

ICWA Initial Inquiry Webinar Transcript 2020

Welcome, my name is Shauna Schwartz and I wanted to kind of say hi to everybody and introduce our other faculty. Our presentation today is “ICWA: Initial Inquiry, Further Inquiry, and Formal Notice, in California Juvenile Dependency Proceedings”. I have a great cast of characters with us today. Let me go ahead and start by introducing myself. I am Shauna Schwartz, the supervising Judge of Juvenile Dependency Court here in Santa Clara County. A fun little thing about me today is that today is my 19-year anniversary on the bench, and all but two years and three months of that have been in juvenile dependency, and that is by choice.

We also have joining us today Chris Costa who is the deputy county council with Sacramento County council's office assigned to juvenile dependency. He represents the Sacramento County department of child, family, and adult services, child protective services division in juvenile dependency matters. Interesting fact about Chris is that before joining county council in 2014 he was an active-duty officer and attorney with the U.S army Judge Advocate General or JAG Corps, so picture him in a snazzy uniform when he starts his presentation.

We also have a really great expert joining us today Judge Sunshine Sykes, who is a graduate of Stanford University, undergrad, as well as law school. She was appointed to the bench in 2013; was the first Native American judge ever appointed to the bench in Riverside County. She is actually presiding over the county's complex civil department and is the presiding judge of Riverside County's superior court appellate division. Interesting fact about Judge Sykes is that she's actually a member of the Navajo Nation. She was born to the Coyote Pass Clan, and in fact, she was born on the Navajo Reservation in Tuba City, Arizona.

Finally, we have Judge Michael Whitaker. He was appointed to the superior court in 2014 by Governor Brown. He is on the bench in Los Angeles County. He was assigned to family court for two years, then he had the good fortune to be assigned over to dependency court where he's been for the last four years. Before being on the bench he was a deputy attorney general with the California department of justice. Kind of fun fact about Judge Whitaker is that, in fact, I would say this is one of his claims to fame, is that he worked at the same Baskin-Robbins as Barack Obama. Not the same time but certainly shared the same space with Barack Obama, so that's kind of a fun thing.

A couple housekeeping matters before we begin, you're, the participants, your audio and video will be muted throughout the presentation so that we don't have any distractions. We are going to ask if you have questions to please type them into the Question-and-Answer box, and we will be monitoring that throughout the presentation, and we'll address those as time allows. In terms of the presentation today, and the outline, and the objectives, I know that you all received an email with the power-point. What we're going to do is we're going to start off with Judge Sykes and she is going to give us a brief history of Federal and California Indian policies leading up to the passage of the Indian Child Welfare Act. With the goal being to help us understand the purpose of ICWA, the value of equity to Indian children and families, and complexities of equal-why is it so challenging to get equal right. We'll follow that up with Mr. Costa. Chris Costa will then talk about the inquiry and notice nuts and bolts and talk about some hypotheticals. The goal there

ICWA Initial Inquiry Webinar Transcript 2020

being to understand and apply the legal requirements, particularly in light of all of the recent changes because we want to, as you all know, there have been some recent changes. Chris will go over those, but we want to see how we're supposed to be applying the law in light of all of those changes. Then, Judge Whitaker will go over some of the recent appellate cases trying to understand how courts are interpreting reason to believe and reason to know and inquiry and further inquiry and basically how AB, AB 2944 has affected the interpretation of that case law. I think at this time I am ready to turn it over to Judge Sykes who can explain to us about kind of Indian history leading up to the passage of the Indian Child Welfare Act.

Okay thank you welcome everyone. This is my first time doing one of these virtual trainings, so please bear with me. I wish I could be in person with all of you seeing all your faces, but this is what we have. I just want to speak briefly, essentially just give you all a nutshell version of a brief history leading up to the passage of the Indian Child Welfare Act policies not only in the state of California but federal government policies, as well, certainly this is not all encompassing. There's a lot of policies that I will not even touch upon, but these are the main ones I wanted to speak about.

If you look at the policies it seems that the main thrust of all of these policies really from the 17-1800s onward, was to try to break up the Indian family, the extended family, the planned culture, and to assimilate Indians into white culture. And that was really the main thrust of all of these policies. What happened specifically in California during this time a California, next slide, did become a state in 1850. Laws were passed that significantly impacted the lives of the division of people in California. The two acts I want to talk about is one, the act for the government protection of Indians from 1850 also from California militia policies from 1851 to 1859. The act for government protection of Indians a facilitated removal of California Indians for their traditional lands and also separated children from their language and their culture. It's interesting that the act was passed in 1850 and it was in 1848 that gold was first discovered in California, which if you look at the policies behind the act and what was allowed pursuant to the act, it was essentially trying to take a native land on some native people and to steal native children of predative family. The act did allow for indenturing of native children and adults it also allowed for punishment and vagrants by hiring them out to the highest bidder. A vagrant could have been any native that was seen loitering or leading what they called an "immoral life", and I put my fingers up in quote. It allowed for a justice of a peace to have full jurisdiction over cases concerning Indians and they had no right of appeal. It allowed the justice of the peace to when non-Indians sought removal of Indians from their land. For instance, if a person seeking gold found a pot of land, and a native person, or a native tribe, or a native individual, were living on that land they can seek to take over that land through The Justice of the Peace and remove the Indian people from their land. If a native person was convicted and was required to pay a fine, The Justice of the Peace also could approve for a bond to be posted by a non-Indian person and the Indians would then have to work off that fine in whatever capacity on that person wanted them to work. So, it gave a lot of power to the justice league to handle Indian matters during that time frame.

ICWA Initial Inquiry Webinar Transcript 2020

The next slide shows the number of Indian children that were removed and living in a white home, non-Indian homes. If you were a native male under the age of 14, you could be indentured to a non-native person up to the age of 25. The law allowed for that as well as females under the age of 14 could also be indentured unto the age of 21. During this time the state did finance expedition to essentially hunt and kill native parents in hopes of taking away the native children and that's how many of these native children were left without other parents and living in non-native households.

Next slide. The next slide just gives some quotes from newspapers in regards to the kidnappings of native children. It was thought that the best way, or the only way really to steal these children away, were to kill the parents, and that the native parents would because they had so much love for their children, that they would try to defend their family; to their homes to the extent that their lives are more taken during 1850 to 1859. The article 7 of the first state constitution did give the governor the power to call for on militias to suppress insurrection, oftentimes when Native people, Indian people, got together that would be considered an insurrection. In 1850 the governor called for a militia in the counties of San Diego and Los Angeles, numerous sheriffs and individuals to punish the Indians and bring them to terms and to protect the immigrants these were a lot of immigrants that came in slowly. Really because of the gold rush and after gold was found there were a lot of devastation and destruction to Indian communities, particularly here in California which had a multiple of tribes, multiple nations living throughout the state in 1887.

As well, the Dawes Act was passed. It was adopted by congress. It authorized for the president to divide Indian lands into individual allotments. Before the Dawes Act there were in fact, on reservations, there was also Native peoples had thought of land as communal property. It was really unheard of to have individual ownership of land. It was as if the land is your mother the land is your protector, so if you think about it you can't own your mother so you can't own the land, and most many tribes looked at the land as their mother as communal property on something in fact you could not own, so when they were allotted individual parties of land they didn't know what to do with it. The whole landscape simple was a foreign concept to them.

On, next slide, it was expected that they would work the land, they would feed the land, they would show the land, but a lot of these tribes weren't familiar with that way of living. So, it resulted in a lot of land being sold off by individual Indians to non-Indians, and if you look in particular down here in Southern California in the Palm Springs area if you take a look at a map of Palm Springs it is essentially the checkerboard. There's partials here and there that are individually owned by natives there's partials that are owned by the tribes, and there's partials that are owned by non-Indians, and it looks just like a Checkerboard.

Next slide. The Dawes Act did bring about a really dramatic change to Indian culture. A lot of tribes who had been used to hunting or no longer able to do so. They were expected to stay on their individual allotment. It resulted in a drastic shift of roles of women and men. Women who were once caretakers, were now domesticated and expected to stay in the home. It changed the roles for men as well. The community focus was now really a nuclear focus as opposed to a

ICWA Initial Inquiry Webinar Transcript 2020

communal focus, and so that dramatically have shifted the roles of not only men and women, but the community as it related to other universe tribes. Just that societies that have given women's status, for instance, my tribe and Avalon tribe, we are a matrilineal society, and so back in the day women held a very powerful role within our community and within our tribe. And after contact, it was changed quite differently where it was expected that men were to be the ones in charge. Men would be the ones who were the chiefs to rule the government, and that really changed our way of living.

