

# ICWA Legal Update (April 6, 2022)

## Transcript

### Slide 1

Ann Gilmour - Hello good afternoon, everyone. My name is Ann Gilmour and I'm an attorney with the Judicial Council of California in the Tribal/State Program Unit. And I want to welcome you to our webinar on "Indian Child Welfare Act Legal Update" this afternoon. Just a couple of housekeeping matters. Your participant video and audio will be muted throughout the training, but I'll be monitoring the chat. So, if you have questions, please put them in the chat or in the question and answer and we will get to those questions at the end of the session. Following the training my colleague Amanda Morris will email all participants an evaluation and a link to the post-test. When you complete those and return the evaluation to Amanda, she will send you out your educational certificate. And I want to introduce our fabulous trainers today. We are very pleased to have Judge Shawna Schwarz with us. She is the supervising Judge of the juvenile dependency course in Santa Clara County she has been on the bench for 20 years and four months. She has been in the dependency court for a total of 18 years and one month all of it by choice. She began her legal career working as directing attorney for Legal Advocates For Children and Youth. During her six-year tenure there she represented children in guardianship, emancipation, and educational matters. She is a recognized expert in child welfare and a frequent presenter at Judicial Council events and other educational events. Our next presenter is Judge Mark Vezzola. He is Chief Judge of the tribal courts for the Pala Band of Mission Indians and the Chemehuevi Indian tribe. He is also directing attorney at the Escondido office of California Indian Legal Services where he has worked since 2009 representing tribes in a wide variety of matters including Indian Child Welfare Act matters. And now I am pleased to turn this over to our presenters.

Judge Shawna Schwarz - Okay hi and -- can you all hear me, okay? This is Judge Shawna Schwarz.

Ann Gilmour - Yes, we can hear you.

Judge Shawna Schwarz – Great. Thank you all for attending today. Let's jump right into it.

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Judge Shawna Schwarz - So, in terms of what we're going to talk about -- and we have just an hour -- but what we're going to try to cover is, well a quick overview of the "new" law. I put "new" in parentheses, quotations because you know it started January 2019. But it still feels new. We'll go over some hypos which will sort of highlight the issues. We'll then talk about the takeaways from the hypos including the struggles that I think many of us are confronted with, as well as highlighting some issues about inquiry. We'll also talk about the case law. There's been a lot the last year and a half. We'll talk about that. We'll talk about tribal engagement. We'll go over some tips, tricks, suggestions and then the last page we've got some resources available for all of you.

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Judge Shawna Schwarz - Okay so in terms of the new law, you know I'm always trying to put things in flow chart forms and make it understandable and this is my latest shot at doing that for ICWA. I think the new law you can think of is having sort of three stages -- the initial inquiry piece, the further inquiry piece, and then notice. So how does this play out? Well, there's a report of child abuse or neglect and the social worker basically gets that referral and has to investigate the referral. As a part of the referral though, what the social worker has to do is inquire of a number of folks -- parents, guardians, extended family, and the reporter of child abuse or neglect as well as an Indian custodian. Even before the petition is filed the social worker is supposed to be making these inquiries. If the petition is filed, it comes to court, and you have the initial appearance and at that point the judge has some obligations and responsibilities. First of all, the judge has to inquire of all participants. Notice it is participants not parties -- all participants to the proceedings about the Indian Child Welfare Act and then the judge is supposed to direct all of the participants that if they get further information in the future, they have to let us know. So based on the information the judge gets at that initial appearance, as well as the information that the social worker has based on the social worker inquiries, and what we read in the reports, the judge can make certain findings: no reason to believe that the child is an Indian child; reason to believe; reason to know; or this is a known Indian child. And based on sort of those findings, the court takes some further action. If there's reason to know, or this is a known Indian child, then ICWA applies. Formal notice that -- the court has to order formal notice -- that the department gives formal notice to the tribes, and we treat the child as an Indian child with all of the protections that ICWA affords. If there is reason to believe, at that point, the court has to order further inquiry. And reason to believe is highlighted or bolded because I think that's what we find most of the time. So basically, if the court has reason to believe, but not enough information to have reason to know, then the court shall order that the department make further inquiry as soon as practicable. Now if there's no reason to believe, we don't have to worry about it. ICWA does not apply. However, what happens once we get that information from the further inquiry? Because now we're going to be back in court another time. If based on further inquiry you have reason to know, then ICWA applies. Formal notice is kicked in. You treat the child as an Indian child. But if after further inquiry if there's no reason to know -- and that's after adequate further inquiry and due diligence -- then ICWA does not apply. Now I think you all know the ICWA law is complicated. And this is my attempt to sort of simplify it and demonstrate it graphically so that it's sort of understandable. At least that's my hope. Based on that we are going to do some hypotheticals, and then we're going to come back to sort of this this flow chart and see where the case law fits in. So, Judge Vezzola and I are going to go through the hypotheticals, and I will present the first one. And he will answer it and we'll talk about the law that applies.

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Judge Shawna Schwarz - So this is going to be a typical scenario and I'm sure that there are judges in the audience you've had this happen. But you're at your detention hearing. First time you're in court for this case. Family shows up. Parents fill out the ICWA-020 because you order that they do so. It's important to get that information. The parents say we have no information that we have any Native American or Indian heritage, and we don't know of anybody in our

family who's lived on a reservation. So, the court does the voir dire. You take the ICWA-020 form. But you also you ask the parents. You inquire of the folks in court. And the parents say we've never heard of anybody in our family who's lived on a reservation, we don't know of anybody who's been enrolled, we don't know of anybody who's been a ward of an Indian court. There's also an aunt in the back of the courtroom. So, the judge inquires of the aunt and says what do you know about this? And the aunt says I just had an ancestry.com test done. And it shows I am 37.8 percent Native American. But the aunt also says however, I've never heard of anybody in our family talked about us being Native American. Okay Judge Vezzola, what does the judge do at this point? Reason to believe or no reason to believe?

