

**Qualified Expert
Witness (QEW)
in ICWA:
Overview for
Attorneys**
Presented on
February 26, 2021 to the
Child Protection
Section of the Idaho Bar

Prepared by
Jack F. Trope, Sr. Director,
Indian Child Welfare
Programs



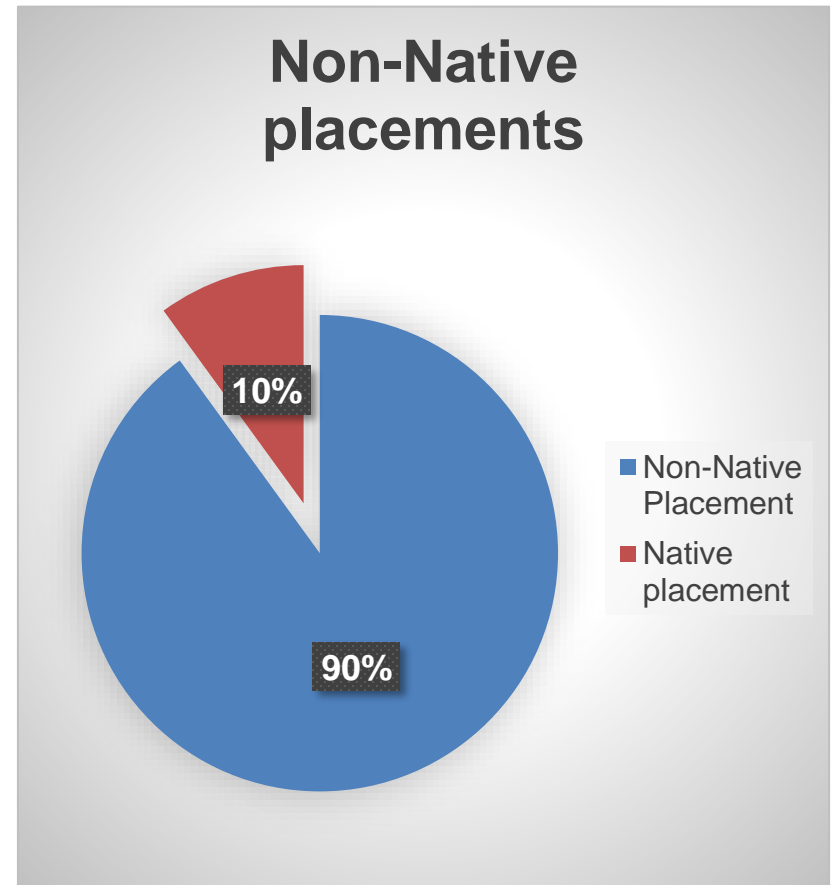
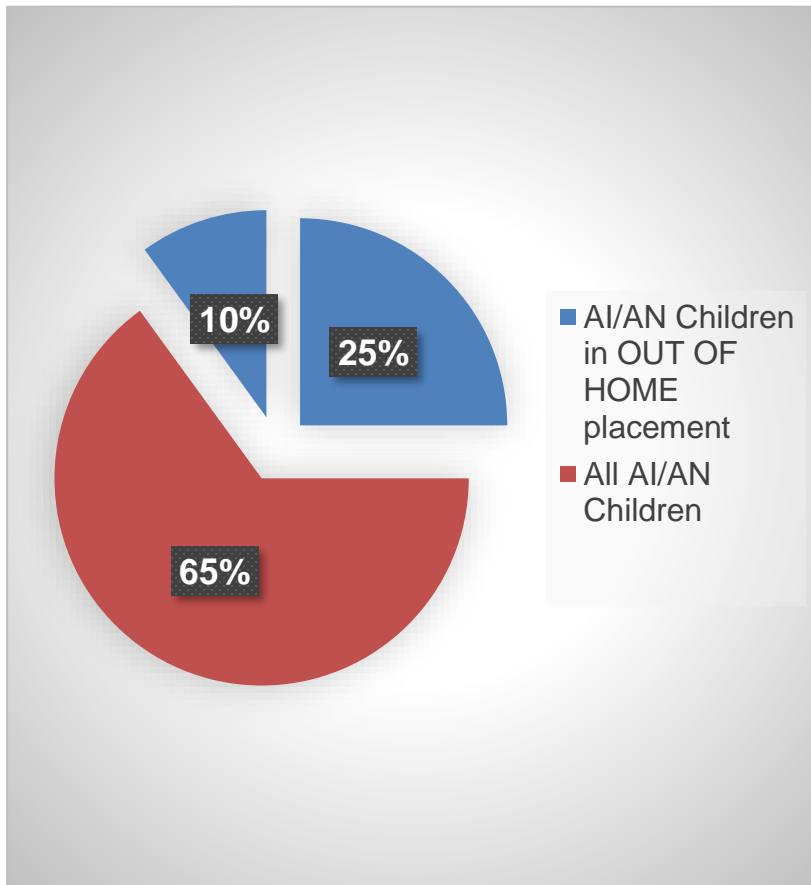
casey family programs