The next slide. I wanted to speak a little bit about Indian's boarding schools. During the 1860s when the first Indian boarding school was established, and that was in the state of Washington. The goal as Indian boarding schools were to assimilate youth and to civilize. And I'll put my quotes up, "civilize" the Indian. One of the most famous quotes comes from Colonel Henry Pratt who was the head of the Carlisle Indian school in Pennsylvania, and the quote was to "Kill the Indian and save the man". So, the hope was, is that if children were taken away from their families and plenty of these schools that they could be taught the English language. They could be taught how to assimilate, and they could destroy any language that they may have held or any culture or traditions that were held by these children. If you can only imagine these children were forcibly removed from their homes, it wasn't voluntary. My grandparents actually attended the Sherman Indian school here in Riverside that was established in 1903. My grandfather tells the story of him being on the Navajo Reservation and being afraid that he could be stolen and taken at any time, because families knew that this was going on. And so, my great-grandmother would hide him when the agents would come out. They would hear their wagons and they would hear them coming and she was successful a number of times. My grandfather would say, however, one time he had hid under a an old sewing machine cover and it was one of those real upright a big sewing machine that had a foot pedal and he accidentally hit the foot pedal, which caused the machine to go off, and they found him and he was taken away onto Riverside to Sherman Indian school. My grandmother as well was taken to Sherman Indian and they spoke of it and not you know very it was very hard for them they weren't able to speak their language um they weren't able to see their families they weren't able to practice their traditions on children as young as four or five years old were taken onto a foreign place with a foreign language of foreign people not understanding anything and being stripped away from their families um so I'm sure all you can just think of the horror someone coming to your house in the middle of the night and stealing your children away and not knowing where they went not knowing if they were okay not knowing if they were being loved and so a lot of native children went through this experience and it did really devastate Indian families because they're being raised in boarding schools with no sense of attachment no sense of family no sense of someone loving them um and then there when they grow up they're expected to know how to take care of their own children and so that's with the devastating impact on native peoples and native families.

In 1928 Louis Miriam did prepare a report looking at these boarding schools he did compare quite a thorough report which was commissioned by the government it was over 800 pages and committed to the secretary of the interior um the report was very critical affording schools I'm citing to the numerous things I've already said um and um and the report suggested or

ICWA Initial Inquiry Webinar Transcript 2020

recommended that they be done away with although that did not occur. It spoke of on the next slide um how very young children were forcibly removed from their home and it did have devastating effects on native children and native families the next slide is a picture from the Carlisle Indian school the report did find fraud exploitation ongoing failures the Bureau of Indian Affairs it did criticize the Allotment Act which was devastated um Indian lands and there was a significant loss of Indian lands as because of the Allotment Act. It also led to the Indian Reorganization Act which is another act that was passed by congress which allowed native tribes to write their own constitutions. However, that still has some issues and some problems because you're implementing a western style of government on a traditional tribe who may, who have never, may never have written a constitution, and this western style of government could be foreign. So that resulted in a lot of devastation as well.

The next era is the Indian Adoption Act. During the 1950s and 70s, I won't speak about this very long, but 25 to 35 percent of all American children will remove their families permanently during this governmental program with Indian adoption. Also, during the 1950s with the Termination and Relocation Era, over 109 tribes were terminated from federal responsibility of jurisdiction, and the hope was, is to force assimilation of these native peoples into non-native culture. This resulted in the number of Indian families being relocated to urban cities such as Chicago, Seattle, LA. That's why we see a lot of native families in this city because they were actually relocated by the federal government with promises to give them housing to give them food. But if you have a structure, and you have a community, and a culture, that relies upon other natives on the communal culture where you're used to having grandma and grandpa right down the street you're used to having friends and family there to help you, you're used to having relatives. It was very foreign to go into a big urban city and have none of that and so that resulted in a lot of poverty, drug abuse by a lot of natives, who were forced to go into their cities.

That leads us into why did congress pass the Indian Child Welfare Act? Well in 1974 congress did begin a series of hearings regarding Indian Child Welfare. They looked to the past, the history of battle and boarding schools, the Indian Adoption Act, as well but they looked to everything that I've really spoken about and they found that since the 1800s there was an overwhelming percent of Indian children that were removed from their homes and communities. Many of those children were removed for unsubstantiated claims of neglect or abuse, but it's really a matter of cultural differences between the social workers not really understanding the native ways of child rearing. The next slide gives you some ratios of percentages of foster care placement of Indian children. I won't go through all of them. I'll note in Michigan an Indian child was 390 percent more often removed from their home than a non-Indian child and these were statistics, but really across the board in numerous states throughout the country. I've only just highlighted a few. Officials did testify under oath that government document, some of which I've already spoken about, proved that the main thrust of federal policy since the close of the Indian wars had been to break up the extended family and the clan structure in Indian communities and it did result in that based upon what had happened through all those governmental programs.

ICWA Initial Inquiry Webinar Transcript 2020

I also have another quote from a testimony from Dr. Robert Bergman from the Indian health service, who spoke of “Separating Indian children had been one of the major aims of governmental Indian services after generation.” The report also found through the testimony and through what was presented that, decisions made about Indian children for bias when made by non-Indian authorities. 25 to 35 percent of all Indian children were removed and raised at some time in non-Indian homes and institutions. Congress did take responsibility for the state of Indian's families and then passed the Indian Child Welfare Act. It was written with the understanding that Indian tribes are in the best interest of serving, the best position to decide what is in the best interest of Indian children.

I love this next slide, it's actually from my dear friend of mine Tom Lidot, who works for a tribal justice's collaborative now, but previously worked for San Diego State. But he speaks of a it's really a curious paradox because when you look at initial contact with native communities and native people. Those commentators really praised native ways of child rearing and their devotion to their family and to their tribal peoples. And it was only through the devastation of the policies that I've spoken about, that now or recently, you know, not in our distant past Indian families were perceived as being incapable of child rearing, and you have to, you know, be aware of why people may have thought that and what governmental programs had caused that really to occur by taking away of native children from their homes and supporting schools.

So I give you this information in hopes that, you can go to the next slide, where we're at now it's not ideal. We're still I'm struggling for the ICWA to be followed, but I just want you to remember and give you this information that when we're tasked with the extra work, because I know it was a lot of extra work; it's extra questions, it's extra effort, it's extra everything, but I want you to remember my hope is that you remember why and what native families and native children have had to endure for generations and that trauma is still present in each and every one of us as a native person. It's historical trauma that we carry with us from our ancestors, you know, my grandmother, my grandmother's grandmother, my great great grandmother, and it's still carried on by us to this day. So, my hope is that you will understand the why. Why it was passed with a little touch of history and the importance of keeping native families together. The importance of keeping native children within their communities, within their culture, connected to their tribes. The act was passed as a need to remedy all of these wrongs. So, thank you. I hope I wasn't too quick and too fast, but feel free to look at the Powerpoint, but I do thank you for your time and I really do hope that you just remember why we're all doing this work and the importance that it has. So, I think now we're going to go on to our next slide and go into the meat of all of our presentation.

Thank you, Judge Sykes. Good afternoon, everyone. I just want to take a moment to introduce myself. I'm Chris Costa and the deputy county council in Sacramento County, and I primarily focus on training and reviewing agency policies and teachers for CPS in Sacramento County, and of note I assisted Sacramento County in developing its policy and procedure and practice. As it relates to post AB3176 ICWA inquiry and notice, and I want to thank Judge Sykes again for a really important part of the presentation. I think that getting the historical context and

ICWA Initial Inquiry Webinar Transcript 2020

understanding the history behind the enactment of the Indian Child Welfare Act really does provide critical context for words and phrases that we say every day. But it really has a really qualitative perspective when you think about the history and thinking about how it's the first step in ensuring protections for the Indian family. Like for example in this duty of initial inquiry it starts right at the beginning of the case. It's when the emergency response intake social worker is taking a phone call from a reporting party, and that person is saying that there is an alleged abuse or neglect incident, and they should be asked at that moment in time. "Well do you have information about the child being an Indian child?" "Do you know if the child or the parents are affiliated with a Native American tribe?" That's that first step in time when the agency is trying to, you know, assist in providing equal protections, and that duty of initial inquiry continues on, right. So, the child welfare agency still has this duty to continue when the emergency response worker gets that referral across their desk and they've been advised that they have a 10-day or an immediate response referral, and they need to go out in the field. So, they investigate and they're talking with family members, they're talking with the mom, the dad, and the child is age-appropriate. They should be asking the questions about whether there is information about whether anybody in the family has Native American ancestry. Whether there is a particular tribe or tribal affiliation for the mom, the dad, or the child. To start assisting themselves and eventually the court if necessary, in making a determination about whether there's reason to believe that the child's an Indian child.