Judge Vezzola - Uh thank you Judge Schwarz. And thank you for the amazing graphics and the animation of this presentation. And thank you Ann for the introduction. So, this is an increasingly common situation now that more and more people have access to DNA tests through ancestry.com and 23andme. At California Indian Legal Services, we get a lot of calls for people who are looking to enroll or find out more about a tribal membership because they now have these printed or computer results that indicate that they have Native American ancestry. But as we learned from the In re. H.S. case, one of the many cases that came out over the last year and a couple of months, that that information by itself without anything more does not really provide a basis for a reason to believe that there is an Indian child involved. Partly because those DNA results are indicative of race and usually, they are talking about a large swatch of land. As far as I know there is no scientific way to give people results that actually link them to a particular tribe or a group of tribes which is really, I think at the heart of the Indian Child Welfare Act. That's how an Indian child is defined: a person unmarried, under the age of 18, who is either a member of or eligible for membership in a tribe. So that's a political distinction rather than a racial distinction. So based on the facts in this hypothetical, I would say there is no reason to believe that this is an Indian child. Unless there are other relatives present in the courtroom the court might want to inquire of those individuals if they have any information, but based on the limited facts we have in this hypo, I would say no.

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Judge Shawna Schwarz - Okay thank you. Let's move on to hypothetical number two. And Judge Vezzola you're going to go ahead and present that hypothetical?

Judge Vezzola – Yes. So, this hypothetical to set the stage takes place at a juris/dispo hearing. So based on responses from the parents at the detention hearing the judge found that there was no reason to believe that the child is an Indian child. No other relatives were present in court and the ICWA-020 forms indicated none of the above and after inquiry the parents had no information causing the judge to find reason to believe. Now in the jurisdiction disposition report under the ICWA section the social worker stated that after the detention hearing, while speaking to the maternal grandmother about placement, the social worker inquired about ICWA. The maternal grandmother reported that her mother, who would have been the child's great-grandmother, had always heard that she was a full-blooded Indian. But because she was adopted, she did not know the name of the tribe. So, she was registered -- or excuse me she was not registered and had never lived on a reservation. Sorry so the social worker explored with the maternal grandmother whether there were any living relatives who might have information, but the answer was no.

There were none. The social worker then contacted the Bureau of Indian affairs and the Secretary of Interior and provided all the information that she had available. According to those agencies there was not enough information to determine that the child is Indian. What finding should the judge make?

Judge Shawna Schwarz - Okay. So, if this were a case in my court, I at this time -- assuming that the jurisdiction report in the ICWA section shows that the social worker had inquired of all of the other relatives that she was in touch -- that she was able to connect with. I would probably find -- that this is the finding would be: After further inquiry and due diligence there's no reason to know the child is an Indian child and ICWA does not apply. I think though this is one of those situations which highlights for us that the information is always evolving, and you think you know one thing at the first hearing and when you come back to the next hearing there's new information. This also reminds us that we should not rely on the ICWA-020 form. We'd like to think we can, and I think in past days that's what we used to do. But there's some new case law about that that we'll talk about in a few moments that says that the ICWA-020 is not the end of the story. The other thing I think this highlights for us is that it may be appropriate during the course of the case to change your findings. I mean the court may have found at the detention hearing that ICWA didn't apply, and no further inquiry was required. But as the information evolved, you have more information you make a different finding. In this particular case because it appears that there was no other way to get information about this particular branch of the family that may have been involved in a tribe, I would make that last finding. After further inquiry and due diligence there's no reason to know. Judge Vezzola would you agree or want to add anything to that?

Judge Vezzola - I would agree. Absolutely. But I would like to add that this scenario is actually probably more common than any of us would think. Quite a number of -- and I think part of the reason that the Indian Child Welfare Act was passed by congress in 1978 -- was because so many Native American children had been adopted out particularly by non-native families. And as a result, many people ended up disconnected from their tribes but also from their biological families and cultural communities. And that information could change. There is language under the Indian Child Welfare Act and the California Family Code that people can rely on to unseal their birth records if they had been adopted. But that's not going to happen during a juris/dispo hearing. It could happen in the future, and as Judge Schwarz pointed out there might be to change a finding in the future if that happens. But this is probably a common scenario.

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Judge Shawna Schwarz – Okay. Thank you. Well, let's move on to our third hypothetical. It's going to get a little more complicated. So, sometime in 2018 before the detention hearing happens, social worker is investigating because there's a referral for child abuse or neglect. And she talks to some relatives and the maternal grandmother says I have Navajo and Jicarilla Apache heritage. Paternal grandmother says no Indian ancestry at all. You come to the detention hearing and mother is present. She fills out the ICWA-020 form and she does indicate Navajo heritage. The father, however, is not present because he's got some warrants out for his arrest. He told the social worker he's not coming to court because he doesn't want to get arrested. We come to the jurisdiction disposition hearing also happening in 2018 and no ICWA findings are made

