

Active Efforts Transcript

00:10

VIDA CASTANEDA: Good afternoon. I am Vida Castaneda, senior analyst in the tribal-state programs unit at the Judicial Council of California and descendant of the Chumash, Ohlone, Zapotec, and Tarahumara nations.

We would like to acknowledge our presentation is brought to you today from the original and current lands of the Ohlone people in the San Francisco Bay Area where our Judicial Council of California office is currently located.

We thank the Ohlone ancestors and present tribal communities as well as the tribal lands and communities from where our presenters are speaking from.

Welcome to everyone joining us today. We will be featuring active efforts which judicial officers and counsel for parents and children need to know in today's webinar. If you have questions during the webinar please write them in the chat box to our panelists, and we will be answering your questions throughout today's presentation. We will be offering BBS, MCLE, and judicial officer continuing education units for today. Please email Amanda or myself if you would like a certificate.

Now let's meet our panelists. We have joining us today Judge Leonard Edwards, retired judge of the Superior Court of California, County of Santa Clara; Antoinette Fabela, Ojibawa, ICWA consultant/trainer and QEW; David Myers, attorney for COO for Dependency Legal Services; and, Jedd Parr, who is the Directing Attorney at California Indian Legal Services.

So, Amanda, next slide please, and Judge Edwards, please lead us into today's presentation.

01:52

JUDGE EDWARDS:

Well, thank you, Miss Castaneda. It's a pleasure to join this team and to talk about a topic that's near and dear to our hearts, and that is active efforts. It was a term created in 1978 by Congress with the passage of the Indian Child Welfare Act, which we refer to as the ICWA. In 1980, just two years later, Congress, Congress passed, and President Carter signed, the Adoption Assistance and Child Welfare Act of that year, which created the term reasonable efforts, um, so the two are related and we will go back and forth between them today. However, in the original statutes, neither active efforts nor reasonable efforts was given a definition in those statutes. Next slide.

So, as we follow through history, 2016 the Bureau of Indian Affairs issued regulations, and they contained a definition of active efforts, and I'm going to tell you that from my opinion, um, in my opinion, the, the definition they offered gives a lot of aspects of what should be contained in active efforts but whether active efforts have been offered or not is a topic... one of the things we'll talk about today. And in 2019, that same definition was incorporated into California law with the passage of AB 3176. Next slide.

Any party seeking to affect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitated programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. That is the federal law coming from the federal regulations. The citations are there.

I'm going to take side issue right now and point out that dependency law for the history of our legal institutions has been the lowest level in terms of procedure and in terms of judges who have had experience before they reach dependency court, and yet it is my belief that no issues are more important than whether a family is to be maintained or whether the child's... parental rights to a child shall be terminated, and so I consider this a very important topic, and I'm glad that we have people listening in today, and I urge you to spend a considerable time of your legal career in dependency court because that's where the most important societal decisions are made. Next slide.

To the maximum extent possible active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and tribe, and now that is once again right out of the regulations. That's the law we're dealing with. Next slide.

So, active efforts is more than working with the parent to complete the case plan, and we're going to mention this several times today. You need more, and the law requires more, and the statutes require more. Next slide.

So, active efforts, I'm going to give examples when they must be employed by the social worker and what's the social worker to do? Well, there are a number of things. One is prevent removal of an Indian child, identify, notice, and engage members of the Indian child's tribe, provide services to promote reunification of the child with the family, prevent the breakup of an Indian child's family prior to disposition. We have a statute we'll talk about. And take steps to ensure if the child must be removed that the child is placed with family or tribal members, and I'm going to ask Antoinette to talk a little bit about the importance of family team meetings. Antoinette, are you there?

ANTOINETTE FABELA

I'm here. Thank you. Um, hello, everybody, so um and speaking about preventing the breakup of an Indian family. We have a code, W and I code 306(f)(4), as Judge Edwards previously mentioned. It is efforts to prevent the breakup of an Indian family prior to disposition. This is a widely underused practice of implementing this code is what I have recognized in my work as a qualified expert witness, uh, and something that I stress heavily on when I do trainings of ICWA. So, there are some really specific steps that are mentioned within the code, uh, that social workers must first consider prior to removal and that would be and that is also if there is a no imminent risk that is present, and so that includes, um, to think about whether there are any reasonable services available to eliminate the need for removal, uh, and to make those referrals for parents, uh, or the Indian custodian, any referrals to any public assistance that could eliminate...services that could eliminate the need for removal. Can the non-offending, uh, caregiver, Indian custodian, parent provide for and protect the child, and the alleged perpetrator agrees voluntarily to remain to leave the home and to remain out of the home, um, and, uh, also, um, that you know some of the, some of the tools that can be utilized to do this is to consider either using a child family team meeting, using that venue to meet with the family, any extended family members, a child if age appropriate, um, perhaps some native community providers or resources, other community resource providers, and anybody else that the parents want to be a part of this team to have this discussion. And some of the, uh, the ideas that could be discussed after, uh, identifying the concerns and the strengths of the family, uh, could include, um, that, um, you know is there can they use a voluntary family maintenance? Perhaps the parents would agree to that, uh, and if the particular circumstances that, that brought the attention before CPS, um, that that's possible, um, perhaps there's a safety plan that could be put into place, um? Otherwise, there's also, you know, is there a higher level of care needed, for example family maintenance or aka a non-detained petition? Uh or perhaps there's a possibility of the family identifying an Indian custodian? So, these are all things that can be discussed at the CFT prior to removal.