Before moving into the next slide and talking about the steps of further inquiry and documentation, I want to pause for a moment, and I want to let you all know that I think that this is the most critical portion of inquiry. I find that it's often overlooked by social workers, and I don't mean overlooked in a negative way. I mean they want to make sure that ICWA is complied with, but I think we all need to get away from the mind frame "that it's the checkbox or the compliance issue" and kind of think of it more as a family history issue and assisting the social worker and understanding the family better. So that being said is this inquiry is not just "oh well hey mom you said that you have Cherokee heritage, I better pick up the phone right now and tell the tribe what you said". Really that social worker should then be going on to other family members and asking mom who is the particular individual in your family who you believe has membership or has lived on a reservation. And really deep diving into the specific facts about the Native American ancestry. That way it's, it will be able for the court to actually have a qualitative assessment about whether there is reason to believe in a particular case. So, I want to pause there and just kind of let you know how important I think that initial inquiry is and making sure that social workers are following up on logical leads for family members who may have information about the family's Native American ancestry.

And obviously that type of information has to be documented before I get into what needs to be before the court when the court's looking at the agency's filings. I think it's important to realize that every child abuse and neglect investigation does not result in child protective services agencies filing petitions in court. There are cases that are primed for informal supervision, and those cases still need to have inquiry and further inquiry as needed. And that being said I'm kind of just throwing out a reminder to agencies and agency attorneys. That it would be good

ICWA Initial Inquiry Webinar Transcript 2020

for agencies to have a practice not just for what's going to happen when court asks for filings. But how the agency is going to document its initial inquiry and further inquiry, even if the case doesn't go to court at all. Because not the focus of this presentation but there are voluntary proceedings preceding their requirements for doing that type of investigation before a voluntary replacement of the child if the case is not going to go to court.

So as far as what the court's looking at before the hearing, or after hearing, the first hearing in a case, the court would be looking at you know the ICWA 010a that's being filed by the agency with its petition. And that's going to be including that initial information about whether the child is an Indian child, which family members were interviewed and obviously there should be an extension of what's discussed in the ICWA 010a, in the actual report the detention report that's being filed with the court. And then oftentimes the social workers will not have enough time to get through a full inquiry or robust inquiry, but at least another social worker knows what's already been started, the court knows what's been started, and then what potentially will be continued as the case develops. Also, if the court is receiving a filing at that first hearing the court should be instructing the parent or guardian to file an ICWA 030 to see what the parent or guardian's belief is about their Native American ancestry and their history. And then obviously if the agency is going to be finding a reason to believe the court makes the determination that there is a reason to believe making sure that there is adequate documentation and evidence of the information about the steps taken to satisfy further inquiry.

Now although this slide may indicate that further imported investigation is easy as one two three. I think we all know that although the steps of further inquiry are pretty spelled out as far as what the agency and the court needs to be thinking about, I think the real critical question is what is the threshold issue? What is reason to believe under the law? As Judge Whitaker and some of the other judges and I will talk about later, we'll be talking about kind of what the case law has been saying over the last few months about what a reason to believe is. But I think it's really important now to make that note like bullet two says, that assembly bill 2944 was effectuated on September 18th of this year. It's effective now and it provides the definition for reason to believe where the law never had a definition. AB 3176 did not include a definition of reason to believe, but now AB 2944 sets forth in its amendment to with section 224.2E. That is information suggesting that either the parent or the child is a member or may be eligible for membership. And what I think is helpful information is now it includes that it could be information that indicates but doesn't necessarily establish one of the six reason to know criteria. So a little bit more than just information suggestion we have a little bit of framework for what types of information might be indicating you know pursuant to 224.2D.

And as far as the steps of further inquiry go, I think the first step is one of the most critical steps in Sacramento County, and I'll talk about this on a later slide. Sacramento County social workers are oftentimes going out into the field and speaking with family, with a family tree. It's a double-sided document that goes through the lineal history of the mother and the father. It allows the social worker to document all of the information that's essentially required on the zero three zero, right. That's that family history information. The names of grandparents, the birthdates, you

ICWA Initial Inquiry Webinar Transcript 2020

know, places etc. This is the information that they're supposed to be collecting, even if it was a formal notice case, but we're just talking about this informal piece. But they're supposed to be investigating that family history and interviewing available family members to gather. In Sacramento County their social workers are instructed to then find information from the BIA and the department of social services. And that looks like for us, it looks like, looking at the federal register or the BIA to see what the contact information is for the designated agents of receipt of notice. That document was updated on April 30th, 2020, and also this process is step two, also includes contacting the department of social services for assistance in identifying tribal contact information. And right now, that looks like a social worker sending an email to ICWA inquiry at dfs.ca.gov and that populates an auto response from the agency, and it basically provides different ways to get contact information for trials. So, after the social worker gathers their family history information, gathers their you know, contact information for the tribe. That's when they would begin their multiple attempts to try and reach out to the tribe. You have phone facts or email or maybe some other means not necessarily like that, but we know that subsection three here is saying it doesn't have to be by ICWA 030 sent by certified mail. You know the social worker is able to utilize informal means of contact, and this type of information within the statute is coming right from the BIA federal guidelines and regulations. These are the types of things that you know the BIA is saying let's not just rely on, you know, formal ICWA 030. We can do this investigation too, and we can call tribes. We can email tribes and see if they have information. A critical piece of this step is providing the tribe information necessary to determine whether the child's an Indian child or not. You know hopefully that's the family history information that the social worker has gathered, but just something to be mindful of is that the agency should be documenting what it's providing to the tribe, and the tribe hopefully if they're responding should be letting the social worker know that the information, they provided is sufficient or what other information they may need to make a determination.

As I mentioned earlier this is what it looks like in Sacramento County. Obviously, there's no legal requirement for how this looks under 224.2, but in Sacramento County social workers are utilizing sometimes this family tree document to handwrite information. And then in Sacramento County there is a court report template for the Indian Child Welfare Act, and that outlines inquiry; initial inquiry, further inquiry, and steps to essentially contact the tribe, and what efforts on multiple occasions were made to reach out to the tribe. In the materials that you've been provided today, I provided drafts of those materials. So, you'll be able to look at what that family tree looks like and then you'll be able to look at what the court report template in Sacramento County looks like, maybe to assist you all with your inquiries in further cases.

And so now we have our first hypothetical and the first hypothetical that, and then I'll tell, I'll go ahead and ask Judge Schwartz, and essentially the hypothetical is about sources of evidence that the court should be relying on when looking at inquiry and further inquiry at the beginning of the case. So, the night before the detention hearing the bench officer is reviewing the child welfare agency's filings. So, what sources or documents should the court be reviewing to gather information about whether there is reason to believe, or reason to know the child is an Indian child? Judge Schwartz take it away.

ICWA Initial Inquiry Webinar Transcript 2020

Thank you. Well Chris actually answered it in his previous slides, but once you get that detention report and hopefully you are getting it the day or the night before. First thing you're going to do is read that report and there should be a section in the detention report that talks about the Indian Child Welfare Act. Then you want to turn to the petition itself, and the petition, the JV100. There's a place on the bottom section two which has some check boxes for the social worker to indicate what kind of inquiry has been done and what they've learned. And then the ICWA 010, which is an attachment to the petition, is a one page, again check boxes with information about the, what the social worker has had an opportunity to find out already. Usually, we don't get the ICWA 020, the form the parents fill out until the actual detention hearing, but it makes it, it's a good idea for the judge to have reviewed all of the information that you have ahead of time. Make a note of that so that when the family does come into the courtroom, or you're talking to them remotely, you can use that as a springboard to inquire of them about their ICWA heritage. We don't usually see a, the family tree or the genogram that, that Chris has mentioned. That may be a practice that differs by county. Chris?

Thank you, Judge Schwartz. I just want to add something else here. As to the detention report you know just saying that there's information in the detention report. I think it's helpful obviously we're all looking there for the issues that come up with detention, but I think this is where I'd like to make a note. That it's good for judges, attorneys in court, everybody, to be looking at what family members are mentioned in that report. Not just as pertaining to ICWA but for relative placement or if there was a safety plan during the informal supervision part or emergency response investigation in the case. Who has the agency had contact with because that's going to resurface later when the social worker is saying they're going to be interviewing individuals or family members about the case? So, I just think it's a good moment in time to take note of the family members that are there to kind of take a registry, or a kind of a mental note. So that later on we can make sure that they were asked about the Native American ancestry in the family.