whatsoever. Now you might wonder how that happened and I would just say well it was 2018. We were doing as good a job as possible. The new law had not yet kicked in. As the case proceeds however, Dad is still on the lam. The social worker has spoken to him by phone about five times. He says I'm not coming in because he's going to get arrested. So, I'm not coming to court. Importantly though, social worker never asked him about his Indian heritage when she spoke to him. Again, why would that happen? Well, if it was happening in 2018 or 2019, we're probably still getting used to the new law. And I think our good habits regarding inquiry haven't yet really kicked in. Fast forward to the .26 hearing and it's now 2020. It's February 2020. And at the hearing itself -- the .26 hearing -- maternal and paternal relatives are present. There are letters from 11 or 14 tribes saying child is not eligible. Well, why do we still have letters? Because if this case started in 2018 the department was using the old law which is if somebody identified a tribe you sent formal notice. And so, we've got these letters on file. Child not eligible for 11 or 14 tribes. The judge however, now that it's 2020, knows to do another voir dire. Judge inquires of the family who are all present: "Has anyone lived on a reservation? Anybody have a registration card, or anybody enrolled? Is anybody a ward of a tribal court?" The maternal grandmother says no now. Remember she's the one back at day one who said Navajo and Apache heritage. The paternal grandmother who initially said no Indian ancestry said, "There is tribal descendancy, but as far as I know they are not any kind of member." Now that's a quote from a case in front of me right now. An actual quote. And grandmother who reported this learned from her mother who's in court. She learned this information from her own mother who's there in court. Neither of them knows about a tribe. Neither of them knows of any other relatives who would know. So as the judge here are your options Judge Vezzola: No reason to believe if ICWA applies? Reason to believe based on the new information from the grandmother? Order further inquiry? Reason to believe again based on grandmother's information but order the social worker to ask the father? No reason to know after adequate further inquiry and due diligence ICWA does not apply? What do you think?

Judge Vezzola – Okay. So that is a lot of information. But this hypothetical was deliberately complex because that's really the nature of these cases. You know, Judge Schwarz and I discussed when we were planning this presentation how information tends to come in dribs and drabs. It's not all there nicely presented at the first appearance. You might get new information or contradicting information as you go down the line. But here there are a couple of important facts. The fact that the social worker never asked the father about Indian heritage. Of course, the law changed between the beginning of this case and where we are at the .26 hearing in 2020. And frankly sometimes people give different information when they're asked questions at different moments in the life of the case. So, we do have the grandmother indicating tribal -- what she called tribal descendancy. But she also denied knowing that there was any kind of member in the family. Tribes have different kinds of criteria and definitions of membership. It doesn't necessarily mean that you are formally enrolled in the tribe and carry an enrollment or identification card. It could mean that you are a lineal descendant of a person who is or was enrolled. So, in this case I believe that the judge would find reason to believe, because of the information provided by the paternal grandmother. But I would also order the social worker to ask father, because there is -- and we get this from the cases -- an affirmative and continuing duty to inquire of Indian heritage. Would you agree with that Judge Schwarz?

Judge Shawna Schwarz - I would. And I will tell you this came directly from a case that's in front of me right now. It was an unpublished decision, but that's exactly what the appellate court ordered, was to ask father and that was the basis of the reversal. You know, I would indicate this this case also highlights though that actions that were done based on the old law, they're being viewed through the new lens of the new law. And so, it's not uncommon. Although at some point, we, you know hopefully, we'll be through that. It's not uncommon to see some reversals because we were behaving the way we used to behave and there's a new law that's being applied to it. Let's move on to our final hypothetical. And go ahead Judge Vezzola.

#### Slide 7 (Hypo #4)

Judge Vezzola - Thank you. So, this hypothetical also takes place at the detention hearing. The mother and the father are both present and the ICWA-020 forms has no Indian heritage. Each parent reports being from India -- the country of India -- both of their families are from India, and they say they have no relatives who have ever lived in North America. It is just the parents who are here in this country. So, what finding should the judge make? No reason to believe the child is an Indian child ICWA does not apply? There is reason to believe the child is an Indian the social worker is to conduct further inquiry? There is reason to know the child is Indian the Indian Child Welfare Act applies and the social worker is to give formal notice to the BIA and the Secretary of the Interior” Or after further inquiry and due diligence there is no reason to know the child is Indian and ICWA does not apply?

Judge Shawna Schwarz - Judge so you know what? This is one of the very rare cases where at detention I would feel confident finding that there is no reason to believe the child is an Indian child and that ICWA does not apply. And in putting this hypothetical together you know I chose the country of India because it's sometimes -- it's interesting in court to talk to people who are from the continent of India and explain to them why you are making a finding that the child is not an Indian child. But unless there is -- the family is from a country where it is so incredibly clear -- somewhere in Europe or Asia, I feel confident making the findings then. But if I have a family where they are from North America or they have heritage you know from North America, I'm much less likely to make a finding at detention that ICWA doesn't apply. Especially because though the social worker is supposed to inquire of all of the relatives prior to filing the petition, sometimes you know that can happen pretty quickly, filing the petition. And so often when you get to the detention hearing the social worker has not had a chance to inquire of other relatives and so I will hold off on finding ICWA does not apply until I have information from more relatives. But when we have a sort of an ethnicity issue like this, where somebody comes from a country where there is no Native American possibility, that's the only time I will find that it does not apply at detention anything you want to add Judge Vezzola?

Judge Vezzola - No I would agree with that decision given these facts.

#### Slide 8 (Struggles for judges, social workers)

Judge Schwarz - Thank you. All right let's go ahead and move on. So, these, hopefully, these hypotheticals have highlighted some of the struggles that we see happening with the ICWA inquiry issues. And certainly, if you have, you know, even been on one or two dependency cases

you've experienced some of this probably. But one of the things we learn is that, and that we experience, is that a lot of times people do not know their own heritage. And my understanding is, and certainly Judge Vezzola you know working closely with the tribes the way that you do, you can weigh in on this, but a lot of that has to do with the oral transmission of the history of tribes. And so, it's not uncommon and the appellate courts have acknowledged that it's not uncommon for folks who have Native American heritage to not know that. And not be aware of that. And that's why you can't just rely on just the parents who are in front of you.

