA does not apply. I think what's interesting is that even at the initial hearing, when we're finding no reason to believe it doesn't stop there. I will typically find there's no reason to believe and still order, that the Department engage in further inquiry, because I only have before me a limited number of people, and the Department has to then go out and talk to all these other relatives. So that, again, is a very quick overview of what the process looks like.

Judge Shawna Schwarz: You know. One of the questions is, I mean, this initial inquiry can be ongoing for a long time. Right? It's not just at the initial hearing. The initial inquiry can be the 1st time that that the social worker has spoken to a particular relative. So, we're seeing tons of appeals. That have to do with this inquiry issue. So, when I say tons of appeals, well, what do I mean? Well, so here the numbers.

Slide 8 – Appeals Update: Numbers

Judge Shawna Schwarz: Back in 2020, which we hadn't quite gotten the hang of things yet. 11 published decisions, but a total of 186. In 2021 that jumped up. Not too much. Just to 205 total. 2022 was a banner year for those folks working in the appellate courts. 574 total cases, 40 of which were reported. And if you were trying to keep track of those, you will remember. That was a pretty tough year, because it was not quite weekly, but it was almost every week and a half. There would be a new ICWA case. Then we get to 2023, and we see over 600 total cases, but only 16 of them published. And then here we are in 2024. I thought we had a total of about 195, I think, Ann thought 175, but you can see we're close to 200. 4 have been reported. If we stay on track with this, we're looking at a total of 475 cases. So, it's less than it used to be, but it's you know, it's coming down a little bit, but it it's still way more than it used to be in the in the old days.

Slide 9 – How Many "Reversals" ID Indian Children?

Judge Shawna Schwarz: So you know, I actually emailed judges across the State with a query, over the weekend. And I said, look when you get a case, kick back to you, and remember, like sometimes, the Appellate court is not saying you're reverse. Sometimes the Appellate court says, I affirm, but with directions, or I affirm, but remand right? So the question is, is the case moving forward, or are they sending it back to you to fix ICWA. And so that's what I'm referring to as a reversal kind of in quotes. So, I sent this out to judges around the State and said, How many times, when a case has come back to you, did you end up discovering that yes, indeed the child was an Indian child? You can probably guess the numbers, basically, every single judge responded 0, except there was one outlier case in Los Angeles County that wasn't entirely responsive to the question but a little borderline. So these reversals that we're seeing are not resulting in us discovering Indian children. And I'm not saying that to say that we shouldn't do our jobs properly. But just as an argument why, we need to be doing it better upfront, because so that we don't have these reversals. And I'm going to circle back to this. When we talk about some case law in just a moment.

Slide 10 -Appeals Update: Main Questions

Judge Shawna Schwarz: In terms of the main questions raised by the appeals, and some of you, if you attended this last year, you see that the same, the first four are the same, but then there's a fifth. So first of all, can the court cure a failure of initial inquiry by doing a proper later inquiry? Secondly, once it is appealed. Can you actually supplement the record with post appellate evidence? So that information that comes in after the appeal is filed? When you get to the appeal? Does the parent actually have to claim that they have heritage? I mean, because sometimes a parent will appeal, and they're not even saying they're an Indian child. They're just, or that they're they have Indian heritage. But instead, they're saying, Hey, they didn't ask properly, or they didn't ask at all. And then how do you? How do you know what's the standard? So when there is an inquiry that is not done properly like, is it reversible per se? I mean, what's the rule that the Appellate Court should use? And then we have another issue that has come up in the last year, that if you've been following the case law. You've noticed this, and we'll talk

about this in just a moment. The duty to do that initial inquiry of the extended relatives. Does that depend on the mechanism used to remove the child? So we'll take so just so, you know, here are the answers to the first one. Can you cure it? Yes, that is the easiest one supplementing the record. There's a split and opinion. Needing a claim of evidence or evidence. So heritage on appeal. There's a split. Failure to ask reversible per se. There's a big split and we'll come back to that. And then about the mechanism of removal, and whether that kind of determines whether the social worker has to do the inquiry of extended relatives, big split on that one, too.