So, when the case does get to court, the court has this responsibility under section 224.2C to ask the participants whether anybody has a reason to know or knows that the child is an Indian child. So, this is, you know, it can look a lot of different ways. I know that Ann Gilmore who from judicial council who set this training up today, has provided a script for judges and others to think about. I know in Sacramento County we don't have a script for social workers to think about what types of questions they should be asking family members, but I think the script is helpful. It kind of sets the stage for the types of questions that the court might want to ask, because sometimes if you ask someone straight up you know are you, is this an Indian child? That doesn't resonate. You know nobody's thinking about technical definitions of what an Indian child is under the law. You know the child is a member or eligible for membership, and their biological parents are members. So, I think it's important to understand that inquiry. Think about you know where, when they're, when a judge is asking about whether someone has reason to know. Thinking about those types of follow-up questions that might be necessary you know asking if anybody received services from an Indian organization, or has anybody left on a reservation? Kind of additional questions that might lead to whether the child is or may be

ICWA Initial Inquiry Webinar Transcript 2020

eligible for membership. And I also want to note here that this duty of inquiry for the court, it's required in each proceeding. And so that term proceeding is a technical term, right. So, we're looking at, I'll talk about this later, child custody proceedings. We're talking about the 2-6 hearing that might come up, pre-adopted placement hearings, and adoption hearings. The court has this obligation to teach those hearings, to then double check with everybody about whether there's reason to know, or these checks about whether there is additional information that's since come to light since the department did an inquiry and further inquiry, or since noticing occurred. So, I do think that this it's important to remember that not only does the obligation follow the child welfare agency to have a continuing duty of inquiry as information developed, but this also is an obligation for the court as well.

And if the court gets information from the social workers report, and there's information that it is believed that there is a reason to believe that further inquiry needs to be done. The court and you know the department child welfare agency should be making sure that we're closing the loops on this information. Meaning a further inquiry has started. Has the court gone back and said okay we'll look through the information you've provided, or I've heard the testimony that you've provided and you know, I find that you met the steps of further inquiry, and I also find you've been dually diligent in attempting to make efforts to reach the tribe. I think that that needs to be spelled out as far as the multiple efforts. So, something to think about is again not only are we double checking that family members have been followed up with and closing the loop on family members who are mentioned in reports. But also, double checking to make sure that all of the filings are consistent the information is consistent, and there have been at least multiple attempts. This you know quotation off to the right, is a snapshot off to the right in this slide is from the BIA guidelines at page 11, and so it's talking about the fact that there should be multiple attempts for verification. And I also think it's important that if the social worker reports they tried to reach the tribe on one or two occasions, but that nobody responded, I think this is a good point for social workers to court attorneys to see and make sure that the agency followed up with the department of social services and the BIA to make sure they have the right contact information with the tribe. I'm less concerned about that there's dialogue with the tribe and we know that we have good communication with them, but if there's no communication at all, I think we need to make sure that contact information is correct. As opposed to just relying on no response, because as we'll talk about later the law has changed. There is not an ability for the court at any point to just wait for 60 days. The requirement is that whether there's a reason to believe a reason to know to make sure that due diligence has been, has been made with the efforts to reach out to the tribe.

And so, I'll briefly just mention because reason to know is a critical decision for the court. That there are six criteria in 224.2D. That looks like, and what looks like reason to know is a person having an interest in the child informs the court that the child is an Indian child. The child or the child's parent resides on a reservation or Alaska native village. Any participant to the proceeding has informed the court that it has discovered information indicating that the child is an Indian child. The child him or herself gives the court reason to know the child is a tribal ward, or the child or parent is in possession of an identification card. So, these are the six criteria of reasons

ICWA Initial Inquiry Webinar Transcript 2020

know a little bit later in the presentation, I'll talk about the effective reason to know and how that you know boils up to notice and active efforts and things like that. So, I'm going to go ahead and switch over to Judge Whitaker, who is going to talk about some important cases of health cases that deal with reason to believe and reason to know.

Hey good afternoon, everyone. If anyone's wondering, it's been all downhill since Baskin and Robins days. So, I'm going to be talking about some important cases today. We're not going into detail with all of the cases that are on this slide. A few footnotes about these cases, one is that as they say all legal cases are fact driven. And I want to say that's really important to know when it comes to ICWA cases. The facts that are developed in terms of information provided by a parent or a relative, runs the spectrum from a parent or relative, saying we have no Indian ancestry or heritage to the other side of the spectrum where a child actually is a member of the tribe and has a evidence of that, and everything that falls in between those two extremes of the spectrum. So, these cases illustrate the different information that is developed when there is a robust inquiry. At the beginning stages of the case all the way through the end of the case in terms of what is developed and what is learned from a parent or from a relative. I'm not going to be going into detail as to all these cases as they say. The second footnote is that these cases were selected. These publish cases were selected because they were published after AB 3176 was enacted. AB 3176 is the provision that made significant changes to the state ICWA laws. So, these cases follow AB 3176. The other footnote is that these cases were published before the enactment of 2944, which amended 224.2E giving definition to the term, reason to believe. The only case that technically following the enactment of AB2944 was Dominic F. But in that case the court of appeals did not discuss in great detail and did not discuss at all the enactment of 2944.

So, we leave it to all of you to read these cases. The, they're very instructive in terms again of the information that is gleaned from a parent or relatives in terms of Indian and social inheritance, and again it runs the spectrum as we will see on when we talk about three of these cases in detail.

Next slide. So, the first case I want to talk about "In re Dominic F.". In that case the mother at the initial detention hearing submitted an ICWA 020 form. In that form she indicated that she may have Indian ancestry from an unknown tribe in New Mexico. At that point in time at the detention hearing the trial court ordered the agency to begin an investigation of potential Indian ancestry and heritage. From that order the department interviewed maternal relatives and mother further. In that case the maternal grandfather indicated that his family was due, was believed to have some Native American descent, but it was never proven. He indicated the family was out of New York. So, he could have been in that area. The maternal grandmother was also interviewed. She initially denied any Indian ancestry heritage, but later stated that her paternal grandmother was part Native American born in New Mexico. The mother also stated during the additional inquiry of her, that a maternal great-grandmother was full Native, but nothing was checked before she passed away. At that point in time with that information the department developed, it prepared and served ICWA notices. What the department did in that case was simply identify all the tribes, and all the tribes in New Mexico and New York, and noticed all of those tribes.

ICWA Initial Inquiry Webinar Transcript 2020

Next slide please. In the Court of Appeal's decision, it reminds of us of the continuing duty for the department, as well as the chalkboard. There are three phases. One is initial duty to inquire, and that initial duty to inquire is, Mr. Costa has indicated, it set forth in section 224.2 subdivisions A through C. The duty of further inquiry, which is set forth in section 224.2 subdivision E. And then the duty to provide formal ICWA notice. Which is set forth in again in 224.2, as well as 224.3. So, there's a continuing duty. There's three phases of that duty for the department as well as the trial court.

Next slide please. In *Dominic F.*, the question posed to the Court of Appeal was based upon the information that mother and the maternal relatives had provided, was the case a reason to no case. The department argued that the information did not amount to knowing or having a reason to know that the minor children were Indian children. Therefore, the formal notice provisions under state and federal law were not triggered. In that case the mother had challenged the sufficiency of the notice that the department had prepared, and then served in all those New York and New Mexico tribes. Well, the court of appeal agreed with the department in that case, saying that it was not a reason to no case triggering the notice requirements under state or federal law. The totality of the information gleaned by mother and maternal relatives did not amount to an obligation to provide formal notice to any tribe. Therefore, mother's argument that there was a deficiency in the notice itself was not a argument that, that was well taken. So, the court of appeal in "*In re Dominic F.*" indicated that was not a reason to no case triggering formal notice in that case. The other question before the Court of Appeal was whether or not the information developed was, was this a reason to believe case? On that issue the court of appeals said yes there was a duty. To conduct a further inquiry based on mother's claim that she may have Indian heritage from a tribe in New Mexico. Simply by that statement alone the court of appeals said that the obligation to conduct a further inquiry was triggered. Court of Appeal said we find this information is specific enough to trigger the duty of further inquiry. The initial inquiry conducted by the juvenile court here created a reason to believe that children possibly are Indian children. In that case the court of appeal acknowledged that the term reason to believe was not defined at that point. And we now know that AB2944 enacted on September 18th, 2020 provided definition to that term. However, in "*In re Dominic F.*" did not discuss the development and definition of reason to believe. So, that case stands for the proposition that the information provided by mother alone triggered the reason that triggered the obligation to conduct a further inquiry.

Next slide. So, the question is would the information provided by mother and maternal relatives have amounted to a reason to believe prompting a further inquiry under section 224.2 subdivision 8, as amended by AB2944. So, let me turn to Judge Schwartz and get her opinion as to whether or not the amendment to that section. Whether the Court of Appeal would reach would have reached the same decision. Thank you.