fostering families. fostering change®

What is the Indian Child Welfare Act

Association on American Indian Affairs

1960-70s found:



Indian Child Welfare Act (ICWA)

- Federal child welfare law passed in 1978
- ICWA pertains to Indian children in state child welfare systems; it does not apply to children under tribal jurisdiction; families who currently live or have a permanent home on the reservation are subject to the Tribal Code, not ICWA
- Purpose of Act: address problems in state child welfare systems and to curtail state authority
- Adds federal standards to state child welfare law, but does not replace state law except where state law is inconsistent with ICWA

ICWA

- The acknowledgment of tribal sovereignty is one of the keys to understanding ICWA
- Congress recognized the important role of tribes in protecting the well-being of Indian children and keeping children connected with their tribal community and culture
- It also recognized that tribes have an interest in keeping children part of their communities if they are to survive and thrive in the future
- Tribes get notice of all cases involving their children, can intervene as a party, and seek transfer of cases to Tribal Court

ICWA

- Emphasis on protecting the rights of biological parents and extended family
- Congress believed that this would advance the best interests of Indian children

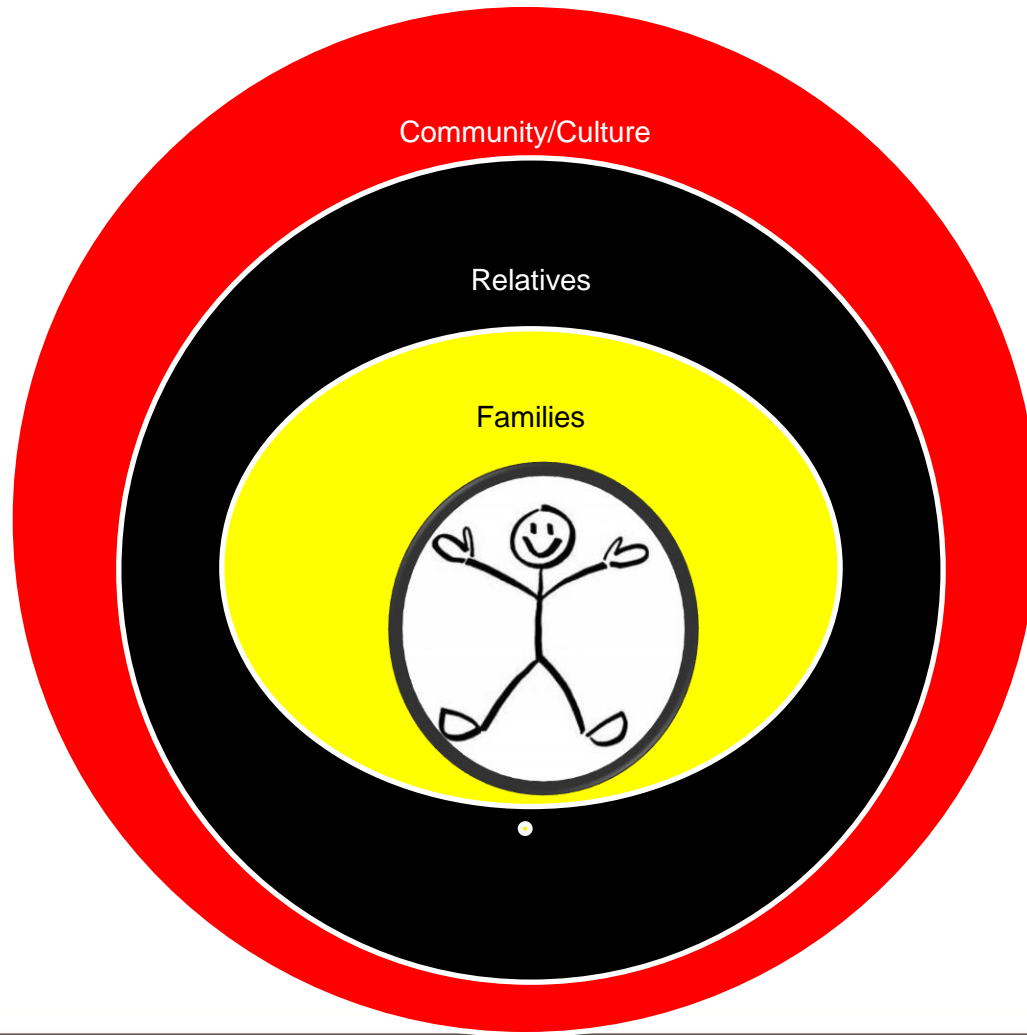
ICWA – Rights of parents

- Some of the most important rights are:
 - Active efforts are required to keep children with their parents/custodians and to reunify families if a child is removed