Judge Vezzola - I think that's absolutely correct. And I would also add, that historically and we still see it today in the 21st century, sometimes there were very practical and even safety reasons for people to deny or just don't claim any kind of Native American heritage. And perhaps those connections didn't get passed down from one generation to the next. So, it's very possible younger people didn't know. And some of the cases that we're going to talk about today involve situations where the parents I believe honestly denied any Native American ancestry. But then information came up from another source, a grandparent or an auntie or an uncle.

Judge Schwarz – Okay. So, another struggle I think, and something that to be careful about, is that the ICWA-020 form. I will say in the old days if I was at a detention hearing, and I had parents checking the box saying no ICWA heritage I felt like we're done. And that's not the case anymore. And we have some case law that will talk about -- that fact and that's related to what Judge Vezzola just described about sometimes folks don't know that they have Native American heritage. The other thing I'm hoping that our hypotheticals highlighted for all of you, is the information evolves. So, what you know at the detention hearing can be very different than what you know at the .26 hearing. And in fact, a part of the law is that we inquire about ICWA at various points, but also that we encourage and remind the families to let us know if they get new information. And so that information is evolving, and you've got to figure out a way to stay on top of it. We also saw -- and Judge Vezzola mentioned this too. Sometimes you get different information from the same person once you start asking about this. Very often they will go home, and they will talk to their relatives and find out information that they may not have known previously. Sometimes we see that parties withhold information. You know people aren't always that excited to be involved with the dependency court and with child welfare. And so occasionally folks will not be forthcoming with information. The other situation is that it can be difficult to extract information. And for different reasons than people withholding. You know certainly we all had the experience during COVID when you have remote hearings, getting information from people who have difficulties with technology. Adding that layer made it complicated when you have folks for whom English is not their first language. Sometimes getting the information can be more challenging. And then of course when people are in court, they can be emotional. And so, trying to get through the emotion here we are trying to be all you know I need these facts just the facts please. And there's a lot going on around that. And so, getting the information itself can be very difficult. Certainly, in court, but also when the social worker's out there in the field talking to folks. Because there's so much else going on. Once you get the information it seems to me that one of the big challenges that the court has is keeping track of all of the information. And Judge Vezzola mentioned getting information in drips and drabs. You get a little bit here at this hearing a little at that hearing. How do you keep track of that? How do you -- and you get it from multiple people -- but also over multiple hearings and so keeping track of that information becomes very critically important. And then also one of the

things I've learned as we've been doing this is that each tribe responds to the requests differently. So, whereas the department -- the agency -- is encouraged to reach out to tribes informally, right? Because we've we put everything on the front end. Here some tribes respond via email. Some tribes are willing to answer the phone and have a conversation. We've even had some tribes tell the social workers send it to us and in mail certified receipt return'. You know that whole thing. So, you're trying to get this information expeditiously and yet we can get different responses from tribes to the initial request for information. Did you want to add anything to that to Judge Vezzola?

Judge Vezzola – Yes. Thank you. With respect to the last point about how each tribe responds to requests differently, I just want to note that – and I'll talk about this later we have a separate slide just about tribal engagement -- but every tribe is different. Their resources, their organizational structure, their staffing. Not all tribes have social workers. In some tribes the people who receive these notices or these inquiries are tribal members who volunteer their time to serve on what might be called an enrollment committee. You know, they don't have at the repository of all of this family tree information about enrolled tribal members. So, they might not be at a desk Monday through Friday from nine am to five pm. So sometimes patience is necessary. And with respect to parties withholding information. As an attorney representing tribes in state court dependency cases, I have seen -- I've seen things that run the gamut between tribal members who intentionally tried to withhold information about their tribal ties because they didn't want the tribe involved in what they saw as their personal business. And then other people who believe the tribe's involvement will only be a benefit to them. So, I could see why some parents would want to downplay or withhold that information altogether.

Judge Schwarz - Well and sometimes when it comes to withholding information one of the things, I've seen is parents who may have a belief they have some heritage but think that they're in control of whether the tribe gets to be involved or not. Yes, so yes, I'm Cherokee but I don't want them told about this. I don't you know I don't want them to be involved in this and then you have to explain to them that the tribe has this independent right.

Slide 9 (What info would trigger further inquiry)

Judge Schwarz - Okay, so Judge Vezzola let's talk about kind of what information would trigger further inquiry. For you so you've got grandma saying there's tribal decendancy what would you do with that?

Judge Vezzola - Well as we saw in one of our hypos you know there is a statement by a family member that there is a connection to a tribe. So, you know I think that statement would require further inquiry. As I said if there are other family members present in court. Maybe they have information that the grandma doesn't have or isn't aware of.

Judge Schwarz - Okay and then on the ICWA-020 I cannot tell you how many times I've heard folks say I'm descended from a Cherokee princess.

Judge Vezzola - Yes, that's absolutely true. But also, as Judge Schwarz pointed out, the information on the ICWA-020 form might change. It might not be accurate, and I can tell you



that at California Indian Legal Services by and large the tribe referenced by callers who are seeking assistance with enrollment or some other tribal membership question, are Cherokee. Or are claiming Cherokee heritage. Because there are three federally recognized Cherokee tribes in the United States there are many non-recognized Cherokee groups. And I believe Cherokee Nation of Oklahoma is the most populous tribe of any in the country.

Judge Schwarz – Absolutely. Okay and judges let's go back to this issue of the DNA test. Would that trigger additional inquiry for you?

Judge Vezzola - Well that-- what the case law is telling us is that those test results by themselves without any additional information are probably not sufficient to trigger further inquiry. But they could be accompanied by other information. But test results by themselves are not.

Judge Schwarz – Okay. All right. And what about -- you get your ICWA-020 or the detention report and the father says, I'm enrolled in the Ohlone tribe, and I have a registration card?