Slide 11 – Appeals Update: Failure of Initial Inquiry

Judge Shawna Schwarz: So we'll go over the first four kind of quickly, cause again. We did these last year, but just as a reminder. So can you cure the failure of initial inquiry by later inquiry? And basically, the answer is, yes, I mean, we have an ongoing continuing duty to ask. The appellate courts have pretty much said the claim is not ripe. If you appeal too early. We're talking about ongoing obligations that are not yet satisfied. But why should the Appellate Court order something when it's already required? So I think most of the ICWA cases that are problematic are at the .26 level. We see those appeals up at disposition, but we have time to fix it at disposition. But a lot of appeals at the .26 level.

Slide 12 – Appeals Update: Supplement Record

Judge Shawna Schwarz: Second question is, can you supplement the record? So this is what happens when you know there's an appeal based on ICWA. Usually it's because of some inquiry issue. And after the appeal is filed, or even after the court makes a decision at a .26. Hearing. Then the department tries to fix the problem, or they go on, and they do additional inquiry. So can we tell the appellate courts that? Like, wait, wait, wait! I know we screwed up to start, but now we've fixed it. Well again split of opinion. And those folks who say yes, like, just let us fix it, cite the incredible delays that happen as a result of all of these appeals. Those folks who say No, you should not be able to provide post appellate evidence. Remind us that CCP 909 is supposed to be used sparingly. You're supposed to have exceptional circumstances in order to supplement an appellate record. And we're not special just because we're in juvenile dependency. So we don't have some blanket exception for that and also there has to be a stipulation to a conditional reversal. So again, split of opinion regarding this issue.

Slide 13 – Appeals Update: Evidence of Heritage

Judge Shawna Schwarz: The next appellate issue that we're seeing a lot of times is, what about? So when the family appeals, and it's usually the parents who file an ICWA appeal. Do they even have to say like, hey, I have ICWA heritage, and they didn't even ask? Or is it okay that they do not have to mention it? Well, there -- this is a split and a couple of cases -- a couple of appellate districts say, that, yes, they have to. The parents have to actually come to the appellant and say, not only did they not ask, but had they asked, I would have been able to tell them that yes, I have this heritage. So the ones that say yes, basically say, look, it's a very low hurdle for the parents. If there's no claim in the juvenile court, or the opening brief, or the reply brief and in this particular case that said that yes, the parents that they have to provide this information. Parents denied unequivocally that they were ICWA, but they were in touch with extended

family, and they were not likely, unknowing members of a tribe. Whereas the other side says, no, you cannot supplement, or the parents don't have to make this claim. They say no, the parents have no affirmative duty to make any sort of factual rep assertion on appeal regarding ICWA compliance that is not supported with citations already before the Appellate Court. So far there's a split. We have a kind of a table that we've put together that tells you which districts say what.

Slide 14 – Appeals Update: Failure to Inquire

Judge Shawna Schwarz: So I went through those a little bit quickly, because I think the next two are really the bigger issues in terms of appellate issues. And this is the one where, okay. The inquiry was not done properly. Either there was a failure to ask extended family, or it wasn't done well. And so most of the appeals have to do with the failure of the inquiry, and the most common problem is not even asking available extended family members. They're there, and the court or the social worker does not even ask. Everybody agrees it's required that they be asked. So, the split of opinion here is not a split about whether it's required. The split is what's the consequence of that failure?

Slide 15 – Appeals Update: Failure to Inquire

Judge Shawna Schwarz: And some of you may have seen this little kind of chart I put together where basically, what's happening is our appellate courts have four different tests to approach, whether evaluating the error is prejudicial or not. At one end is a presumptive affirmance rule that says, look, even if there's not an inquiry, the error is harmless unless the parents actually assert Indian ancestry on appeal. So that would be the appellate court that said yes, the parents should have to assert heritage on appeal. The other end, it says, is the automatic reversal rule. Says reversal is required like, if you screw up this inquiry, then automatically, you get reversed. Both of those are kind of some the extremes. And so, since then we've had two other rules that have been propagated. The first is the reason to believe rule, which basically says, and it's closer to the harmless error, right? The presumptive affirmance is like a harmless error rule. But the reason to believe rule, says the defect is harmless unless the record actually has information that suggests reason to believe that would make the absence of that further inquiry prejudicial. So that's the reason to believe rule. So, you'd think that would be enough. But then there is another rule called the readily obtainable information rule. And actually, I think this one came up before the reason to believe rule. And the readily obtainable information rule says it's harmless error, unless the record actually indicates there was readily obtainable information that bears meaningfully on whether the child is an Indian child. So here are some of the cases that that fall into each of these tests. And here's some of the districts, although I haven't kept up on that. Some of you may have listened to Dezi this morning. And we'll come back and talk about Dezi. C. Dezi C. is looking at the reason to believe rule.