Thanks. So, the timing here is really curious, right, because what 2944 became effective September 18th, and then this case was published September 30th. But this case of course *Dominic F.*, does not even refer to the new law. So, it was decided kind of without the benefit of the definition. So, you know, I think it's entirely possible that the appellate court would have

ICWA Initial Inquiry Webinar Transcript 2020

found that this was not a reason to believe. The reason to believe now tracks the reason to know factors, and basically, it's information that indicates but does not establish the existence of one or more of the reason to know factors. So, if you look at what the, the family said. They didn't say the child was an Indian child. They didn't say anything about living on a reservation. They didn't say anything about a tribal court or possessing an identification card. So, I think it's entirely possible that the appellate court would have said this is not a reason to believe, had they looked at the new law as it was passed under AB-2944.

Thank you, Judge Schwartz, and I do agree with Judge Schwartz. I think the, if the court of appeal had addressed the amendment, that it would have concluded that the information that mother and the maternal relatives provided did not amount to reasons we believe triggering the requirement for further inquiry.

Next slide please. The other issues that I thought were important to discuss regarding "In re Dominic F" was did the agency in the trial court, did both comply with the initial duty to inquire? That's again set forth in 224.2 subdivisions A through C. In this case should the interviews of the maternal relatives, specifically the maternal grandfather and maternal grandmother, should the interviews of those two relatives, should data have occurred at the front end of the case? Right? That they should have been part of the initial inquiry of the relatives as to whether or not there's Indian ancestry inheritance. In my opinion is that yes, the maternal grandfather and the maternal grandmother should have been interviewed as part of the initial inquiry regarding ICWA, and not have waited for the trial court to impose an order that the department conduct a further investigation or inquiry of the family regarding ICWA compliance. The other part of the case is that the mother was part of the department conducting a further interview of her regarding Indian ancestry and heritage, mentioned two additional relatives. The two relatives are one with her, her sister. The mother had mentioned that her sister's children were receiving benefits. However, the mother did not know the benefits that mother was receiving, and the implication is that it was benefits derived from some Indian organization. That whether those benefits derived from the sister's husband who was not biologically related to the minor children before the court. The other relative the mother mentioned was a maternal cousin who had Cherokee heritage. But the mother indicated she was not sure that Cherokee heritage flowed from her cousin's father, who again, the father was not biologically related to the children before the court. The interesting part about those two relatives they were never interviewed. At least the opinion does not indicate whether or not those two relatives were interviewed as part of any inquiry conducted by the agency. And what I would argue about that is that as part of the initial inquiry, at least in follow-up to information developed from mother, that the department should have interviewed these two additional relatives to probably confirm what mother said. That the, the benefits that were being derived from her nieces and nephews were actually from a non-biologically related are relative, and to determine whether her cousin's Cherokee heritage actually flowed from again a non-biological relative. So they're interesting issues with respect to whether or not the agency in that case conducted a, a robust initial inquiry of any of the relatives of the minor children.

ICWA Initial Inquiry Webinar Transcript 2020

All right, next slide. So next phase to talk about is “In re M.W.”. In that case, mother submitted an ICWA 020 at the detention hearing indicating that her maternal grandfather had native American heritage with the Apache tribe. The father in that case also reported to the agency that he had Indian ancestry but was neither a member of, nor seeking membership in any tribe. The father also reported that his grandparents may have membership in a particular tribe. Now trial court inquired a father whether he had any Native American heritage through which father stated, “I don't know?” When asked if relatives who may have knowledge of Native American heritage, father said no to that question. As well the trial court inquired of a paternal aunt who was present in the courtroom about Native American heritage. To which he responded it's believed that we do have. I don't have confirmation. Adding she did not know which tribe the family may belong to. At that point by the court orders a further inquiry.

Next slide. As part of that further inquiry, the paternal grandfather is interviewed. There are reports to the agency that there are relatives who may be part Navajo and part Apache. The paternal grandfather indicates that the family had not been involved with any reservation for generations, but he thought other relatives either currently lived on or used to live on reservations in Colorado and other states. Subsequently, the paternal grandfather refused to provide the agency contact information for any other relatives that he had mentioned during his interview with the agency. At a subsequent hearing father's council raised the potential that father may also have Cherokee Indian heritage, which then the court asks father about that heritage. Father simply deferred to statements that were made by his other family members including his father. At that time the court of, the trial court ordered a second further inquiry and notice if there is a reason to know that the minor child is in Indian child.

So, the questions are posed by “In re M.W.” again the two questions are, is there sufficient information to determine that there is a reason to believe that the child is an Indian child triggering further inquiry, and is there sufficient information to determine that there is a reason to know? Triggering notice to any of the tribes that were identified by the relatives including the mother so as to the question as reason to believe? The court of appeal answered yes. Based on the information gleaned from the father and the paternal grandfather the court of appeal determined there was at best a reason to believe the minor may be an Indian child. Thus, triggering a requirement of a further inquiry. In this case we know that the trial court ordered two further inquiries of father and all the relatives with respect to whether the child was an Indian child as defined under state of federal law. As for the question as to whether there was a reason to know that the child was an Indian child? The court of appeal indicated the answer to that is no. The Court of Appeal held that the trial court and the agency complied with its duty to conduct a further inquiry. And again, there were two separate further inquiries as ordered by the trial court and based on the information gleaned from those inquiries the Court of Appeal agreed with the trial court's finding that there was no reason to know that the minor was an Indian child, and no further ICWA noticing was required. The Court of Appeal went on to state that the information provided by father and the paternal grandfather indicated the possibility that they may have Indian heritage, but the information did not rise to level of information indicating that the child is an Indian child. Again, triggering the formal notice provisions under state and federal law.

ICWA Initial Inquiry Webinar Transcript 2020

Next slide. Next slide please. So, the question that stems from “In re M.W.” again, it's a case that was published before AB2944, is whether the court of appeal would have reached the same conclusion based on the amendment. So, let me toss this over to Mr. Costa and see what his opinion is as to whether or not the court of appeal would have reached the same conclusion under AB2944. Chris?

Thanks, Judge Whitaker, and before I answer this question, I want to give a quick shout out to the attorney from my office who briefed this case. Nicole Roman. The brief was very excellently written and what made the job easy for our office in this appeal was the social worker had actually done an amazing job following the template that we had prepared or that we had developed in Sacramento County, and she really went through thoroughly and made sure all of the steps of further inquiry were covered. So, I just wanted to throw those shout outs there because this was out of the third DCA. Um, as far as the question goes, my answer is probably yes, and I think the facts in this case indicate possible political ties between particular family members with particular federally recognized tribes. So, I think at some point we have information that um the father says that there is a great great-grandparent who is part of the Apache tribe. We have the father saying that the grandparents may have had membership, and then we have information about relatives living on reservations. In this case the third DCA found that that information was the best reason to believe. I think that's accurate. I think that the information, you know, indicates possible or suggests possible political ties with the tribe, and I think that was the right decision. I think it would be the same decision under AB2944.

Uh, thank you Chris, and I agree with Chris's analysis that the court of appeal would have reached the same conclusion under AB2944 based on the information that was developed in asking the father and the relatives about Indian ancestry and inheritance.

Next slide please. So, the next case we're going to talk about is “In Re A.M.”. In that case the mother indicated that she was unsure if she was of American Indian descent and denied that she or the children were registered with a tribe. At the detention hearing mother denied American Indian ancestry. At the same time, she submitted an ICWA 020 form. In that form she checked the box indicating that she may be a member of an Indian tribe and wrote the tribe's name as unknown. Mother also indicated that maternal relatives are or members of federally recognized Indian tribes at the time of this detention hearing. The fathers in those cases denied American Indian ancestry. At that point in time the department prepares and serves an ICWA 030 as notice to the bureau of Indian affairs based on the information mother provides in her ICWA 020.

Next slide. Subsequent to the detention hearing mother informed the agency that she was told that she had some Black Foot and Cherokee tribe affiliation, but she was not registered. Mother indicated to the agency when asked she was planning to register with the tribes. Months later mother informs the agency again that she may have some Black Foot tribal ancestry. When asked about whether she had registered with any tribe? Mother indicated she, she did not register. At that point in time the agency did not prepare and serve an ICWA 030 notice to the Black Foot or

ICWA Initial Inquiry Webinar Transcript 2020

Cherokee tribes. The department did not believe it had sufficient information to trigger the formal notice requirements based on mother's statements.

Next slide. So, on appeal following the termination of mother's parental rights, mother claimed that the agency failed to comply with the inquiry and notice requirements of ICWA in light of her statements that she believed that she had Black Foot and Cherokee heritage. Mother argued that her statements about having potential Black Foot and Cherokee heritage triggered the notice provisions under the federal law. The Court of Appeal disagreed with mother's position. The Court of Appeal indicated, and I'll quote here, there are two separate ICWA requirements, which are sometimes conflated. The obligation to give notice to a tribe and the obligation to conduct further inquiry to determine whether notice is necessary. Notice to a tribe is required when the court knows or has reason to know the child is an Indian child. So, the formal notice provisions are not triggered if there's a reason to believe that the child may be an Indian child. It's only when there is reason to know. The Court of Appeal indicated the information provided by mother did not amount to knowing or having a reason to know that the minor child, or minor children were Indian children as defined in the state and federal law, and the information provided by mother was simply insufficient to trigger the formal notice provisions.