Judge Vezzola - So this was a question that Judge Schwarz and I just kind of mulled over yesterday preparing for this presentation. There are 574 federally recognized tribes in the United States today. Which simply means the United States government sees itself as having a government-to-government relationship with those tribes. And almost 20 percent of them about 110 are here in California. But there are also dozens of non-federally recognized tribes within the state, and the Ohlone tribe identified in this example is one such non-federally recognized tribe. So, in cases like this, the Indian Child Welfare Act --the text of the statute is pretty clear that it applies to federally recognized tribes. But there is an opportunity for you as court officers to exercise your discretion and allow non-federally recognized tribes to participate. But that is a different question than whether or not the act applies. And so here we have information that dad has an enrollment card and is a member of a tribe, but it happens to be a non-federally recognized tribe.

Judge Schwarz - What about the situation where mother told social worker that her grandmother was full-blooded Indian but does not know a name of a tribe?

Judge Vezzola – So, here again we do have some information from a mother, not even an auntie or a grandmother, but a mother that the grandmother her grandmother the child's great-grandmother was a full-blooded Indian. So, this is probably the type of information that would definitely trigger further inquiry. The social worker might want to ask questions of the child's maternal grandmother, other family members, to try to home in on which tribe mother was referring to.

Judge Schwarz - And finally you're at a .26 hearing. Dad is in custody. Previously he had reported no heritage, but now he has additional information, and he says: “You need to ask my uncle. He did the family tree. I don't know his phone number however you're going to have to find the phone number.” What do you do with this?

Judge Vezzola - So again, as Judge Schwarz pointed out earlier, I mean sometimes information changes during the life of the case. You get some information in spurts and some in drabs. But

now father is changing his statement. And that is because possibly he his recollection was refreshed, or maybe he himself had information later on that wasn't available the first time he was asked. But now there's information that a family member might have the key to this question. So, I think there might be other available relatives who could help track down the uncle, and possibly determine whether or not there is reason to believe that an Indian child is involved.

Judge Schwarz - You know, and I will tell you I put this one in here because this happened to me a few weeks ago at a .26 hearing. And it took us quite a bit to get to the .26 hearing because of COVID delays and various things. So, I did not want to delay the .26 hearing. So, what I ended up doing is holding the hearing. Taking all of the testimony, but not ruling. Continuing -- taking it under submission and coming back in two weeks. And I ordered the social worker to see if she could find the uncle. He had a pretty unique name. So, you know google search was able to be done. But I didn't rule on a .26 so that I could get the ICWA of the final ICWA information and make an ICWA determination prior to ruling on the .26. But you know this is a frustration. I know for judges when you're at the .266 hearing and it's set for trial. I mean there you are. You're ready to go and you get new information, and you just don't want to delay it. And so sometimes you've got to finesse what to do in those situations.

#### Slide 10 (Case Law)

Judge Schwarz - Okay so let's talk about the case law really quick. Here's a reminder of what I see as a simplified representation of the process. The case law and I think the cases -- I thought it's helpful to look at where the case law falls in this process. So, in 2021 there were eight ICWA cases. In 2022 there were six so far. And we're going to talk about these in a little more detail in just a moment but In re. A.T. is not really about inquiry, further inquiry, or notice. It has to do with the overlap of ICWA and UCCJEA. But what we see is we've got three different cases in 2021 that have to do with initial inquiry. One with further inquiry where basically the court's findings were fine. But we have a lot more that were --well not a lot more -- I guess four. There were four where there were reversals, or it was kicked back to fix it. And then in 2021 we've got a couple of initial inquiry cases that were fine we've got twice as many that got kicked back.

#### Slide 11 (Beware)

Judge Schwarz - So, we're going to come back to that and we're going to go over those in a little more detail. But I want to highlight In re. K.T. And this is out of the fourth district division 2. San Bernardino County and it's, this slide starts off with beware you know anytime an appellate court starts an opinion, and their first sentence says, "We publish our opinion not because the errors that occurred are novel, but because they are too common." You know that you're in trouble. And then the conclusion in this case basically the court said, 'listen over the past three years in our county alone San Bernardino county there have been 19 reversals for ICWA.' Nineteen, including unpublished but basically two were published, seventeen were unpublished just about ICWA. And then they go on to conclude 'this is concerning' -- they're like quotes embedded in quotes here but -- 'concerning especially considering our court's admonishment from nearly a decade ago that we were well past the state of growing weary of appeals in which the

only error is the agency's failure to comply with ICWA'. So at least the fourth district division 2 court is getting very frustrated with ICWA appeals.

Slide 12 (Cases in context...)