Slide 15 – (Map of Appellate Districts following which rule)

Judge Shawna Schwarz: In case you're wondering like where your county or appellate court rule, you know, falls in. This is here. Here's a map where I've kind of plotted kind of who is doing what? Again, because we heard Dezi C. today, perhaps we'll have an indication soon of

which of these is the way to go in the future. But again, just in case you're wondering, this is what some of the counties and districts have done and some of them use different rules. So.

Slide 15 – Appeals Update: Removal Mechanism

Judge Shawna Schwarz: Okay, but this is sort of the fun one. This is the newest issue that's come up in the last year. And this is basically about the removal mechanism. So this talks about the social workers' obligation to speak to relatives, and whether that depends on the mechanism by which the child was removed. So 224.2 (b) basically distinguishes between two kinds of removals 306, which is the emergency removal by a social worker. Social worker is out there in the field makes a determination and removes the child. And then 340, and obviously these are Welfare and Institutions Code, is removal via protective custody warrant. Where the social worker submits the information to the court the court signs a PC warrant. So these are sort of the two camps.

Slide 16 – Appeals Update: Removal Mechanism

Judge Shawna Schwarz: And here here's what's been happening over the last year, which has been sort of interesting to watch. So we've got the two positions. First is the expanded duty of the initial inquiry, so that social worker, having to ask all those relatives and all those folks upfront. This camp says it applies only if the child was removed by the social worker under 306. So it does not count if it was a warrant. The second camp says, no, no, that extended expanded duty of initial inquiry applies to any child removed. It doesn't matter the mechanism. So this has been kind of the fun part is watching kind of what's happening here. Robert F. came out, and basically, that was the first case that mentioned it, although I think it referred to an Adrian L. concurring opinion. So Robert F. -- and I put down, and I know these aren't the right designations - but 4th District Court of Appeal, second division. Robert F. said you don't even have to do all that stuff in advance, or the social worker doesn't, if it's done by a warrant. So Robert F. That's what Robert F. said, and Ja O. says that's right. You don't have to. And look at who's doing this. Also 4th District Division two. Then some other folks in the Fourth district came back, said, nuh uh - Delilah D. Said, no, this applies to everybody, not just removals by the social worker. Well, 4th District came back with Andres R. saying, Yes, it is, you know, it's you don't have to do all of that stuff. And I would recommend kind of reading some of these decisions. So you can see the thought process there. Well then, we have other counties and other districts weighing in and in re. V.C. the first district division two sided with the Delilah D. court, saying, it applies all across the board. Then we've got the fifth district, Jerry R. agreed. And then we've got C.L.. The third district also agreed. And then L.B. the first district division four. So now we've got five against three. Oh, and then Samantha F. against. Again, fourth district, division two. Oh, and then D.M. came out literally earlier this month. So if you notice, we're looking at a fourth district division two that has an inter-district and inter-division intra-division split of opinion.

Slide 17 – Update: Split Re Inquiry of Extended Relatives

Judge Shawna Schwarz: So again, if you, want to you know, here's the question, does that inquiry of extended relatives apply to all kids, even if they're removed by warrant? And if

you're wondering kind of what the different Districts are saying. The first district, the third district and the fifth district have all weighed in, and they say, yes, it applies to all kids. The sixth district, no published decisions about this yet. Second district, no publish decisions. The fourth district is where it's all happening, right? The so fourth district division 3, which is just Orange County, no publish decisions. But then, if you look at the also the fourth district, division, one San Diego Imperial County, no decisions. But it's the fourth district division two, where we have this big split and this is where we've got Robert F., Ja O. Andres, R. and D.M. saying, No, you don't have to do all of that expanded inquiry, if it's removal by warrant, and you've got 2, 2, 2 cases basically saying, yes, it applies to all kids. So this is sort of the biggest split and kind of a big issue that is now kind of facing us.