Now it's important to note that W & I code 361.7, which, uh, Judge Edwards previously mentioned about preventing the breakup of an Indian family, and active efforts must be shown that they were unsuccessful. That code is, is more directed towards when there is already a detention that has been ordered for, uh, recommendation for foster care, whereas the W and I code 306f is free. In other words, it hasn't been determined yet, and so these are ways in which, um, uh, social workers can engage into and utilize their active efforts to keep families together because all of these things that I mentioned will keep the child in the home, and not to say that something could happen that would cause imminent risk later on, um. However, it's important, and I must add because I know somebody put a question into the pre-questions here when they registered, and I want to add that the

question was: "How do they know if active efforts, if the information isn't put into court reports?" It is the social worker's duty to document all active efforts, even if parents you know, uh, do not meet up to the standards or, or for some reason or another do not engage in their services. All of those must be put into the delivery of services log and then transferred over to, uh, the court reports, and then this is about documentation, and so it's not just saying "yes, active efforts were provided," but rather must be documented and the dates and all the specifics and what was discussed, and all these things that you hold the CFT meeting with your family's pre-detention would be in your delivery of services log, and and if necessary in the future if a detention were needed all this information will be then transferred over to the detention report.

12:39

JUDGE EDWARDS

Thank you, Antoinette. Very helpful. Next slide please.

Here is a copy of 306 f4. If it is reason to know that the child is an Indian child, the county social worker shall make active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family prior to the removal of from the custody of a parent or parents or Indian custodian unless emergency removal is necessary to prevent imminent physical damage or harm to the Indian child.

Now Antoinette is absolutely right when she says there must be a report, a report specifying the active efforts that the social worker used or applied to the family, um, and that report is critical, but you heard Antoinette, and you saw the last slide there are a number of things that the social worker could do, and You, if you don't see those in the report then you need to start asking questions, and in fact we're going to give you a copy of more than 30 questions that we have drawn up that to give you an idea of the specificity that you should be demanding appear on the record because if you're going to appeal you have to have details and just the statement "all active efforts were, were given by the social worker," that is not enough. You need to specify did the social worker have a family team meeting? If not, why not?

The other comment I want to make is what is imminent physical damage or harm to the Indian child? I want to tell you that I think it's a higher bar than we often see in our court proceedings, and for judges and attorneys, I think you have to ask and probe on what the imminent physical damage or harm was, because so often it's, it's passed, there was a crisis it passed, and then you have to see whether you can stabilize. Let's go on to the next slide.

So, I mentioned before that neither active nor reasonable efforts has a specific definition; it really depends on the problems presented and the resources available in the community.

And, even though the regulations have a number of details, the problem is always going to be a little bit different and the tools that the social worker has are going to be, uh, relevant or irrelevant depending on the particular problem. Next slide.

However, the federal regulations give you an outline of the specific aspects of what active efforts should include, but the details that we've been talking about will be on just what the regulations say. Next slide.

So, some of you have heard of Justice William Thorne who was an appellate court justice from Utah, and, in my way of thinking, uh, one of the most articulate and knowledgeable persons about the Indian Child Welfare Act, and here's what he had to say about active efforts. Next slide.

This conversation made me realize -- this is judge, Justice Thorpe -- made me realize that active efforts was not a measure of services but instead a different attitude or approach to helping a parent or family succeed. Not judging, but healing. Not compliance focused, but oriented to assisting the parent and family. Not creating a parenting plan, but instead walking and working the society of the parent and family. Active efforts is about doing things differently. Not just more or increased amounts of the same things we've already been doing. It's about investing in the success of the family. It is about connecting them to healing. It is about walking beside them and lending them our strength when they need it. It is what we would do if they were our families. It is what we would do if their lives really mattered. All families matter, and we should act like it. I think we should all take that to heart.

Active efforts involves an attitude on the part of the social worker. It's a different attitude in cases not involving Native Americans. There is an urgency in all child welfare cases, and the social workers attitude must reflect the urgency of a situation where a child may lose his or her parents and his or her tribe and parents may lose their child. Next slide.

Well, this is for the lawyers and judges. Few state appellate cases address the meaning of active efforts, and I've collected these in a couple of articles you can get on my website, um, but I'm going to review them quickly right now. Most state appellate decisions conclude that active efforts require *more* efforts than reasonable efforts. Well, that seems like a very simple proposition. Active is greater than reasonable. However, as we'll see that's not what every state says. Next slide.