Judge Schwarz - You know the new law was supposed to make things easier. And I'd like to think that all of these appeals are really some growing pains and learning pains and that we're going to get better about this. But let's look at the cases that have come down and look at them in context. So, we've got 2021 we've got eight cases. 2022 we've had six cases. Just for comparison in 2021 we could expect a new ICWA case once every six and a half weeks. In 2022 we have had a new ICWA case every other week. It has been crazy to keep track of those. So how do you make sense of them? Well one of the -- I'm hoping one of the handouts that Ann sent out to you was sort of a -- I took the ICWA cases, and I tried to condense them. And I sort of divided them by not by year necessarily but by initial inquiry versus further inquiry. So, let's look at those really quickly. And when we talk about ICWA cases, we're not going to talk about affirmed or reversed because what we're seeing now is appellate courts you know because it used to be they would do a conditional reversal. Now what we're seeing is a conditional affirmance. But still being remanded. And so, these are -- when you look at these -- you need to think about did it pass muster. Not remanded. It's fine or now it got kicked back to fix the ICWA issue. So, it got remanded and so it's a little color coded here. The green are fine, The red are remanded. And then I also added if it's in a circle, it's the agency's action -- the agency's error. If it's in a square, it's the court's error. The court failed to do something. Although anytime there's a reversal in remand it comes down to the court anyway. But let's look at these and how they came down in order. So In re. A.T. as I mentioned is sort of an outlier. Which just really quickly basically says if ICWA applies it trumps the UCCJEA. In this particular case it didn't apply because it was a placement with the other parent, so it was not triggered. Okay but let's look at our initial inquiry cases. First, we had Charles W. Said and it was fine the court did not ask. So, this was a court case -- and I'll just say this case actually came down when everybody was having remote hearings -- so it's a little challenging. Parents on the phone or on video and basically the court said you know the same parents, different child - this is the third child -- but the prior dependency with those other kids ICWA didn't apply. Mom's attorney said yeah, we don't have any new information the court said okay we're done with ICWA. And there was an appeal saying well wait a minute you know the court didn't inquire. And that was okay. And the second case where there is a failure to inquire was deemed to be okay and that's In re A.C. And this is an interesting case. You're going to see this come up in a few different cases. Because when dad appealed, dad he never even said like they didn't ask me about ICWA and had they asked I would have said I'm Native American. Dad made no representations of having ancestry on appeal. The A.C. court said, 'gosh dad wouldn't even have said -- dad didn't mention it, so it's okay.' There's a strong dissent in that case. And then we have the Benjamin M. case came down. And you'll see it's in red meaning it was a remand And in Benjamin M. the court said, 'yes the failure to investigate the information is prejudicial error'. And the Benjamin M. court actually came up with their own test about when you need to ask. And that test is: Was there readily obtainable information likely to bear meaningfully on whether the child is an Indian child?' And this is kind of a big deal because we're going to find some other courts that will follow the Benjamin M. test. The other initial inquiry cases -- we've got a couple that came down in 2022. In re. H.B. and here the court said, 'No you -- the department -- did not ask the extended family.

And mom does not have to assert heritage on appeal. And there's a dissent. That's what the "d" means. And then we have a couple of cases. In re. S.S. and Darien R. where the failure to ask relatives or interview the family members was considered harmless error using that Benjamin M. test. That you know what? Had the social worker asked, the family would not have meaningful information that would, that was readily obtainable, that it would I guess would bear meaningfully on the question. And then we have the Antonio R. case which is a reversal or a remand to fix ICWA. We've got a situation where the parents or the family was actually present, and they were not asked about the child's heritage. So those are the initial inquiry cases. Further inquiry we've got J.S. that's the ancestry case that Judge Vezzola talked about. In re. S.R., the family gave very specific information, named a tribe, and at that point the court did not do further -- order further inquiry. And the department did no further inquiry. So that was a remand. Y.W. -- and Y.W. appears twice. Interestingly Y.W. was also reversed based on notice, and that's the case where I think it straddled the new law and the old law. So, notice was sent. The notice omitted names. And so, it was reversed for that issue. But also Y.W. tells us that the parent does not have to assert ancestry on appeal. And Y.W. disagrees with A.C. So, you're going to see that the cases are starting to -- you know of course they refer to each other. they don't like A.C. and basically, they're saying the parents don't have to assert any ancestry on appeal. Josiah T. the department didn't investigate for quite a long time, and they didn't tell the court information. Then we come down to another A.C. case. Totally different than A.C. in 2021. Totally different case. Again, and this is the case that tells us the ICWA-020 is not the last word. Failure to ask the extended family is prejudicial error. Very strong descent in that case that certainly is worth reading. And then K.T. which I did mention where I think the appellate court communicated very clearly that they're tired of us not getting this right. So, the purpose of this graphic here is for you to be able to see kind of where the pain points are. And I think it's clear it's -- we're having some -- well in the old days remember, we were getting reversed left and right for not providing the name of the great grandmother when it was you know people knew that. Or we put the wrong birthplace for somebody. But now we're not -- because the system is front loaded -- we're not seeing notice errors. For the most part the errors have to do with the inquiry. Either failure to do the initial inquiry, or a failure to do the further inquiry. Judge Vezzola did you want to comment on this before we move on to sort of the trend that we're seeing?

Judge Vezzola - Thank you. Just a general comment. So of course, inquiry is a big issue. I mean the courts are telling us this with all of these decisions. And it's important because you, as judges of course, need to follow the law. But I also wanted to add a practical consideration. And that is the involvement of tribes in cases where -- in cases that deal with Indian children -- tribes could be disadvantaged getting involved in a case at a later stage. Trust me when I say they really want to know what's going on with their children. Even if maybe, they don't take a proactive approach to the case. And while some social workers I get the feeling sometimes see tribes as adversaries, I really think they could be valuable partners in terms of locating placements, transportation, offering services to the parents, things like that. So, you know it's not just the law. It really does have an effect from the tribe's point of view. I think in the long run it could behoove everybody to have the tribe involved early on. So, let's -- and there's there are a lot of cases, and you know certainly if you want to read those that make sense -- but it's been a little hard to keep up with them lately.

Slide 13 (Case law trends)

Judge Schwarz - But I think what we can do is look at some of the trends that that have come out from some of these cases so if you want to address those Judge Vezzola?

Judge Vezzola - Yeah so thank you. As Judge Schwarz noted a moment ago the appeals are coming fast and furious. We had several meetings to plan and design today's presentation, but inevitably after every meeting we had multiple other decisions that we had to factor in and work into the power-point. But what we're seeing now is that initial inquiry and further inquiry are the problem areas or the areas to take note of. So, you know up until maybe five years ago, a lot of these appellate decisions were related to notice. But now we're hearing more and more about inquiry, initial inquiry, and further inquiry. And the need for further inquiry results in a lot of reversals. So there also seems to be a theme in a lot of the cases that Judge Schwarz just talked about, of rejecting the narrow holding of the *In re. Austin J.* case which really addresses reason to believe. And you know it's kind of a growing trend. That's not a very popular decision based on the fact that there did seem to be evidence that the child involved had Indian ancestry. But the court came back with the decision that there was no further inquiry required in that case. And you know also as was pointed out earlier-- you know a lot of these cases address agency action or inaction. But really at the end of the day it's supposed -- it's the courts there that are being reversed. So, this is something that can be addressed, and I think the purpose of this program is to help judges understand what is required of them and maybe think creatively about how to manage the information. How to collect the information at each and every hearing. And keep in mind that ongoing and continuing duty.