Slide 18 – Appeals Update: Another New Case

Judge Shawna Schwarz: So I want to mention one other case. So H.A. v. Superior Court, and if you have not read this, I would really recommend that you do. And I don't mean to call out anybody specifically. But the appellate court does. The appellate court says, this matter is one of many we receive particularly from San Joaquin County, complaining of a lack of compliance with the ICWA require the inquiry requirements of ICWA. So I think it's safe to say that the 3rd district is a little bit frustrated, and if you read this decision, and I really think you ought to, because it's quite informative. Basically, they're saying again, this is one of the many cases we're receiving, complaining of a lack of compliance. And then I put this quote in here. We publish this decision to clarify our expectations of counsel and the Juvenile Court to -- and these the bold is my own bold -- to put an end to the delays caused by these repetitive writ petitions and appeals. And in this particular case, basically, the parents did the ICWA form saying, no, we don't have anything. So the agency and the court were like, I guess we're done, because the parents said no ICWA on their ICWA-020, this case makes clear that completion of the ICWA-020 form does not excuse the agency or the court from doing its own inquiry. So you'll remember back when I had that flow chart to start with, and I said, no reason to believe, just because you're in court, and the parents say, no, we're not Indian, and they fill out the ICWA-020, and they say no, no, ICWA heritage. That's not enough like you cannot stop there.

Slide 19 – Appeals Update: H.A. v. Superior Court

Judge Shawna Schwarz: So I want to tell you, though what else the H.A. court says… and that is, and again, I'm going to have a lot of words on this next screen, just because I want to make clear kind of their position. And this is a quote from them:

> Finally, because we have received an inordinate number of cases arguing inadequacy of the ICWA inquiry based on the agency failure to inquire about possible Indian, heritage from relatives, and have remanded many such cases for correction of ICWA error, we are compelled to comment upon the omissions of both the parties and the Juvenile Court and to provide some direction all involved in these dependency matters.

So basically, this, this appellate court is telling us. Here's your job. Here's what you have to do, and it's a very short opinion, very worth reading, and I'd recommend that you read it. But it's really great guidance. And what they tell us is okay, counsel for parents and minors, you need to

raise the adequacy of the inquiry, the ICWA inquiry to the Juvenile Court. So this 3rd District Court is saying you know you keep appealing to us. But we're like, did you even tell the Juvenile Court like you that there's that whole idea of you like you cannot sit idly by. So we don't use a forfeiture rule very often in Dependency Court, but it's not an invitation to sit idly by like parents counsel, kids counsel, you need to bring this up to the Juvenile Court, so the Juvenile Court can fix it. You have an obligation to bring the ICWA issues to the court's attention. And then for the court, you need to timely perform your duties and make your findings about applicability. So that means you'd have to do a meaningful ICWA analysis on the record and engage in meaningful consideration. So this whole, like adopting recommendations without comment is not enough. The Appellate Court is telling us there should be discussion about this. This should not be a rubber stamp like court, you need to ask, and you need to not only ask the folks in your court, but you have to ask folks of the in your courtroom, the attorneys and the social workers about this ICWA analysis. And then the agency and yes, there's a, you know rule that, you know, look, you don't have to cast about trying to find ICWA heritage, but you do have an affirmative and continuing duty to inquire of all of those relatives. And once you inquire, document it, put it in the reports and put in the reports kind of the efforts you made to locate folks. What happened when you interviewed. What did they say? So, when you have that grandparent who's saying I'm not going to tell you anything, or a parent saying I refuse to give you contact information for my relative that I think is an Indian child. Or that, I think may have Indian heritage put that in the report so that the court can see that. And if there's an appeal, then the Appellate Court sees it. So, the Appellate Court is telling the agency. You need to diligently discharge your duty like just because you think like. Oh, this family is not an Indian family. I know that. That's not enough. Your unsupported opinion is not enough. You need to diligently discharge your duty. And, by the way, I know there's an appellate court case that came out last year that that made it sound like this should be easy, like, what's so hard about this? I mean, come on, agency. You're already talking to relatives, anyway. Just ask about the ICWA issue. But that's not the case. Right? We know it's hard. But it you're not excused from duty from your duty to do that. Based on your unsupported opinion.