Next slide however on the issue of whether or not there was reason to believe the court of appeal find that the information provided by mother was sufficient to trigger a further inquiry. The Court of Appeal indicated that the information gave the juvenile court and the department reason to believe that, that there, that an Indian child was involved, and that additional inquiry should have at a minimum, included interviews with mother's extended family members. The Court of Appeal cautioned that ICWA does not obligate the court or the department to cast about for investigative leads. In other words, it should not be a phishing expedition to chase down all leads that are provided by a parent or a relative. It should be a reasonable approach and a reasonable follow-up to information that's provided by a relative. The Court of Appeal also indicated that there was no need for further inquiry if no one has offered information that would give the court or the department reason to believe that a child might be an Indian child. This includes circumstances where parents fail to provide any information requiring follow-up or if the persons who might have additional information are deceased.

So, I want to go back to our, one of our prior cases in which the paternal grandfather was interviewed. He provided some information about potential Indian ancestry and inheritance. But when the department followed up with him, the paternal grandfather refused to provide further contact information for other relatives. And in a prior case that we discussed a mother had indicated that she had a relative that may have had Indian ancestry but that relative was deceased. So, the Court of Appeal is saying in "In Re A.M." you would take the leads that you have to their logical conclusions. If there is a relative who's deceased obviously you can't get information from that person and if a parent or a relative is refusing to provide further information for the department to conduct an inquiry of that of those relatives, then there's not going to be any further information that may be developed for a trial court or the agency to determine whether you have a reason to believe or a reason to know case.

ICWA Initial Inquiry Webinar Transcript 2020

Next slide. Next slide please. So, the query here again is whether the Court of Appeal would have reached the same conclusion under AB2944. I'm going to toss this question to Judge Sykes and get her opinion as to whether the Court of Appeal would have reached the same conclusion with the amendment to 2944. Judge Sykes?

Okay thank you. Um well the short answer is I believe yes um looking at the information that was provided by the mother at the very least, um she did indicate that the maternal relatives are or were members of federally recognized Indian tribes. At the time she made that statement, or she checked the box she wasn't aware of the potential tribes that later being the Black Foot and the Cherokee Nation. So based upon the totality of the information that was provided by the mother, I think even with the provisions of AB2944 that would be information suggesting that a parent or the child is a member at least eligible for membership in the tribe, which would in fact prompt a further inquiry. So, I think um if this case was decided after um AB2944 amended 224.2 subdivision E, that it would have resulted in the same decision by the Court of Appeal requiring at the very least, further inquiry based upon the mother's additional information. So, thank you. Judge Whitaker?

Thank you, Judge Sykes and I do agree with Judge Sykes's opinion about the Court of Appeal reaching the same conclusion.

Next slide please. I just want to mention briefly in “In re Austin J.”, in this case the Court of Appeal are critiqued. The lack of a definition to reason to believe. So, I just want to point out that the Court of Appeals critique of the failure of the legislature to define the term reason to believe was resolved with AB2944. So, in “In re Austin J.” should be reviewed and digested in light of the legislature following through, and addressing the critique raised by the Court of Appeal in “In Re Austin J.” and I just want to, I'll point that out again, that the term reason to believe has now been defined by AB2944. I believe, now turn it over to Judge Schwartz and Judge Sykes to go over our next hypothetical. Thank you everyone.

Thank you, Judge Whitaker. Okay so let me ask this of Judge Sykes. This is a very typical scenario that happens in court. You're at your detention hearing. The mother says yes, my maternal great grandmother told me that the family has Indian blood. That's a very typical phrase that's used mother then says that the maternal great grandmother, the one who told her that they the family has Indian blood, is deceased. Judge Sykes what should a bench officer do in this scenario?

Thank you and I know that we had talked about this in preparation for this training and it is something that comes up frequently in court. And it's something that I, I think if I were a judicial officer sitting in dependency, my first question would be well what do you mean by Indian blood? To get a full understanding as to what that term means to that individual. Natives unfortunately have been defined by blood quantum from really, from time and memorial-first contact really, unfortunately. So that's a term that's really been thrown around a lot and I think it's a term that you have to have some cultural sensitivity to as well, with using that term. So, I

ICWA Initial Inquiry Webinar Transcript 2020

think as a judicial officer my question first question would be to kind of sensitively um ask questions about what does the individual mean by Indian blood? For their follow-up questions well do you mean that you were affiliated or you have indeed heritage to a specific tribe? Where did you hear that from? What information was provided to you? Was there any information about what location or what area this tribe may have been in? So, I think it does require at the very least, further inquiry by the judicial officer to really get to the overall meaning of what they mean by Indian blood, and if there's not further information provided all they have is that they have some family more that they have Indian blood. Then in my opinion that wouldn't require any further inquiry or would not provide a basis for reason to believe or a reason to know. But it will take those initial steps at least once that has disclosed to really investigate and flush out what that means further.

Thank you. So, you know related to this, and our next slide kind of talks about what is becoming, I think a more and more common scenario in court, which is what's displayed by this hypothetical. Hudson's grandfather comes in its disposition, and he says, "hey I just took one of these DNA tests", either ancestry.com or 23andme, "and that DNA test said that I am Native American". What do we do with DNA test results when it comes to, to the Indian Child Welfare Act?

And I know we um in regards to this as well and because it's being, it's so common. I'm sure a lot of people will get one of these test props even as a Christmas present from their relatives this year, and um and then you, you get these results back. Um and I you know my, my initial feeling is just because these results may say that you have a Native Indian or you are Native American does not indicate or even suggest that a child is or may be eligible for membership in a particular tribe. That would require, that would be a reason to believe or a reason to know, that would require any notice. Of course, it may require for just a bit of inquiry on the record beyond the DNA test. Are you aware of any affiliation, any heritage with any particular tribe? Is this something that your family discussed prior to you taking this DNA test? Did you take this DNA test to confirm something that was already told to you by a family member? So just as with the last hypo, trying to get to the root and to flush out what the individual is really means beyond the DNA test itself if there's any further information. What are your thoughts? Do you have any addition?

Well, you know I, I laugh because 23andme apparently is having a buy one, get one free during the holidays, so I am assuming we're going to see a few of these, a few more after the holidays. So, I'd be curious from our colleagues around the state, or I would just kind of caution them to pay attention to that, and I feel like we have some, with the state of the law right now, we have some pretty good guidance about what to do when somebody comes in waiving a DNA test. Which is the, it's not an automatic yes, we have reason to believe or reason to know, uh but it's also not an automatic no. It's a ask further questions and find out if there really is the tribal affiliation that would take us to the next step.

ICWA Initial Inquiry Webinar Transcript 2020

And there is a second question there about percentage of native and the ancestry, whether or not that makes any difference with compliance. And, and the short answer to that is, is really no. Um because it's up to the tribes to determine whether or not a individual is eligible for membership. And that could be varied depending upon what tribe the individual is affiliated with. For instance, um Navajo, which I'm a member of the Navajo tribe, um currently has to be at least one-fourth um Indian. What they call Indian blood. Um I have issues with that, but we can, we can talk about that a different time, um but you have to be at least a quarter. Other tribes may have different blood quantum requirements. Other tribes may just have ancestry or connection to a role. Um it is certainly, it's not, it's not our decision as judicial officers or social workers or attorneys, um to make that determination for the tribes. It's something that's left up to them.

Excellent. Thank you very much. At this time, we're going to turn it back over to Chris, and Chris is going to continue to educate us regarding the nuts and bolts. Chris?

Thank you, Judge Schwartz. Um we're going to kind of take a step back and talk about, we spent a lot of time talking about the reason to believe standard, and we went through some really good hypotheticals to kind of find that issue. So now I want to talk about what happens when there is a reason to know. What if the court finds that, or what if the social worker finds that one of the six criteria under 224.2D has been established? So, I think it's really important, and I remember reading AB3176 and saying oh my gosh this is going to change everything. We're going to be looking at what the federal government's been saying in their BIA regulations and guidelines, which is once you have reason to know we're going to be treating this as a full Indian Child Welfare Act. So, I think the important takeaways from this slide and kind of this portion of the presentation is if there is a reason to know then that brings us to the decision of okay what is this case going to look like, how is this case going to be serviced, and how is this case going to be different from a case that's not an Indian Child Welfare Act case?