Slide 14 (What does case law teach us)

Judge Schwarz - So, you know continuing on this vein along this vein of talking about one of the cases. What's the case law teach us? There's a raging debate among some appellate courts about this idea of whether error is harmless or prejudicial. And there are some courts that say that any error regarding inquiry or further inquiry should be *per se* prejudicial. And then we've got a number of courts that also that said you know it's hard. Failure? Yes, the court screwed up. But it's harmless error. So that's I think worth paying attention to. Of course, our goal as judges should be to not make any error harmless or otherwise. But the appellate courts when they're looking at what we've done or not done are going to be commenting on whether they believe harmless error applies or they're more toward the end of the prejudicial error. And then related to that, what is the test that's used to determine the impact of the error? So, you've got Benjamin M. which enunciated a brand-new test saying that you know: "Is there readily obtainable information that bears meaningfully on the issue?" So, that again -- that's an appellate issue, but certainly is worth thinking about kind of when you're down in the trenches and you're making these decisions. The other one that's really kind of fascinating is whether the parent has to assert heritage on appeal so some of the harmless error decisions came back as harmless error because they said you know the dad didn't even say on appeal that he had Native American heritage. So, he you know there's no other reason for an appeal. He came up to the appellate court, but he never even told us that he has ICWA heritage at all. And other folks were saying 'Well yeah, but

how is he supposed to you know? He's supposed to be able to point to something in the record and if there's nothing in the record below how is the appellate court supposed to know?' So appellate courts have come down differently on this issue about whether or not a parent needs to assert heritage on appeal. And then as Judge Vezzola mentioned, the trend right now is a very broad interpretation of a reason to believe. And so, you know I kind of think of this this picture in my mind of sort of a megaphone, right ? And at the small end is Austin J. I don't want to do a funnel because that's a different sort of thing. But Austin J. is this very you know, very narrow definition. And at the very wide end of the megaphone these are where the cases are now including you know K.T. and Y.W. and S.R. were saying no. There's a -- they explicitly reject Austin J. and have broad information of reason to believe. So, I would just say if you're you know you're in court, and you're making these findings, it certainly makes sense to -- if you have any whisper of ICWA heritage -- to make a finding that you have reason to believe and order further inquiry so that when you do come back and you have no additional information you can feel confident in finding ICWA doesn't apply. Because the appellate courts are -- most of them are looking at this issue fairly broadly. This is only mentioned a couple times about tribal engagement but let's talk about that and what that means for folks and what to be looking out for?

#### Slide 15 (Tribal engagement)

Judge Vezzola - Okay. Thank you. So tribal engagement what does this mean? Well, it we can talk about it in terms of different questions. The who of tribal engagement? It's not always the same person. Or the person you might expect when a tribal member or a tribal representative shows up in court. It could be an attorney. It could be an in-house counsel or a contract attorney like California Indian Legal Services. But sometimes it's a tribal leader, or a tribal advocate. One thing that I see in southern California is tribes sending representatives from their local Indian health consortium whom they contract with not only for health care services but for ICWA services. Those people are probably not members of the tribe, nor are they employees of the tribe. But they might be authorized to represent the tribe's point of view in your courtrooms. Or let's talk about how you know? Me personally I like to file a notice of intervention when I intervene and appear on behalf of a tribe in a state court dependency case. And I do that for two reasons. Number one, I like there to be a paper trail. I want that notice of intervention to be part of the official record. But number two, I also include in that notice of intervention a discovery request because I want my clients to have access to the same documents in the courts file. Technically under the statute tribes can intervene orally on the record or in writing. So, you might not get a written notice of intervention especially if the tribe is not represented by legal counsel. And we also talked earlier a little bit about the distinction between federally recognized and non-recognized tribes. And the discretion that the courts have with respect to the non-federally recognized tribes. Well, this depends on a number of factors. It depends on when the tribes get noticed. But keep in mind tribes get a lot of ICWA notices and they have to make a determination whether or not the tribe -- excuse me -- the child is a member or is eligible to be a member of the tribe. They're going to have to review family tree information, enrollment certificates, census records, things like that. There's probably not a database of all people who are eligible to be members of that particular tribe. So, what do you expect or what should you expect? In some ways I would encourage you to expect the unexpected. You might not get what you expect. It might not be an attorney for a tribe each and every time. It could be an advocate or

a tribal leader. It could be a family member with information about the tribe but perhaps no authority to speak for the tribe. So, I would just encourage the judges on today's program to be open-minded in that regard. And one final point about tribal engagement. Some tribes just want to be along for the ride and get information and notices but don't really take a hands-on approach. Other tribes, including tribes with attorneys, and those without attorneys because tribes are the only parties to these dependency cases who aren't appointed counsel. They can get legal counsel through California Indian Legal Services, or contract with another attorney but it's also important to remember that the level of engagement might differ.