Slide 20 – Appeals Update: Issues Before Supreme Court

Judge Shawna Schwarz: So that takes us to what are the issues before the Appellate Court. So, there are. I'm sorry before the Supreme Court. So, there are kind of three of these issues before the Supreme Court fist is Dezi C., and that was, I think it's supposed to be a “zi” sorry about that which again, as a reminder how to assess error when the agency fails to do the proper inquiry. Some of you may have even listened to the argument this morning. I was not able to, as I was on the record, but I did hear from folks who did listen to that. And Ann from the Ann Gilmour from Judicial Council, says, in her opinion the question seems to be working to find something between structural error, automatic reversal standard being argued by Mom and the harmless error standard. So, arguing in between. They did note the trial courts, finding that the inquiry was adequate, and did not give rise to reason to know or believe. That that's discretionary, and it's entitled some deference, and that trial courts should be making a record again of what was done and why. So, we should see a Dezi C. decision hopefully sometime soon. The other issue, that is before the Appellate Court [Supreme Court] right now is Kenneth D. And that's about taking additional evidence to remedy those errors. So hopefully, we'll get a decision about that. And then also Ja O., which is about that's the whole split in the 4th District

Division two. When does the extended the inquiry of the extended relatives apply? Is it removal by PC Warrant, does it apply, then, or only if removal by the social worker? So, kind of some interesting cases and interesting issues up before the Supreme Court.

Judge Shawna Schwarz: I want to shift gears now. So okay, we're having all these appeals. We have all this case law we have a lot of frustration, I think, on many fronts about the fact that the change in the law in 2019 was supposed to streamline this. And yet we've seen appeals. Skyrocket.

Slide 21 – Strategies to Avoid ICWA Appeals

Judge Shawna Schwarz: So how do we avoid appeals? Well, we avoid appeals by doing it right? Obviously. But how do we… how do we do it right? Well, let's look at the Ezekiel G. case. And basically that case says, because early identification of Indian children is critical to the proper implementation of ICWA. And this is going to be key. The statute is… it has to be interpreted in a way that requires all participants -- the agencies, parents, all counsel, and the juvenile courts to work together to determine whether children are Indian children. So it's not just the court. It's not just the agency. Yes, we have the main role. But everybody in the court has a role to play when it comes to doing ICWA right. So how? Like what do you do to do ICWA right?

Slide 22 – Strategies to Avoid ICWA Appeals

Judge Shawna Schwarz: Well, here are some my suggestions about things we could probably do better. For the court, I think it's important to create an environment where there's an expectation that all justice partners take responsibility. Refer to Ezekiel. G. Refer to H.A. Everybody has a role here, and that means also, though you have to know who's in your courtroom right? And you have to have a way to know who's in your courtroom, and to be informed of the names and the relationships. So in Santa Clara County we have sort of a Google whiteboard thing where we set it up every day, about which cases are going to be on calendar and counsel have an obligation to write in there like, who is here? Is it maternal aunt or paternal aunt, and their names, and that matters maternal versus paternal, especially when it comes to ICWA. So create this environment where everybody has an obligation and a responsibility. Know who's in your courtroom. Now that can depend on the size of your county. Obviously, I mean, if you've got a busy calendar and you've got 15 matters on, you have to have a very organized way to know that. If you're a small county, maybe it's a little bit easier if you have small calendars. Also don't forget, Judge, you need to ask the people in your courtroom, and that means ask the participants. Participants is not defined under the law. But you need to ask those folks who are in your courtroom, and then you have to have a way to track it. And I think this can be a challenging part. How do you keep track of who told you what? Yeah, do you have a case management system that you're using? But importantly, and this is kind of a new one for me that I we need to do better at. The minute orders should reflect who you asked and what they answered. And then, so I just learned preparing for this LA County. Go LA County. You all have a local rule. That requires counsel to participate in this process. So I'd check out that local rule, and see if that's something that your county can also do. If your counsel, here's what I'd suggest.

When you have party, if you're whether your child's counsel or parents counsel. If your clients relatives are there, ask them. Like you can ask those folks also, and then let the court know. You need to be able to communicate to the court who's in the courtroom, and this goes back to my suggestion that you have some mechanism to inform the court of who's there. And that means names not just shouting out names from the back of the courtroom. There should be some organized way to make it easy for our clerks to track this information, and then I would also recommend counsel. I mean, tell the judge, remind us that you know my clients, mother or father or aunt, has ICWA information to share. And that means, judge, you need to be open to counsel, reminding you that. Oh, maybe you forgot this, or for them to kind of trigger you to, to do your inquiry. Like you have to be okay with that. And counsel you have to be okay letting us know that you have this information. For the Child Welfare Agency. Don't forget you've got to ask relatives, but also nonrelated extended family members. And then, remember, beware that parent who does not appear in court. They still have to be asked. So sometimes it's easy to forget about that person, or you do all that work upfront, and then you have a parent appearing late. All of us need to remember to ask that person, and -- this goes back to the judge, though -- you should have a way of tracking who got asked, and who is and who has not been asked. Don't forget to ask relatives with whom the child lives. I think there's at least one case where the department place the child with a relative but neglected to ask to ask that relative. And then document the information, make sure you document it and then provide that information to the court. I'm going to shift this back now to Judge Stout, who's going to talk to you about discretionary tribal participation.