 - As compared to state law, a higher legal standard must be met before removal of a child or termination of parental rights

ICWA – Connection with Extended Family and Tribal Community

- Foster care placement preferences:
 1. Relative
 2. Tribally-licensed or approved foster home
 3. Indian home licensed by non-Indian entity
- Adoption placement preferences:
 1. Relative
 2. Other members of the child's tribe
 3. Other Indian families
- Tribe may set a different set of preferences which must be followed by state court
- Social and cultural standards of the Indian community to be applied

Why the **Gold Standard** of child welfare?



Active efforts to keep children safely with their families or to reunify them with their families.

Placement Preferences to keep them connected to relatives, identity and culture. All within a community context (**Transfer**).

When does ICWA apply?

In State
Court

Not in tribal
court

Indian Child

[25 U.S.C. §1903(4)]

Under 18 at start of
case;

Unmarried; and

Member of tribe; or
Eligible for
membership and
one bio parent is a
member

Child Custody
Proceeding

[25 U.S.C §1903(1)]

Emergency
Proceeding

Involuntary
Proceeding

Status Offense
Proceeding

Voluntary
Proceedings

Involuntary Child Welfare Proceedings

Standard for seeking a foster care placement or termination of parental rights is that continued custody will result in serious physical or emotional harm to the child.

Clear & Convincing Evidence for Foster care placement, Beyond a Reasonable Doubt for TPR

Active Efforts to keep the child with his/her family or to reunify with family must be shown

Testimony of Qualified Expert Witness required

Standard of Proof

[25 C.F.R. §23.121]