So, here's the Maryland case of *Nicole B.* The trial court found that the social worker had only provided reasonable efforts. The appellate court concluded that the social worker referred the parents to services and that referrals were not active efforts. The case was reversed and returned to the trial court. Well, I would like to add that if a social worker refers to parents and services that's not reasonable efforts either, but it's certainly not active efforts. Next slide.

So here we go. We have in Illinois the Department of Human Services versus Lee; and in Nebraska we have cases; in Utah we have cases. You can get all of those from the article I mentioned you can look them up on, on, online if you wish, but I'm going to tell you that they're not a great deal of help. They, they spend a lot of time saying active is, is a higher level of services than reasonable and also a higher level of services than passive, which I criticize because passive isn't in the law anywhere, and obviously active is greater than passive. So, let's go to the next slide.

However, if you really want to read about active efforts you look at the Alaska law because Alaska doesn't have an intermediate appellate court, so every case in Alaska is, that's on appeal, is decided by the Alaska Supreme Court, and Alaska has the highest percentage of Alaskan Natives than any state has of, of, uh, Native Americans. And so, if you want to look at one case that's typical, the *Denny M.* case is, from the Alaska Supreme Court just a few years ago. Next slide.

So, one state, Kansas, has issued an appellate decision regarding active efforts, and this occurred after the adoption of the federal regulations so here's the first time we have an appellate court with the new regulations in place and that's the *L.M.B.* case. Next slide.

So, the Kansas court affirmed the trial court and was reasonably specific about what the social worker did in order to follow the regulation, and I think it's worth it looking, looking in detail about what that court found was active. The tribe participated in the creation of the case plan. That's great. You know the federal regulations require that the parent and the social worker create the case plan together, but in the, under the ICWA, the tribe participating is a higher level of case plan creation. Relatives who were members of the tribe participated throughout the case. Again, very consistent with the federal regulations. The social worker met regularly with relatives and the children. Great. The children were replaced with maternal relatives, which was consistent with the cultural tradition of the Citizen Potawatomi Nation. Again, consistent with federal regulations. The social worker attempted to facilitate parent filed visits, parent-child visits, conditioned on clean drug tests by the parents, but the parents only showed up for one visit.

Well, I have a, I have a bone to pick on that one. Um, it's not clear to me that a clean drug test is necessary, although most parts around the country do that. If the parent is showing just a slight positive on marijuana, for instance, it stays in the blood for a long time. The contact between the parent and the child is so important that the I think that the social worker ought to try to figure out a way that the parent sees the child, and one of the reasons is that the incentive to reunify comes from the love of the parent towards the child, and if they're not visiting that incentive is removed. Well, the state provided therapy for the children when needed. That's good. And the state also provided referrals for a parenting class and for a drug and alcohol assessment. It sounds like the assessment

never took place because the court found that some of the efforts provided by the social worker were quote hazy because it was so difficult to contact the parents, let alone provide them with additional help. So that's what happened in the case from Kansas, and I think we can say they did a pretty good job, but I would like to have gone a little, even a little deeper into the facts of that case and what the social worker might have, what else the social worker might have considered. I didn't for example see a family team meeting, um. Next slide please.

California law. Well, this is interesting because most of you are Californians. It takes the position that active efforts are equivalent to reasonable efforts, and that goes back to 1998 and the *Michael G.* case. Next slide.

Well, after the *Michael G.* case, the California legislature passed Welfare and Institutions Code section 361.7b, and here it is: "What constitutes active efforts shall be assessed on a case-by-case basis. The active effort shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's extended family, tribe, and other Indian social service agencies and individual Indian caregiver service providers." Well, you might think that that statute would have changed the attitude of the appellate courts in California regarding what complies, what are epic efforts. Well, let's see the next slide.

However, after adoption of 361.7, the appellate court case law in California has affirmed the position taken in the *Michael G.* case, and here are three cases, uh. Two of them, *T.W.* and *C.F.*, obviously come after 361.7. *Hannah S.* goes back before *Michael G.* Well, uh, just, just after *Michael G.*, and so California hasn't been persuaded yet, but I'm urging attorneys who are managing and handling ICWA cases to, to do the, to use the tools that we are talking about today to persuade the appellate courts that active efforts is greater than reasonable efforts now. There is a there is another, uh, attitude that some people have taken, and that is that California has raised reasonable efforts to the active efforts level, and, therefore, they are one and the same. Well, that's nice to say, but I don't believe it, and I think that, um, I think California can do better, and some of the tools we're going to give you today will, I think, facilitate a more rational decision consistent with the regulations. I should add that the California appellate courts are the strongest in the country in dealing with the reasonable efforts mandate of the 1980 law, and I know that because I know the reasonable efforts cases in all 51 jurisdictions and have written on them, and California has more reversals on the reasonable efforts issue that, in my view, than all the rest of the cases in the state put together. Some states have no reasonable efforts decisions, just as they have no active efforts decisions. So, I think that we, we're doing alright in reasonable effort in California, but we can do better. We can do better in active efforts, and I'm looking upon the attorneys and judges in listening today to take the steps necessary. Let's go to the next slide.