Slide 23 – Discretionary Tribal Participation: New Rule

Judge Dean Stout: Thank you, Judge Schwartz, and I think really, we have got to keep in mind the bottom line and all that is avoiding a delay in permanency for the child. And I think that's a focus that we all need to have as we try to create that environment where everybody has that affirmative and continuing duty and one other technique that I've seen in Sacramento County is basically at every hearing there's a separate calendar line for ICWA compliance, and the department submits a separate report updating and documenting inquiry and notice under ICWA.

Judge Dean Stout: So, turning to discretionary tribal participation, this is a discussion about the juvenile courts authority to - through the exercise of its discretion, to allow tribes to participate in otherwise confidential proceedings. When the Indian Child Welfare Act does not apply. I'm going to highlight a few common situations, but I commend to you Ann Gilmour's ICWA information sheet on this subject. I think it's in your handouts, and very well done. And I think, as we delve into this subject, keep in mind the importance of proper ICWA inquiry and notice in child welfare and juvenile justice cases.

Judge Dean Stout: The common situation is a dependency case where the child's tribe is not federally recognized. So, the child's not viewed as an Indian child within the meaning of ICWA. Again, as the tribe is not federally recognized. In such a case, section 306.6 subdivision a applies, and the court may permit the tribe from which the child is descended to participate in the proceeding upon request of the tribe.

As you know, Welfare and Institutions Code section 346 also allows a juvenile court in a dependency case to allow anyone access and participation who has a direct and legitimate interest in a case. And that may apply what is known as heritage cases. The parents may be tribal members, but the child's not eligible for enrollment, and that could be for a variety of reasons such as the tribal rolls are closed. As we know, in most juvenile justice or delinquency cases the substantive provisions of ICWA are not going to be applicable that doesn't take away from obviously requirements of inquiry. But again, section 676 provides discretion for the Juvenile Court to allow anyone to participate who has a direct and legitimate interest in the case. What we now have is, effective. January 1, 2024, subsection, (g) has been added to rule 5.530, and that governs the court's exercise of discretion to permit tribal participation in juvenile cases involving juvenile justice, unrecognized tribes, the 306.6 cases and heritage cases. What's significant here is that subsection (g) creates a presumption that the tribe has a direct and legitimate interest, a presumption in favor of exercising your discretion to allow tribal participation. And the rule goes on further to state that the Juvenile Court should grant the tribe's request, unless the court finds that the tribe's participation would not assist the court in making decisions in the best interest of the child. And I would respectfully suggest, that's going to be a very rare if ever case. The extent of the tribe's participation is governed by Rule 5.530 subdivision g, subsection 2. And so again getting back to inquiry, we see here how ongoing inquiry under 224.2 is critical even for consideration of discretionary participation. We've got to have that inquiry and notice informal notice that the tribe can request participation. And there is a new Judicial Council form ICWA-042, entitled Request for Tribal Participation that tribes can submit. A lot of courts. I know Inyo and Judge Espana in San Diego have previously adopted local rules, accord or standing orders. And you know, having this tribal participation really can help sometimes ensure ICWA compliance. And I think we're going to get to that in just a moment, real quickly. But you really never know what the end result in the juvenile justice case may be whether the substantive provisions of ICWA may apply, and it's good to be ahead of the curve on that. I think we see better outcomes for children when we have discretionary tribal participation in terms of identifying extended family members in terms of helping develop culturally appropriate case plans and so forth.