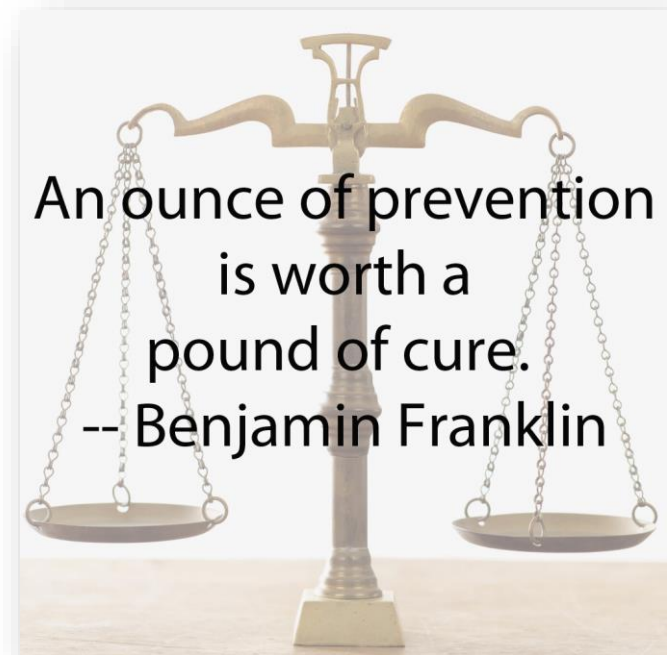
- Must show a causal connection between conditions in the home and serious physical or emotional harm to the child
 - Evidence of poverty, single-parenting, inadequate housing, substance abuse, or non-conforming social behavior by itself cannot meet the standard of proof unless the causal connection is shown

Active Efforts

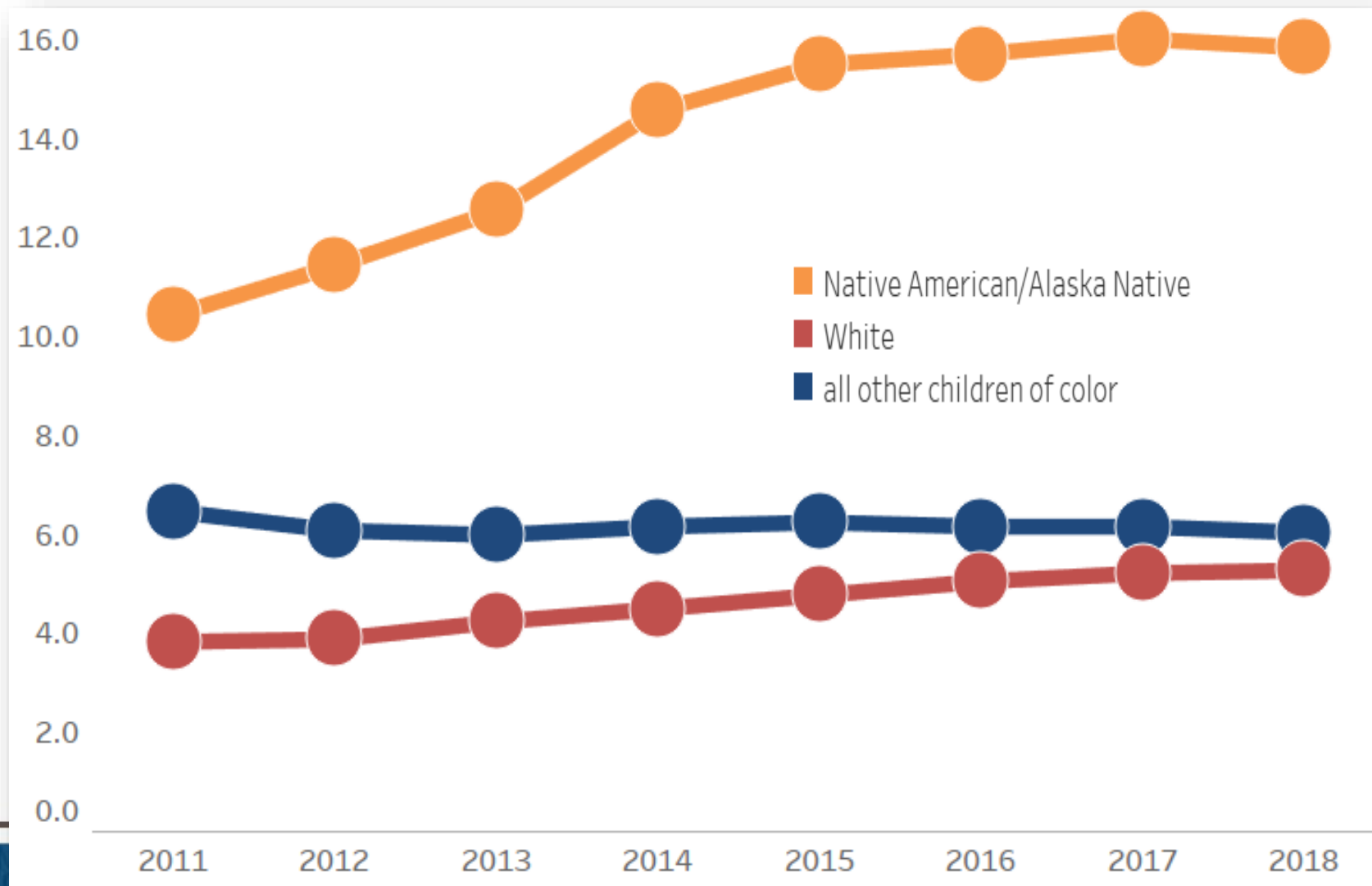
[25 C.F.R. §§ 23.2 and 120; Guideline B.5]