Well, I think I already said this, but I can't say it enough times. Family reunification services are not reasonable or active, yet they consist of nothing more than handing the client a list of services and then putting the entire responsibility on the client to find and complete the services. When you see that in any of your cases, reasonable or active ICWA or not, you've got to, you've got to step in and say, "that's not proper. That's not legal." Let's go to the next slide.

So, my position is that it is the specificity of actions by the social worker, consistent with the regulations and consistent with the other statutes that we've pointed out, and in particular, uh, the comments by Antoinette, that will determine whether active efforts have been provided. Next slide.

So, what are you going to do when you're in court? I think what you need to do is create a record by questioning the social worker about the specific actions he or she has taken to provide active efforts to the parent and child. Now how, how are you going to do that? Well, you're going to start with the report. The social workers report is. should contain a section on what the active efforts were, and frankly if they don't, if that's not there, I would say, "Your Honor, I'm not prepared to proceed because I don't have a statement of what the social worker has done to provide active efforts to the parent and child. I insist on that. If you want, we can start in now and I can go piecemeal step by step, but it's going to take a long time. I think that the law requires the active efforts to be detailed by the social worker in a report before we can go any further." And when that report is there, then you're, going to compare it to the best efforts that you think were necessary in this case, and so start with that report and then start asking the social worker specific questions about what he or she could have done, thought of doing, and what challenges she bumped into. This, this to me is the, is the whole case, is your question, and if the attorneys are, are not on the ball, the judge should take over the questioning at that point, and you need to find out on the record: What's happened? What's there a family team meeting? Was there... and on and on and on? Next slide.

And, by the way, what I was just saying is required by federal law because in section 23.120 how does the state court ensure that active efforts have been made, (b) Active efforts must be documented in detail in the record. Well, the social worker would love to have everyone say, "my report is sufficient," and those of us who've been trained in the law think that's a good starting point, but now let's, let's get into the details. Let's find out what the social worker did on a myriad of possible issues that could have prevented removal of that child from home or reunified that child quickly with the parents. Next slide.

But what we've done is we've created a starting point for the creation of a record, and if you want that I think you, we're going to send it to you anyway or you need to ask you need to ask on a chat box, "please send me a copy." There are a lot of questions there,

and I'm sure there are more. I'm sure that you can think of other things depending on the facts of the particular case that you need to know to create that record the federal government has said needs to be created, so that a reviewing court will know what happens, so I think you can address a lot of the questions that are in attachment A at the detention hearing, which, in my way of thinking, is the most important hearing at the, uh, in the entire, uh, series of hearings in a dependency case. But if you can't answer them all, I think, as a judge, set an interim review 30 or 45 days at the detention hearing to address those issues which were not covered at the detention hearing. Keep the case in front of the court. Don't continue with six months. The, the law says, California law, well, you can continue it for six months. No, there are too many issues about what active efforts are being provided. Are they being provided? Find out at that 30- or 45-day review. Next slide.

We're going to turn over to Jedd Parr right now on a new issue. Jedd?

34:20

JEDD PARR

Hi, everyone. Um, so what I'm going to talk about for a couple of slides here is the question of bypass. Um, it's something that comes up in a lot of cases, and in a number of counties that I've been in I've been surprised at the lack of knowledge or lack of assertion of 361.7. We talked a little bit about that section already. That is the section that says active efforts have to be conducted in consultation with tribe or tribal services and that they have to incorporate the tribe's social and cultural standards. But in my opinion the most important part of 361.7 says that, in spite of the bypass provisions of 361.5, you still have to prove that active efforts were made in an ICWA case, so that for the most part is going to take all ICWA cases outside of the possibility of bypass, and, uh, to be honest I rarely see this asserted unless the tribe intervenes in a case and comes in in time to actually make this assertion. Um, you know, it's something that I would expect to see more parents' counsel arguing or children's counsel or the courts being aware of on their own, but very often it seems like if bypass is something that, um, the county recommends that it, uh, and there's grounds for it under 361.5, that 361.7 just sort of gets swept under the rug. Um, so I'd like to make everyone aware of this, parents' counsel especially, even if you have the grounds for bypass under 361.5, you still have an active efforts requirement in an ICWA case. Next slide please.

So, 361.7 was part of Senate Bill 678, came into law in 2006, and since then there's only been one appellate case in California that has looked at the question of bypass and active efforts in an ICWA case. Uh, the citation is at the bottom there. Um, there is an earlier case that predates 361.7, and I'm going to talk about that in a minute, but really there is not much case law on this, and as we'll see in the next slide, the case itself was a pretty

egregious one, and so, in my opinion, um, you should virtually never see bypass in an ICWA case. Next slide please.