Slide 24 – Tribal Dependency Representation Program

Judge Dean Stout - I'm going to jump interest time here quickly to state funded attorneys for tribes. And what you're going to see here is an increase, having more attorneys representing tribes in your courtrooms. And again, I see that as a benefit, because it can reduce hopefully the number of ICWA appeals and quote unquote reversals, to have that tribal attorney in your courtroom. It says to redress inequities - for tribes have been the only party without state funded attorneys in the courtroom. We now have the tribal dependency representation program under California laws funding recognized California tribes. They have to be federally recognized and a California tribe. It's not available for out-of-state tribes. And, unfortunately, that's a huge percentage of the cases we have. An exception is, for example, Alpine County, where the Washoe tribe is in Nevada, but their land extends into Alpine County. So, it's got to be a California tribe. It's not available to unrecognized tribes. There's limited funding. There's minimum base funding of $15,000, but that certainly helps. The funding will flow from the California Department of Social services to the tribes and the court will have not have any role in the appointment or payment of the attorneys. Tribes can choose to be represented by a non-

attorney, for example, just have an Indian Child Welfare Act representative, present [but that participation is not paid for using these funds]. Tribal rights to remote appearances at no charge is unaffected. We still need to provide that under 224.2 subdivision K. And the special pro hac-vice rules in Government Code 70617, and rule 9.40(g)remain unchanged.

Slide 25 – Tribal Dependency Representation Program

Judge Dean Stout - There's also Federal funding. It's just hot off the press. May 10th of this year the Federal Administration for children and families issued the final rule in foster care, legal representation. And I think we can, we'll post the link to that. But among other changes that allows federal title IV-E funds to be used for the 1st time to provide attorneys for all federally recognized tribes in ICWA cases. It's going to require state implementation, and you have to opt in. But I commend - take a look at that, and we'll get that link again, for the Federal provisions. But again, I think you're going to see more attorneys representing tribes in your courtrooms. I think that will be instrumental in reducing ICWA appeals, and hopefully also produce, of course, better outcomes for the children and the families before us.

Slide 26 – Thank You

Ann Gilmour: Well, thank you both. I cannot believe that we're done a few minutes early. I'm very surprised. We do have a couple of questions, and I'll throw them over to you. I've tried to answer some of them as they went along, because I didn't think we'd be able to get to all of them. But one question we have is: “Since the Tribal dependency representation program was funded in 22 and 23. Have any courts noticed an increase in attorneys representing tribes in these cases.” I don't know whether either of you have noticed that.

Judge Dean Stout: I have in part because of the dependency funding program. But I'm seeing increased numbers of attorneys, particularly from the CT… California...

Ann Gilmour: California tribal families, coalition?

Judge Dean Stout: There we go. I forget the acronyms they've been representing the tribe and increasing number of matters. And, in fact, we're going to a joint jurisdiction court in Inyo soon and that will include not only dependency cases but probate guardianship cases as well in the tribe, will be represented by legal counsel and all those matters.

Judge Dean Stout: But I think that funding still sort of getting off the ground, and I think it's hopefully we'll get an increased allocation of funds over this minimum. $15,000 allotment.

Judge Shawna Schwarz: And I would just say, in Santa Clara County we have so few actual ICWA cases that I've not noticed any increase. But I will say, when we do have a tribal attorney for a case where the child is an Indian child. It's immensely helpful.

Ann Gilmour: Thank you. And if anybody, if any of the attendees out there have information on this that they'd like to pass along to me. Please do so. I have another question that I would appreciate your input on. Someone asks “if the initial inquiry finds that the child is clearly an

Indian child for the purposes of one tribe does that mean that further ICWA inquiry is not needed?" IE. To see the child might be affiliated with another tribe. Thoughts?

Judge Dean Stout: It does not. The ICWA inquiry continues, in my view. In many cases we have multiple tribes, and usually, for example, in the Eastern Sierra. We may have the Bishop Paiute tribe, and the Big Pine tribe, or Lone Pine tribe. And generally, they will confer amongst themselves and decide who's going to be the lead or primary tribe for ICWA purposes. I've never had to get to the point where utilizing the State statute for the court to determine that they generally agree amongst themselves as it should be. But of course, if all the tribes participate and can be very valuable tribal connections for the child that connection with culture building resilience. There are immense benefits to having multiple tribes participating. And, in my view, the ICWA inquiry would not stop just because you've identified one tribe.

Ann Gilmour: Well, thank you. I didn't have an answer to that question. So, I appreciate that I really.

Judge Dean Stout: No, no! Court may disagree. I don't.

Ann Gilmour: So, we are now at 1:01, and I can see that participants are beginning to drop off. So, I want to thank you both so much, and to answer the questions. Yes, we will be posting this recording on our website. As soon as we can. So, thank you both very much, and thank you all for participating.

Judge Dean Stout: Thank you. All the best.

Ann Gilmour: Thanks, bye.

Judge Dean Stout: Bye.