➤ Affirmative, active, thorough and timely efforts to maintain or reunite a child with his or her family

- Involve assisting the parents/Indian custodian through the steps of a case plan and with accessing or developing necessary resources
- Should be conducted in partnership with tribe, child, parents, extended family and consistent with tribe's social/cultural standards
- Agency must document that active efforts were provided prior to removal and before TPR and that they were unsuccessful



Disparity continues for American Indian/Alaska Native children in care (per 1,000 children) (**over 50% placed with non-Native families**)



What is a Qualified Expert Witness (QEW) and Why Do We Need One

Qualified Expert Witness

Purpose:

- In passing ICWA, Congress wanted to make sure that Indian child-welfare determinations are not based on “white middle-class standard which, in many cases, forecloses placement with [an] Indian family”
- Congress recognized that States have failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families

Qualified Expert Witness (QEW)

[25 C.F.R. §23.122]

- Must be qualified to testify whether statutory standard is met
 - Continued custody will result in serious physical or emotional harm to the child
- Should normally be qualified to talk about prevailing social and cultural standards of the Indian child's Tribe
- Social Worker handling the case cannot be the QEW



Adjudication: Qualified Expert Witness

[Guideline G.2]

- Exception in narrow circumstances where knowledge about social and cultural standards is “plainly irrelevant” to the circumstances at issue, e.g., testimony on sexual abuse
- Guidelines specify that there may be multiple QEWs

Who Finds and Approves the QEW

- State has burden to secure the QEW and compensate the QEW
- Assistance of tribe to find a QEW may be sought and ongoing state efforts to work with tribes that are regularly engaged with the agency and court system should take place, but the tribe is not required to respond; if the tribe can identify a QEW, that is a best practice and makes it more likely that tribal community standards will be considered by the Court
- Notice must be sent to the parties
- Judge decides whether to approve the QEW
- Other expert witnesses may also be called

How Does the QEW Get Information

- Much of the information available to a QEW will be found in the state's child welfare file and by talking to social workers (state and tribal) involved in the case
- The Commentary to the regulations also recommends that the QEW be familiar with the child, make contact with parents and extended family members involved in the child's life, and view interactions between the parents and child

What is the QEWs role in a contested child welfare case

What is a QEW expert on?

- Knowledge of tribal customs as they pertain to family organization, child rearing, roles of relatives in caregiving, importance of tribal (group) identity
- Prevailing social and cultural standards and childrearing practices

What might this include?

- The tribe's history
- How children are viewed by the tribe
- Child rearing practices
- Familial relationships and life values
- Use of discipline
- Cultural expectations
- Role of extended family in raising a child
- Available tribal services, formal and informal

What else should the QEW know?