Okay, so this is the 2009 case that was decided after 361.7 was enacted. Like I said it was a very egregious case. Uh, you had a father, or I believe a father, some of the children's stepfather, or some of the others, and, uh, there were a number of reasons why the court said we can't see any purpose in offering him services. He was a registered sex offender. He already had a conviction for lewd and lascivious acts on a minor. Just by being in the home, including in the home with his own children, he was violating parole, and he had already had allegations sustained of molestation against the minor half-sister. And if you look at the rest of the case, the court also finds it important that the mother in that case was essentially denying that abuse had ever happened, was blaming it on the child or saying the child was making it up. Um, and what the court concluded, and it did look at this *Leticia V.* case that's down at the bottom of the slide. Here what the court concluded is that it couldn't imagine any services that would help in this situation. Dad had already had repeat offenses, that there didn't seem to be any admission of wrongdoing, let alone contrition, and that there was nothing that court could conceive of, whether that was culturally appropriate or otherwise, that the court could offer to the father that would theoretically allow the children to be unified with him.

I see a question popping up in the chat, um, and I, I will point out in this case, that active efforts were still offered to the mother even though she was, uh, you know sort of a participating party in that she was looking the other way or blaming the child or not taking it seriously. The court did still acknowledge that active efforts should be extended to her. It was just the father that the court said, "there's nothing that we can do," and the key issue is not whether grounds for bypass exist under 361.5. The key issue is whether you could show that active efforts would be useless, that it would be, if, the quote from *Leticia V.* is, "nothing but an idle act." So, it's not just that you think this probably won't work. Uh, it's not just that the parent may have some past history of having other children removed or being unsuccessful in services. It's whether it's clear that services in this particular case would be useless. In that case, the court did say it's fine to bypass despite the fact that active efforts are required.

Leticia V. is a pre-361.7 case. It's, it's very similar. It may be a little bit more similar to cases that you see on a day-to-day basis. It was a mother who had had a long history of substance abuse, had a number of children removed from her, and services I believe on four or five occasions offered in the past that were unsuccessful, and the court there said you know we can't think of anything that's going to help here. In fact, in that case she had just recently received and been unsuccessful in services, and that's where the court concluded, uh, the law doesn't require the doing of an idle act. And that the fact that there had been this long history and this many attempts to provide services, in particular

recently as well, that the court said there's no point in offering them at this particular time. So, you can take a look at *Leticia V.* too. Again, it does predate 361.7.

40:43

JUDGE EDWARDS

Thank you, Jed. David, I think this would be a great time for you to pitch in with the perspective of a parent attorney and active efforts.

40:55

DAVID MEYERS

Thank you. I was going to say this is the most fun I've ever had being a panelist because if I could have written the script and asked for a judge to deliver the content as a parent or child attorney it would have been you, Your Honor. And so, um, I'm enjoying everything that you're saying, um, and agreeing, of course. I think the challenge that I have coming from a parent and child attorney perspective is, is how to take all of this great information and turn that into really good results for the families that we're servin, UM, g because we move so quickly in child welfare, and what's to say for a parent and child attorney or for a social worker, what's to say that this family and the set of facts they look just like the last 10 families that came in: oh another false tox baby, more domestic violence. here we go, more emotional abuse. And so to treat these families differently requires, I think, parents' and children's attorneys to use different muscles, um, and to slow the process down when judges are telling them, "We've got a heavy calendar. We got to get through this. Uh, we don't have the time today. You know, set this for a contested hearing on a case where the parents are in the wind? You know, why should we really worry about this?" Um, and the, the answer to that is, is really we have to slow the process down, and it's something of course we can do in every case, but in ICWA cases especially because we have different mandates. We have increased mandates that if we don't pay attention to, then we are not doing the full service that these families need, and so really the trick is to take all of this, if you've taken these last 45 minutes to listen, thank you. Um, it's time to take that kind of time in the cases that you have coming up tomorrow or this afternoon. And let's slow this down, and let's go line by line and do what we need to do in these cases to apply that which we are listening to today for every family. And if we're able to do that it will get easier, it will, it will go faster, and you will be training and conditioning your judges and agencies to, to make these inquiries faster and sooner as time goes on, so that would be my perspective at this point.

I know we have a few more slides, and when we get through those, I have some responses to some of the other questions we've received.

43:22

JUDGE EDWARDS

Well, David, I have a question for you right now. Um, do you think it's good practice for the parent attorney and the child's attorney to talk to the social worker outside of court about what, what efforts he or she is, uh, providing the family?

43:37

DAVID MEYERS

Yeah, I think to the extent that that's allowed in a given county, because some counties don't allow for that and that is certainly their right as represented parties, but to the extent there can be open and active communication, that is always the most effective way to get results. One of the things that we always teach our parent attorneys is that you are the ones that write the report, and I don't mean that literally, but a good parent attorney can look at it at a situation from the moment they're handed a petition and know exactly what they need that next report to say, and so for that attorney, um from the minute they start talking to a client, whether it's a child's attorney or a parent attorney, you know what you want those reports to say, you know how they need to read. And so, however you can get those reports to reflect what it is that your client wants and what it is that your client really needs, then you're doing your job and that includes the best work sometimes being done outside of the courtroom context.

44:36

JUDGE EDWARDS

Thank you very much. Let's go on to the next slide. We'll come back to further questions after this is over.