#### Slide 16 (Tips/tricks/suggestions/reminders)

Judge Schwarz - Okay well we are getting to the end of the hour, so we're going to have to get through these next slides a little quickly. But we didn't want to just touch base on you know tips tricks suggestions and reminders. Okay, how to track who's asked and the response? We've got to figure out a way to do that better. As we've said -- that one of our themes today has been -- you get this information a little bit here and there. And being able to have all of that in one place can be challenging. And so that's certainly a problem looking for a solution. Don't forget those late appearing parties. And participants initial appearance does not just mean detention hearing, right? Because if somebody shows up for the first time at a six-month review if it's grandmother's first time appearing you're going to want to ask that grandmother. Because you're supposed to ask at the initial appearance don't forget the relative the child lives with. There's some case law about that. But sometimes it's easy to overlook. Make sure that you ask that person too. I am really a big believer in having precise minute orders. Minute orders should indicate who is personally present. Their names and these are all the participants. It shouldn't just say paternal grandmother with no name. It shouldn't just say Grandmother Margie Smith. It should say whether they are paternal or maternal. And it should have the full name. And it should say whether they are a step grandparent or not. Because if it's a step grandparent I'm not going to worry about the ICWA inquiry as much as I am with a blood relative. So especially now that you know people are looking back -- when if there's an appeal, they're going to look back to see did the court do a *voir dire* of this. Did they the court inquire of this party? Having a very clean record of who was present I think is quite important. A few other things to think about Judge Vezzola?

Judge Vezzola – Yes. So, ask attorneys for their help to get information that you might need. At least one of the decisions that we talked about today -- *In Re. Charles W.* -- talks about the representations of parents' counsel to the court. I would also say if the parents are not present, if they're appearing telephonically for whatever the reason, ask them during the hearing while they're on the phone about Indian ancestry. Prevail on attorneys to take a bigger role in these cases. There might be some pushback, but they're in a unique position to talk to parents and to gather that information and share it with the court. And one idea that we talked about in preparing this program was whether or not there should be a dedicated ICWA report at the .26 hearing that really just goes through the social workers efforts to communicate with inquire of the parents and other family members.

#### Slide 17 (Final remarks)

Judge Schwarz - All right. And then finally just some final remarks. You know this 2019 change in the law, as I said it really shifted everything to much more of a front-end inquiry. And front loading the process was supposed to make this easier and result in fewer appeals which we are not seeing yet. So far, we're still struggling. And I think anybody who's done this realizes that ICWA inquiry is more of an art than a science. You can certainly have all of the -- you can have all the guides telling you what questions to ask --but you have to be able to think on your feet when you're talking to people. And be able to respond in the moment and understand, you know, when somebody says "dependency" which is not even a word. You still need to kind of pursue this information. You know at some point our ICWA inquiries hopefully will become normalized and ingrained in us. Hopefully the way that family finding is now becoming ingrained. And then we talked about this a lot in preparation. Courts need a better way to track this information. And we all have our, you know, our online or our computer case management systems now, but they were created for dependency and there's no special section that says ICWA. And so even gathering keeping that information in our electronic case management system is not really a great way to keep track of things because it's hard to access it in a way that that makes sense. Did you want to add anything about that Judge Vezzola?

Judge Vezzola - I just you know one more tip and it's not really a specific tip but one of the things that we brainstormed in preparing for today's presentation was just whether or not there should be kind of a family tree document or maybe an updated script for judicial officers? You know something that would help courts make sure that that the proper inquiry is made. To avoid these appellate decisions.

Slide 18 (Resources)

Judge Schwarz - Thank you. Well and we are, you know, we're already over time but we have a list of resources that Ann from the Judicial Council provided. So those are available for all of you. But that does bring our hour to the to the conclusion here. Thank you so much for your attention and your attendance today. And I'm not sure how you wanted to handle questions if there were any at this point?

Ann Gilmour- Yes, we did have several questions in the chat and if you have time to continue -- if you would like to address those we can. One question was whether --sorry I'm just scrolling back up -- "Wanting to make a slight change to your hypo number two and it had to do with a known grandfather who was a tribal member but relatives having difficulty obtaining adoption records and birth certificates to show the chain of relationship between the grandmother and her father. And the tribe saying the mother of the child and the child are not enrolled members, but that they could be eligible if able to confirm the biological connection." So, what do you do with a case like that?

Judge Schwarz - Well that's, you know what? Every time we have these hypos, they're complicated. We try to make hypos complicated because they are in real life. You know I would probably err on the side of caution, and I would probably treat the child as an Indian child until we had information that we shouldn't. And I might get pushed back from our county counsel, but I believe the department has an obligation to try to help folks kind of establish those connections



which is not easy. And Judge Vezzola I don't know if kind of in your role you have a different or different answer?

Judge Vezzola- No I would totally agree, and I would just say that is it is a very real problem. Especially within the Native American community not to have access to those birth records or certificates. There are tribal elders who are just in their 60s and 70s who never got birth certificates when they were born.

Judge Schwarz – Okay. Yeah, go ahead.

Ann Gilmour - Just one final question. Which is: “Someone else what's the practical difference for you in the juvenile court when the court of appeal conditionally affirms versus conditionally reverses?”

Judge Schwarz - Based on I would say there is no difference. I mean maybe you feel better if you're keeping score in your chambers with your reversals. But it's the same. And it's weird because this is the first time that I recall being conditionally affirmed. It's the same. I mean it basically you're you've got to fix the problem. If it's being remanded, you've got to fix the problem. And most of the time even when there was a conditional reversal, you know they give instructions you know address the ICWA issue, and if ICWA does not apply then the prior findings and orders remain. So, I don't think that I'm not aware of any practical difference. And I don't know Judge Vezzola if you have an a any input on that?

Judge Vezzola - I do not because my tribal court decisions are not reported to the public.

Judge Schwarz - So okay. All right and anything else?

Ann Gilmour – No, that's the end of it. And I do want to ensure all the participants that we will be sending out the PowerPoint slides. There were many requests for that. So, thank you all for joining us today and thank you so much Judge Schwarz and Judge Vezzola for all your insights. All right. Thank you. We appreciate it.