- The family's history
- Protective services issues in the family
- Substantiated incidents of abuse or neglect
- The needs of the child and family, e.g. safety considerations, basic living needs
- Agency response, including services provided and family engagement
- Tribal staff and family view of the situation

The Big Question

- If the child remains in the home is it likely to result in serious emotional or physical damage to the child?
 - This may include not only the current impact on the child of parental behavior, but also if the parents are capable and willing to modify their behavior if adequate support (“active efforts”) are provided or circumstances are changed

What kinds of Questions Might You Ask a QEW

Foundational Questions

Foundational questions designed to address whether:

- Is this person really qualified to be a QEW for the purposes of ICWA?
- Does the tribe know this person?
- Do they agree that the person is qualified?



Sample Foundational Questions

- What is your name?
- Are you a member of the Indian child's tribe?
- If not, are you a member of any tribe?
- How are you involved or connected with the tribe?
- Are you employed by the tribe and, if so, in what capacity?
- If not, are you employed, by whom and in what capacity?
- How long have you worked there?
- What is your educational background?
- Have you been designated or approved by the tribe as an expert in these proceedings?
- Are you familiar with the culture of the tribe, particularly in relation to family organization and childrearing practices?



Sample Foundational Questions

- How have you obtained that knowledge?
- If you are not familiar with this specific tribe, do you have knowledge of or experience working with families from other tribes, particularly tribes with a similar cultural background with the Indian child's tribe?
- Please explain.
- Can you summarize any experience that you have in working or dealing with families who present safety concerns?
- Do you believe you have enough information about this case to offer an expert opinion as to the safety of these children?
- Have you testified as a QEW before?
- How many times?
- For this tribe or for other tribes?



Questions to determine what the QEW knows about the case (Direct testimony)

Designed to determine:

- What happened and how do they know what happened?
- How is the cultural knowledge of the QEW relevant to the issues in the case?
- Do they have an opinion as to whether continued custody is likely to cause serious emotional or physical harm to the child?
- If so, what serious physical or emotional harm to the child is likely?



Sample Questions to determine what the QEW knows about the case (Direct testimony)

- Are you familiar with the case in ____ County involving [children's names]
- How have you been made familiar with this case?
- Have you reviewed the file?
 - Have you met with the family?
 - Have you met with others involved in the case? If so, who?
 - Anything else that you have done to prepare?
- What is your understanding of the reasons that this action has been brought?



Sample Questions to determine what the QEW knows about the case (Direct testimony)

- Based upon your review of the case is the parent engaged in child raising practices that are considered unacceptable and unsafe by the tribal community?
- Can you share which behaviors or circumstances pose a serious threat to the safety of the child and how they are impacting or are likely to impact the child? [e.g., chemical dependency, domestic violence, educational neglect]
- Do you know what services were provided to the family to [prevent out of home placement/reunify the family] and whether and how they addressed the need of the child and family?
- Based upon your review and in light of the services that were or could be provided, it is your opinion that the continued custody of the child by his/her parent(s)/custodian(s) is likely to result in serious emotional or physical damage to the child?
- In your opinion, is the [out of home placement/termination of parental rights] in the child's best interests, taking into account the social and cultural practices of the tribe?



Questions designed to get information about the suitability of an out-of-home placement (Direct testimony)

- Seeking to determine:
 - Is the child in a preferred placement?
 - If not, is there good cause for the non-preferred placement
- May only be appropriate if QEW is a member of the tribal community or employee of the tribe
- While social and cultural knowledge is important for determining the suitability of a placement, this is not a specific QEW “duty”