I wanted to tell you all about a recent decision from the federal fifth appellate circuit, and they've ruled that portions of the ICWA are unconstitutional, and the name of this case is Brackeen versus Haaland, and that's the number. They haven't got a federal third. This is so recent. It was in April of this year, just a couple of months ago, and if you get a hold of that case, don't download it; it's over 350 pages in length. They have about a 20-page summary. Next slide.

But while that court and it ruled that the ICWA is constitutional. However, it ruled that the active efforts requirement of the ICWA is unconstitutional, and there are a couple of other aspects of the ICWA it ruled unconstitutional, so this is serious business. Um, let's go to the next slide.

That decision is effective only in the states which comprise the Fifth Judicial Federal Circuit: Texas, Florida, Mississippi, Louisiana, Georgia, and Alabama. It has no legal effect for any other state. Of course, it has no legal effect in California. Next slide.

However, this case may end up in the United States Supreme Court as both sides have appealed this decision, and you may know that at least two justices on the U.S. Supreme Court have opined that the entire ICWA is unconstitutional. It's race-based, uh, is the main theory, but there are other theories floating around, and since those two justices expressed their opinion, three new justices have been appointed to the Supreme Court by the previous Republican administration, and I think everyone agrees they are, they are conservative judges. We don't know how they will rule on this, but the entire ICWA is at risk at this point. Next slide.

In your practice, be certain that active efforts are discussed in every court hearing. I think that in some cases you'll be educating the judge but you'll also be educating the social worker and her counsel that this is an issue that you find important, and you, and by bringing it up at each hearing, you are reminding everyone of the importance of active efforts. Next slide.

Now we have questions and comments, and, um, any one of the panelists, have you picked up on any of the questions that you'd like to speak to?

47:32

DAVID MEYERS

I have, Your Honor, and this is David. I'd like to go first and then Jedd and answer that. I'm gonna throw the BIA question out to you because I'm going to ask you both to talk a minute about reason to believe and reason to know. Um, this was not really central to active efforts, but it was the question we received, and I really feel like it needs a mention here, but before we go there, um, there was a question from a CASA, about what CASA can do. Um, and I just again, I, for the best CASAs really know their role and that is to support that child and be the eyes and ears for the court for that child, and I would say for CASA, the more questions you're asking, the more communication that you have with the social worker, the attorneys, and the parties involved, the better you'll be able to serve the child and ensure that those around you are doing their part as well. So, I would say if your CASA be curious. That's my best advice, and ask the questions, and raise the issues.

We also had a question about Families First and whether Families First would impact this, and the answer is absolutely. Um, that's a different webinar for a different day in terms of drilling into the Families First Act and how the prevention element of that will translate down. The short answer for purposes to this webinar is yes, it will absolutely have a positive impact, it should, on active efforts, and I would say speak with your

county leadership about how the FFPSA money is going to be routed and where the agency's vision is for how that, and to the extent you can have some influence in where that money flows and how the preventative services translate to all of your families. It should be a very short walk from that conversation to active efforts, so if you are a tribal representative and if you are, you know, coming from that perspective, then, yes, it's not too early to start working with your county and start having those conversations because there should be resources to come in and more of a focus on preventative services because of FFPSA.

And, so the third question, which is really one for, for Jedd and Antoinette, um, has to do with the BIA and getting them to respond, which I understand is more art than science [laughs], but, um, if you have comments about the BIA, and this would also be a really good time to, I think to talk about reason to know and reason to believe. Um, if any of you want to take that...?

50:09

JEDD PARR

Yeah, I'm happy to address that. I mean, frankly, as far as the BIA is concerned, they're not much use in ICWA cases. Um, about the best they can do is point you towards possible tribes that someone might be enrolled in. For example, in California we've got about 20 different Pomo tribes. So, if someone comes into court and says my mother, my grandmother was Pomo, but they can't specify which particular band or rancheria they're associated with the BIA may be able to help. CDSS also has a website or a pdf document, I forget which, that provides information on what affiliations are involved with each tribe and rancheria.

Um, as far as reason to believe, reason to know, you know, that's something that California adopted with, uh, with Assembly 3176 that was largely spearheaded by a group called California Tribal Families Coalition, and what they were trying to do is build a two-step process in where rather than flood tribes with formal notice based on the, the mere suggestion of Indian ancestry, which is what the standard used to be, trying to provide a mechanism where counties could sort of narrow, narrow what possible tribes might be involved and reach out informally and see if they can make a determination about membership or eligibility, or at least figure out which tribes that information should be directed to before formal notice is provided.

Uh, so, a couple years ago we had a case called *Austin J.*, uh, where probably the most common scenario arose, where a parent said "well, I believe I have Cherokee ancestry," and the *Austin J.* court -- this is the Third District Court of Appeal -- they said, you know, what ancestry isn't enough. Saying that you have Indian ancestry isn't enough because that's not set out in the criteria for reason to believe, um, and ICWA is not a race-based

statute; it's based on the political status of a tribal member or someone who's eligible for membership. And, so, we're going to decide that even though the parent named a specific tribe or a specific group of tribes -- there's only three federally recognized Cherokee tribes -- that they weren't going to require even further inquiry based on that assertion.