So first we start with the idea that if there's reason to know and kind of beyond the scope of this presentation, but I just want to mention it, is the idea that if there's reason to know then if there's any type of voluntary placement of a child in foster care, the social order should be going in front of the court, and essentially the court should be signing off on the voluntary placement agreement. That the family and um you know the department of child welfare services are about to agree on. So that's one important thing to think about is the idea that, and that's why it's so important for this inquiry and potentially further inquiry to happen early in a case, because we've got to make sure that if this is going to be a voluntary placement, even if it's not a full-blown court case a child custody proceeding, that that type of inquiry happens. So that's one thing to think about if there's a reason to know as it pertains to our typical juvenile dependency case, uh the court and the party should be thinking about active efforts being necessary. And I, and I quoted 319f here, but obviously the criteria for active efforts is found in WIC section 224.1, and there's a really good definition taken out of the federal regulations about what is active efforts. I would posture for those of you in the child welfare arena providing services to child welfare agencies, and you know, if you're an attorney providing services to child welfare agencies to think about how those court report templates should read for in child welfare cases, right. Not

ICWA Initial Inquiry Webinar Transcript 2020

only is the social worker recapping what services have been provided in the case plan and the report, but also how the agencies establish active efforts. Uh, the law requires under WIC section 361.7 and subsequent sections of WIC section 366, that the court has to find an active effort has essentially been made throughout the case. Um so at those review hearings the court should be revisiting, and the agency should be providing evidence to the court about what active efforts have been made. So those active efforts start at the beginning of the case. They should be evidenced in court reports and those review of active efforts will continue on even through status review hearings. Another thing to be thinking about right at the beginning of the case, if there's reason to know or whatever reason to know is established is ICWA placement preferences. Making sure that those placement preferences outlined in 361.31 are being followed, and if they're not being followed you know having some follow-up with the agency and child and family teaming in a way that can you know work to provide the court with information about whether the child is in an ICWA placement, preference placement or alternatively if that's not the right you know decision at that point in time, to make sure that um the agency is providing the court with evidence and information so the court can find good cause to deviate under 361.31. Because the way the law is written now under WIC section 319 is at the detention hearing if the court finds a reason to know placement preference is applied right away.

Also, if there's an Indian Child Welfare Act or there's a reason to know we're going to be having Qualified Expert Witnesses at the disposition hearing, as well as at the selection and implementation hearing. Those are the requirements um under the ICWA and those are the requirements once there is a reason to know since we would be treating the child as an Indian child. Um those types of Qualified Expert Witness opinions are not necessary at emergency proceedings i.e., a detention hearing. They are only required at the disposition hearing of the early portion of the case and then again obviously at the selection implementation hearing as required by two-six.

Also, if there's a reason to know thinking about the ICWA protections and triggers that apply, there would be a need for formal notice. So, we are kind of differentiated today this idea of a reason to believe case and a reason to know case. A reason to believe case is all about further investigation with the family members and reaching out to the tribe informally; phone, facts, email letters, whatever, but not necessarily providing the tribe and ICWA 030 sent by certified mail. If there is a reason to know the law alternatively does recommend formal noticing procedures to apply, and in such cases the agency has to prove to the court that it's provided formal notice via ICWA 030 by certified mail in accordance with 224.3 of the welfare institutions code. For all of the following hearings listed on the right here. Meaning that if it's a hearing that may culminate in foster care placement, keeping in mind what may culminate looks like, it's essentially every disposition hearing, right. I think, I think we can all agree that not every case that we think is going to be a non-detaining position where the child remains in the home ultimately ends up that way. And if you look at the information and the ICWA BIA guidelines and regulations, I think it kind of spells out clearly that whenever it's pretty much up for discussion, I think we should be noticing in this formal manner. So foster care placement hearings i.e., disposition hearings, termination of parental rights hearings, those are considered

ICWA Initial Inquiry Webinar Transcript 2020

Indian child custody proceedings under WIC section 224.1. A pre-adopted placement hearing which to my mind is just any removal hearing that happens after the termination of parental rights have occurred. So, if the agency is terminated parental rights and has a plan for guardianship of adoption, and something doesn't work out and they need to remove the child from the home then that's going to result in formal noticing procedures happening. And then ultimately for the adoption hearing itself any action resulting in a final decree for adoption requires formal notice via ICWA sent by certified mail under 224.3.

Um I also want to point out that so previously prior to AB3176, I think we're all pretty familiar with the idea that the court could find that the Indian Child Welfare Act didn't apply if 60 days had passed, and the tribe had not responded that was the state of the law prior to AB 3176. Now under AB 3176 uh the court and the parties are instructed that the court should be receiving if there is a reason to know. The court should be receiving a report declaration or testimony to show that the agency has been dually diligent in identifying and working with the tribes when there is a reason to know. So, for example that looks like, in part, that further inquiry where the department is reaching out to the tribe informally by phone, fax, and email. They're trying to get responses from the tribe with information that they're providing to try. At the same time if it's a reason to know case then formal noticing has occurred, and that means that the agency has to prove to the court that those filings have been made and the ICWA 020 is accurate to the best of their knowledge. So essentially if there's a reason to know and the court's trying to make a determination about whether ICWA applies or not, the court would have to first before finding the ICWA does not apply, ensure that the agency has done its further inquiry under 224.2e and has also provided formal notice under 224.3. Um, and Judge Whitaker and I are going to talk about right now some hypotheticals that deal with formal noticing kind of demonstrating how these new the interplay between further inquiry and looking at the notices for the court.

So, I'll go ahead and pose a question to Judge Whitaker, and in this hypothetical the court is at the disposition hearing and the social services agency does not provide a copy of the ICWA 030. We're going to assume this is a reason to know case. Um, what should the bench officer do if none of the tribes, the Cherokee tribes have, there's been no proof of an ICWA 030 file? So, I'll first ask that question for Judge Whitaker?

All right so what the trial court should be doing that disposition hearing is first, ensuring that the ICWA 030 that was prepared and served on any tribe, it is produced to all parties and the court for review. Uh that's required by statute. So, the, the court fulfilling its independent obligation to ensure that proper notice was made to any tribe that was identified by a relative triggering the finding that there was a reason to no case, and then therefore triggering formal notice. So, the disposition hearing should not move forward unless that ICWA 020 form is provided to the court along with all the attachments uh that were sent to the tribes they've identified. In this case we have Cherokee tribes that were noticed as part of the formal process. So, what the court should specifically be looking for, and it's always a humbling experience when you have a Court of Appeal. It's in one of my experiences telling you that you failed to comply with your obligation to ensure ICWA compliance in the case that where I had the Court of Appeal critique, uh

ICWA Initial Inquiry Webinar Transcript 2020

whether or not ICWA compliance was complied with, with the fact that the ICWA 030 did not have some of the information that's required by 224.3. There is a listing of basic information that should be included in the ICWA 030 form. The court should be looking for compliance with the criteria that's required by statute. For example, in the case where the Court of Appeal critiqued the review of that form. In that case the child's name was incorrect. It did not track the child's name that was set forth in the birth certificate. Uh, in particular it did not have the child's middle name. In addition, in that case the ICWA 030 had the wrong place of birth for the child. Again, it did not track what was on the birth certificate of the minor child. Those two deficiencies the Court of Appeal said made the ICWA 030 to be defective. That the department needed to restart the notice process uh to all of the Cherokee tribes. There are also issues with respect to the information that was developed in the case. In particular the, the names of relatives, the relative dates of birth, on their birthplace, any other information that would be useful to a tribe. That information was either missing or incomplete. That information uh was set forth in different, different reports that were provided to all parties and the court. So, what the Court of Appeal was saying in my case was that the information in those reports, the court should have looked to ensure that the ICWA 030 had complete and accurate information as to all the relatives identified by the mother and the father and any other relative in that case. In that case the court they deemed did not ensure that ICWA 030 met the criteria under 224.3. So that's what I agree with Judge Sykes. It's all, it's a lot of work, um but it's really important that we look to see that there's complete compliance with the provisions.

Thank you, Judge Whitaker and I think you answered all the sub questions there about the in-depth review of that ICWA 030 that the court should be doing. Um, I'm going to go ahead and move this to the next hypothetical, and yeah thank you.

Sorry with that hypothetical let me, sorry, ask Mr. Costa if the social services agency prepares the ICWA 030 and serves it all in therapy tribes. But only the Cherokee Nation has responded in writing that the minor child is not an Indian child as defined under ICWA. What should the bench officer do in that scenario?