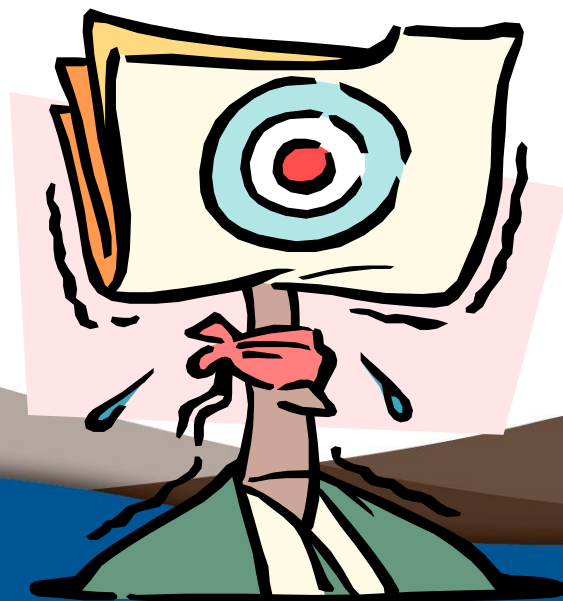
Sample Questions designed to get information about the suitability of an out-of-home (Direct testimony)

- Is the proposed placement consistent with the order of preference under the ICWA?
- (If not)
 - Are you aware of any preferred placements have been identified?
 - Would they have been acceptable under the social and cultural standards of the tribe?
 - Do you know what efforts were made to find a suitable preferred placement? Can you summarize what they were?



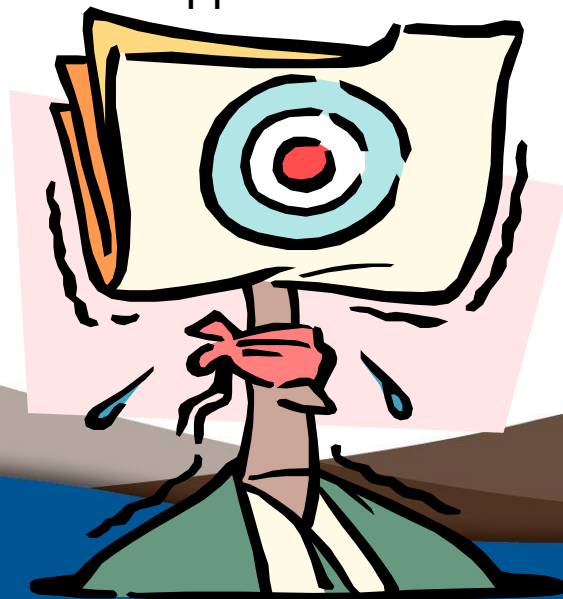
Cross-Examination

- Many attorneys prefer to ask questions on cross-examination that will elicit “yes” or “no” answers
- Since the nature of those questions is very fact specific to an individual case, I have prepared the sample cross examination questions as open-ended questions with the intent of identifying potential avenues of inquiry; attorneys can obviously adapt the “style” of the question as appropriate



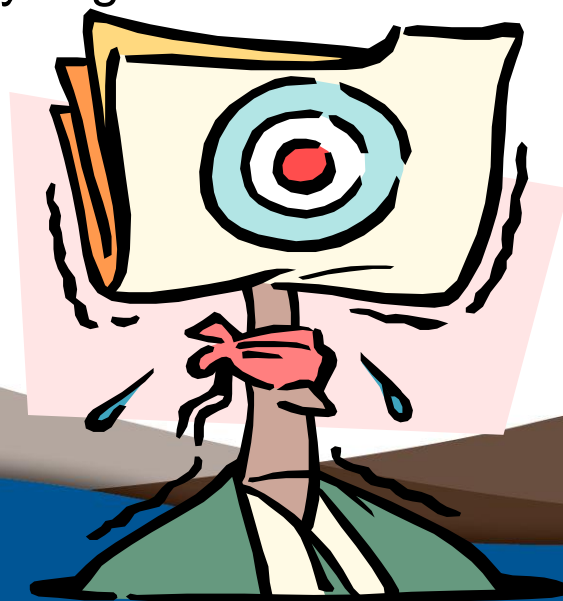
Sample Questions for Cross-Examination

- What are the specific conditions in the home that lead you to the conclusion that continued custody by the mother would result in serious physical or emotional damage to the children?
- Can you relate those conditions to specific harm to the children?
- In your opinion, has the county provided active efforts to the parent(s) [to keep the children at home/return the children back to her care/prevent termination of parental rights]?
- What is your understanding of those efforts?
- Are there any services that you can think of that might have helped the family stay together which were not provided?
- Did you ask the parent what supports he/she thinks would be helpful?