Um, and so an amendment to Welfare and Institutions Code 224.2 was passed later that year that essentially negated *Austin J.*, and it said, you know, there's a suggestion that somebody may have, um, Indian membership or eligibility for membership that triggers a duty for further inquiry, and so it's pretty clear now that reason to believe is not anything close to certainty. That it's, you know, reason to believe. If you think that there may be a possibility that someone's Indian, you conduct where you follow up with extended family. You know, if you can identify a tribe you can reach out informally to that tribe by telephone or email, but that it does trigger a further duty, uh, before you actually get to that certainty, that, that point where you're at reason to know, you're certain that the child is in and that's what triggers the formal notice.

53:32

ANTOINETTE FABELA

So, just to add, um, a little bit what, um, Jedd was talking about as far as reason to know. There are actually some specifics that I just like to add. Under at 224.2, uh, reason to know includes the person having interest in the child, um, informs the court that the child is an Indian child, uh, the parent resides on a reservation or an Alaskan village, the participant in the proceeding informs the court information that indicates the child is an Indian child, the child gives the court reason to know the child is an Indian child, or the court informed child is or has been a ward of a tribal court, or the court advised the parent or that the child has an identification, uh, indicating membership or citizenship in a tribe, and that is for a reason to know because that's all I'd like to add at this time.

54:41

DAVID MEYERS

Your Honor, We also got a question are active efforts required during family maintenance? Um, the short answer is yes, um, but, Your Honor, I don't know if you or Antoinette or Jed want to expand on that.

54:56

JUDGE EDWARDS

Well, my position is that when you're dealing with an Indian family, you're dealing at a different level of services and attention to the case and to the family in all aspects of the case, and so, yes, the short answer is yes, and we shouldn't argue very much about it.

There is a, there's an urgency regarding Native Americans that's based in history. It's, we go back hundreds of years in this, and what we're trying to do is we're trying to heal. We're trying to bring, uh, an oppressed people back into the mainstream, and the way we do that is when they're in crisis, we are there to support them. So, yes, the answer. Now anyone can add to that if you wish.

55:46

ANTOINETTE FABELA

So, what I'd like to add to that is, as I mentioned earlier, family maintenance or aka non-detained petition, depending on the county's practice. It is important to follow and abide by all the, all the, uh, regulations of ICWA, as well as active efforts because let's say what would happen is, let's say down the line the social worker wants to especially engage in those active efforts so that a removal is not necessary, in other words to actively handhold parents or Indian custodians through the process and help them to actually engage and participate in services, and that's not through a piece of paper with referrals, so that, UM, they can, they can, they can complete their family maintenance successfully because if, let's just say hypothetically, if a case were to elevate to a detention, then somebody like, as for example like a qualified expert witness, as myself, will come in and say, well "what, what did the social worker do in terms of active efforts to prevent this removal, and how is it documented, and what are all the details of that?" So, that's why it's important to add active efforts into a family maintenance case. Thank you.

57:05

JUDGE EDWARDS

Well, I think we're, we've completed an hour. This has been fascinating to hear my colleagues answer these questions. I want to thank everyone for tuning in, and Vida may have a final word for you all.

57:21

VIDA CASTANEDA

Yes, we have a, a few items within the chat. Um, Judge Edwards, I don't know if you want to address a few of those before we go.

57:31

JUDGE EDWARDS

I'm, I'm here for that. What will you take the lead on that? I, I don't know where my chat is.

57:39

VIDA CASTANEDA

Sure, uh, so we have one question, um, asking you know if, uh, if Brackeen versus Haaland makes it to the U.S. Supreme Court, what do you think for the most vulnerable portions of ICWA?

57:55

DAVID MEYERS

All of it.

58:00

JUDGE EDWARDS

I, I think the, the constitutionality is the big issue, right? That's, that's the one that both, two justices have said the whole ICWA is unconstitutional, and all that the Fifth Circuit did was to pick on two or three, including active efforts, and say those aspects of the ICWA are unconstitutional. I, frankly, think that that if we can get over the Constitutionality issue, I will, everyone will breathe a big sigh of relief. I hope we could preserve active efforts because the fallback position there is reasonable effort, but, um, but, and we're not talking about right now. We're talking about several years. It's a slow process to get to the Supreme Court, and they have not accepted the case yet, and I don't even think that the hearings that they will take place in the federal circuit are complete. They'll probably ask for a rehearing. They'll probably ask for reconsideration and on and on, and then sending up 350-page opinion, that's not an easy one. Maybe the Supreme Court will decide that's that and not take the case. I don't know.

59:14

JEDD PARR

I think that... I'm sorry, Ann, were you gonna jump in there?