So, this goes back to the idea that I was discussing earlier which is there is no 60-day marker where the court or the parties can rely on for passage of time to just say well now the Indian Child Welfare Act doesn't apply. There are three different Cherokee tribes. So, in this case if the Cherokee nation responded in the negatory and said that this is not an Indian child. I think the court's assessment as to the, you know, further inquiry and notice procedures after that tribe are probably done. But then the court would need to say okay we have two other Cherokee tribes, we have the Eastern Bands of Cherokee Indians. We have the United Keetoowah Band of Cherokee Indians. And now how are we going to deal with that? So, the court should be thinking about whether further inquiry has shown through informal contact efforts by phone, fax, email, etc., has the, has the department, has the child welfare agency been trying multiple times to reach out to the tribe with no responses. And again, if it's a situation where there's dialogue where somebody from the tribe like a tribal representative may say well, I'll get back to you soon or I'll get back to you shortly, and they just are not able to get back to the social worker, we know that

ICWA Initial Inquiry Webinar Transcript 2020

at least there's dialogue between the tribe and the social worker. I think more concerning are those cases where the, you know for example if the United Keetoowah Band Cherokee Indians or the Eastern Band didn't reply at all. It might be that the social worker has the wrong contact information. So, I think in those situations the court would want to make sure that there have been multiple efforts to try and contact the tribe, but also scrutinize whether the agency has been utilizing the department of social services and BIA to ensure that there are not, other contact pieces of information for those traps.

And Chris, can I just add something to that? I guess, at least with my practice, I am requiring that the agency provide that information in a report memorializing its efforts to obtain a response from a tribe. In other words if they're making phone calls, the dates of the phone calls, the phone number that they've called, if they left a message or they spoke with someone, they spoke with someone what was the response? If they sent an email or what was the email address? If they received any response to the email? And I'm also looking for multiple attempts over a time period to ensure that the department or the agency has done everything it can in terms of getting a formal response from a tribe. And then making determination as to whether they fulfill their obligations.

You know thank you for bringing that up Judge Whitaker. I actually forgot something I wanted to bring up here, is that I have seen social workers document that they called the tribe three times on a two-day period before they filed their report. To which my response was I don't think that's due diligence. I think that we have to show some systematic effort over time. I mean we shouldn't be calling them the day before a hearing. It should be you know in advance and a regular process for that. Um, and I think you also brought up a really good point about scrutinizing the further inquiry and what was communicated with the tribe. And this goes to the, the mention of the template that's been provided as part of the materials for today, and what, what Sacramento County is doing is, their template are prompts for the social workers show that there are at least three times when they've tried to reach the tribe, and then the, the template prompts the social worker to say here's what I've provided the tribe and what did the tribe respond to the social worker. So that that way there is this kind of forced dialogue. So social workers shouldn't just be sending off emails and that's it. The social worker should be sending off emails and then hopefully the tribe responds with yes that's sufficient, or I need more time I need more information. Those pieces of information I think are critical for the court to understand whether the agency's been dually diligent in its efforts for further inquiry.

So, I'm going to move along to uh the next few slides here before we move on to questions. And I want to just kind of give some additional thoughts on confirming whether a child is an Indian child, and just remind, you know, everyone, that the tribe makes the determination of conclusive determination about the membership status of the child. That is a, you know, sovereign decision by the tribe whether a child is eligible for enrollment, is a member of a tribe, etcetera. The court obviously is tasked with making the legal decision about whether the child fits within the description of the Indian Child Welfare Act. But the court is really, you know, asking the

ICWA Initial Inquiry Webinar Transcript 2020

questions, and the tribe is really making sure that that child fits within their description of membership or eligibility for membership.

Another thing to point out is that again, we talked about this continuing inquiry duty and also there's this continuing obligation on, on the writing portion of this slide mentioned and talking about how if there's new information that's discovered, and formal noticing has occurred, the tribe should be, and the BIA should be receiving the subsequent information that's been discovered. That way they can really make that determination which goes back to their authority to make determinations about membership uh of a child in a tribe.

And then finally I think it's important to point out that we've talked about reason to know cases requiring formal notice for Indian child custody proceedings under 224.1 of the welfare and institutions code. However, I do think it's important to note that for hearings that do not meet the definition of Indian child custody proceedings under the law, that notice looks different even if there is a reason to know. In such cases the tribe would be receiving a first-class mail notice, and usually that's done on a form JV 280, 15 to 30 days in advance of the hearing, and the tribe should be provided information about what the recommendation uh is of the social worker regarding the case. Now the only caveat there is if you have a 364 hearing, or you have some sort of status review hearing where the child's, in the home and there's going to be a removal, then it switches back to becoming an Indian child custody proceeding, and in such cases formal noticing procedures would be required. So, I just kind of wanted to point out that formal notice uh is different in Indian child custody proceedings under the law, versus the status review hearing, than 364 hearings.

And I think that covers the substance of the materials that the group wanted to cover today. Um I'll, I want to go ahead and allow everybody to answer some questions that have been posed through the question-and-answer segment. So, we should probably go ahead and do that now.

[Music]

I don't know whether any of the presenters, there was one question that hasn't been covered, which was how this, folds into um juvenile justice? I don't know whether any of the presenters have thoughts on that?

[Music]

And is, is the question long is there a way you could read it, because I'm trying to find it?

Yeah, I will read it to you. It says, "If you have time, could you please comment on how this all falls into the juvenile justice side of hearings where minors are placed outside the home during the term of probation or for placement in STRTP's?"

ICWA Initial Inquiry Webinar Transcript 2020

Chris not to put you on the spot but you seem to be the expert at nuts and bolts. Um, do you have any input on whether it applies for juvenile justice folks?

I believe it does. Um, I can't remember each and every provision. Uh, but I do know that when I've been looking at certain welfare institutions code provisions for dependency, I also see some kind of um the same information as it pertains to juvenile delinquency proceedings. Um, so I do think especially in counties like Sacramento where there's kind of a strong crossover practice model, I know that probation officers and, you know, social workers are communicating about whether a child is an Indian child and making sure the tribe is aware of the recommendations. I do think it would be important for the tribe to be involved in, and understand, what is going on for delinquent youth if there is going to be for example, um, you know an adjudication of the **(I am not sure what goes here 1:43:10)**

This is Ann Gilmore. I think you're right Chris. That, that many of the principles of ICWA should apply to children in the juvenile justice system. There is a provision in ICWA that says that if a child has committed what would be a crime, um if the activity were committed by an adult, that the Indian Child Welfare Act itself does not apply. But recently there were amendments to the foster care bill of rights, in California specifically. That does say that all Indian children in foster care whether they come in through the dependency or the delinquency system are entitled to a placement that is culturally appropriate and maintains their cultural connection. So, um, and, and I can provide more citations um to the um question for the person who posed the question. I can provide that offline but uh Judge Sykes do you have anything you wanted to add to that?

No, nothing to add. I, I agree with you. Um I think it's important even the delinquency world for the tribe to be involved because they can provide assistance of multiple avenues of decisions depending upon what the needs are of the child as well as the family.

Yeah, and I just wanted to add, Ann, I'm sorry. I just wanted to add that this makes me think about kind of like I was talking about the crossover practice model and the idea of whether there is a child potentially newly involved in systems, and even if the child is not really involved in systems. I mean I think it's all about supporting the child and bringing together uh to locate services and like you said under the foster youth bill of rights. I think that does encapsulate uh children under the juvenile delinquency system as well as the juvenile dependency system. So, providing those culturally appropriate services would be to me part of that

And I, I will say that the inquiry requirements of ICWA apply in all juvenile cases including the um delinquency cases. So, you're still having to make sure that you are identifying tribal youth for this purpose. Um, although not all of the formal requirements and in particular Qualified Expert Witness requirement or active efforts requirements. Those might not apply as they would in a dependency case. Juvenile, uh, youth in the juvenile justice system do need to be identified their Indian ancestry and then as you say provided with the services and placements that may maintain their cultural connection.

ICWA Initial Inquiry Webinar Transcript 2020

Ann, this is Judge Whitaker. I just want to jump in to say that section 224.2 subdivision A provides for the continuing duty that you just mentioned for the probation department in uh juvenile justice cases to uh to comply with the initial inquiry or provisions of that that section.

Were there any other questions? And folks?

Well, if not then maybe we're actually done a little bit early. Did any of our panelists have any final thoughts?

I just want to thank everyone for being here and for taking the time out of your Friday, and your lunch time to listen to us. I think it's really important um that we all try to get things right. I know the law is always changing, it seems, in regard to the Indian Child Welfare Act. But it's always changing in hopes of fixing things that I think we see could be made better. So, I just thank you all for attending and for taking time to listen to us um during this couple of hours. And I also just want to thank all my fellow presenters as well as Ann, for all the time that you put into this. So, appreciate working with you all and I hope everyone who's present has a safe and happy holiday season.

Thank you, Judge Sykes, and I want to thank all the panelists for their time and energy and input into this.

Okay.

And I also wanted to thank everybody for your attendance and your interest today and thank you to my fellow panelists. Everybody have a nice holiday season and please stay safe and stay healthy, okay? Thank you.

Thank you everyone.