Sample Questions for Cross-Examination

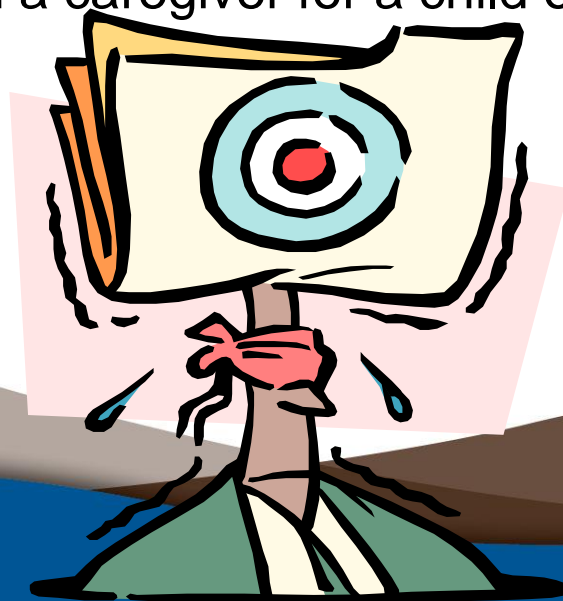
- Do you know if the agency searched for relatives that could provide support to the family or serve as placements?
- Do you think that there might be other relatives that they did not identify through their search?
- What is your understanding of the concern that the county had with the mother's parenting in the case?
- Do you know if the tribe shares this concern?
- Does the conduct of the parent(s) violate the customs of the tribe as they pertain to family organization and childrearing practices? If so, how?



Sample Questions for Cross-Examination

If the QEW is not a member of the tribe or part of the tribal community:

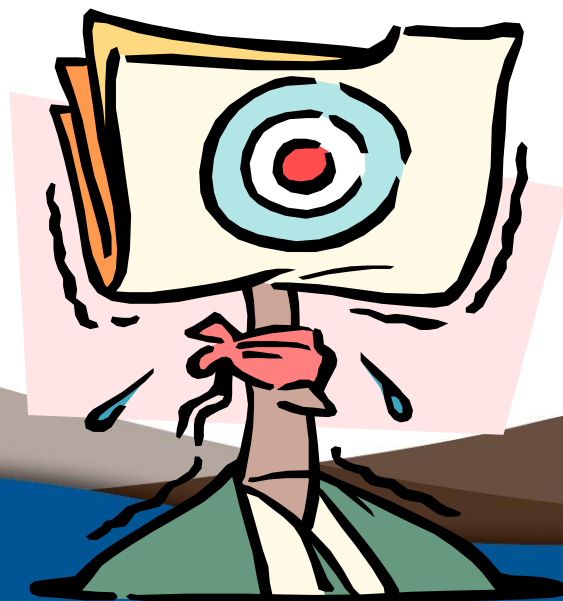
- Are you married into the tribe?
- Do you have any family members who are members of the tribe?
- Were you raised by a tribal member?
- Have you ever lived in the tribal community?
- Have you ever socialized in your personal life with members of this tribe?
- Have you ever been a caregiver for a child of this tribe?



Sample Questions for Cross-Examination

If the QEW is not a member of the tribe or part of the tribal community:

- Did you reach out to the tribal community to better understand their perspective on childrearing in general and in terms of this case specifically?
- Have you ever been to the reservation?
- Have you ever had cultural training from a tribal member regarding child-rearing in tribal ways from this tribe?
- Are you familiar with historical trauma in Indian families?



For Further Information

Jack F. Trope
jtrope@casey.org