Uh, I, I, I don't see the Supreme Court flipping ICWA on the argument that it's race-based. I think it's pretty clearly based on political status, and the arguments that it is race-based are disingenuous at best, um. I do think there is some room on the, the anti-commandeering arguments that the anti-ICWA-sides have made, but I do think there are good counter arguments there. So, as a whole, I would be surprised, um, if, if the entire law was not unconstitutional. I personally think that they may look at the placement preference that says placement with members of other Indian tribes counts as a preferred placement because there you're really getting away from any kind of political affiliation, unless you're talking about a different tribe of the same, you know, group of tribes or

larger genealogy, but just placing a child with a member of a different tribe, you know, you place the Hoopa child with the Navajo family, I think you are pretty far removed from the argument that there's some kind of political status being preserved there. That's just my opinion. Who knows what they are going to do?

1:00:36

ANN GILMOUR

The other point I wanted to make was that, Jedd, if you are right, and we find that portions of ICWA are held to be unconstitutional on the same basis as the Fifth District found, which is that most of it was based on the anti-commandeering, um, grounds, which means that the federal government can't require the states to spend their resources without providing them with any sort of funding, that would not render states like California that have incorporated those things into state law, it wouldn't mean that those were unconstitutional. So, here in California, where we have incorporated active efforts requirements and qualified expert witness requirements into our state law, those would not be unconstitutional if ICWA's found to be a problematic on the basis of anti-commandeering rather than equal protection grounds.

1:01:43

JUDGE EDWARDS

Are there other questions that we've missed, Vida?

VIDA CASTANEDA

Yes, so there's one more, um, more of a case scenario where, uh, someone is, uh, representing a native parent, however, neither of the parents have been enrolled, and where the county does not want to treat the case as an ICWA case, even when the parent and child are eligible for enrollment, um, but not fully enrolled, so any guidance on how to handle these situations in terms of ICWA, in terms of spirit of the law?

1:02:20

DAVID MEYERS

Yeah, I want to jump in on that, and then Jedd and Antoinette, I know you guys will have comments too, but if you're representing that parent, I think, it's part of your job to make sure that, that parent gets enrolled. If you represent that child, I think it's your job to make sure that child gets enrolled, just in the same way with a special immigrant juvenile status case you're going to want to take those first steps. I think you have some role. If you're working in a county that you have social work investigators, that's a perfect task for them to say, hey, sit down with them, get that parent enrolled, um, because ICWA doesn't

apply until it applies and, if you're in that situation where it doesn't apply, I mean, the spirit of the law is lovely, but judges don't have to follow the spirit of the law. Judges have to follow the letter of the law. But if you know that the parent and the child are eligible for membership such that the act would apply, I think that's where your work lies, and if the social worker and county council say, "yeah too bad, so sad," as awful as that may sound, I think that's absolutely within their right to do.

1:03:20

ANN GILMOUR

If I might just jump in here, I, I think that there's room in the Foster Care Bill of Rights now that does, um, provide protection for all native children who are in the foster care system and among the requirements, um, for those are that the, the agency does have an obligation to protect the political affiliation and to assist the child in becoming enrolled if that is, uh, potential, so it's not, it's not ICWA specifically but it is within the Foster Care Bill of Rights now.

1:04:01

JEDD PARR

And I'd just like to point out there's a difference in the law between enrollment and membership. The new regs, and now California law, say very clearly that if the tribe responds to an inquiry and says this person is a member that's the end of it. The court doesn't get to question whether that's true or not. They don't get to ask for proof. They don't ask the parent to produce a membership card or a certificate or anything like that. It's entirely up to the tribe to decide who its members are, and not every tribe is going to require formal enrollment in order for someone to be considered a member. Uh, you may have someone who's lived in a community for a long time and just has never gotten around to formally enrolled, uh, or you know a child in the same situation, um, but it's, it's up to the tribe. If the tribe and the word here is member, not enrollment, you know, ICWA if you're a member or eligible for membership, so if the tribe responds and says this person is a member, that's the end of the story. And there is actually California case law that says formal enrollment is not necessarily required in order to establish membership. That's something that's up to the tribe. The case was I think overturned on other grounds later on, but *In re Jack C. III*, for those of you who are curious.

1:05:23

VIDA CASTANEDA

So that concludes all of the, uh, questions we've received in the chat. Do, do any of our panelists have any final thoughts before I wrap up?

1:05:36

JUDGE EDWARDS

I'd be glad to receive questions, um, on my personal email, Judge Leonard Edwards at gmail.com, or you can check I have several articles about the ICWA on my website. That's judgeleonardedwards.com, but I must say I've enjoyed talking with, uh, with, uh, Antoinette, with David, and with Jedd. I think this has been very productive today. That's all.

1:06:06

VIDA CASTANEDA

Thank you. Alright. Well, thank you for attending today's webinar. We hope you have enjoyed this great discussion on active efforts. If you have any comments or questions, please feel free to reach out, and I can provide feedback to our panelists or connect you directly. If you would like to receive a certificate for BBS, MCLE, or judicial officer CEUs, please email Amanda or I, and we will provide you with one. Have a wonderful day, everyone.