

assessments. In cases where there is a difference of opinion, the court relies on the forensic expert who presents his opinion most effectively.

Psychological testing is not always included or necessary in competency determination. In this case, however, the time spent with Mr. Fletcher and the performance of testing by the psychologist led the court to conclude that Dr. Buckwell's evaluation was more comprehensive and thus, more credible. It is unclear whether the psychiatric expert educated the court through his report or testimony in the ways in which the forensic psychiatrist and psychologist use their fields of expertise to form the bases of their conclusions, but it was moot absent the court's impression regarding thoroughness and how the experts communicated their findings.

Next, the defense chose not to challenge the potential for bias in the opinion of Dr. Dillinger. In her capacity as a trainee, she would not only have to establish the prerequisite criteria necessary for incompetence, but would also be in the potentially awkward position of challenging the judgment of Dr. Buckwell, her supervisor, if she recommended him as incompetent.

Finally, this case illustrates the different criteria states use to define mental illness or deficiency. Wyoming defines mental deficiency as "a defect attributable to intellectual disability, brain damage and cognitive disabilities" (Wyo. Stat. Ann. § 7-11-301 (2009)) and mental illness as only those conditions that impair "a person's perception or understanding of reality" (Wyo. Stat. Ann. § 7-11-304 (2009)). Under this definition, it could be argued that any diagnosis other than a psychotic disorder would not qualify as a mental illness. One could wonder how the court interpreted the testimony of both experts, while utilizing these statutes as a guide.

In summary, this case illustrates the necessity that the forensic expert convey effectively how a defendant's mental disorder meets the statutory requirement for incompetence. With a clear report and well-reasoned conclusions, the forensic psychiatrist can be ready to help the court answer these questions and promote justice as defendants with psychiatric and intellectual disabilities are processed through the criminal justice system.

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Family Preservation Versus Child Wellbeing Under the Indian Child Welfare Act

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Trial Court Verdict Upheld in Termination of Parental Custody Due to Risk of Serious Emotional or Physical Harm

In *Lucy J. v. State*, 244 P.3d 1099 (Alaska 2010), the Supreme Court of the State of Alaska reviewed the case of Lucy J., who appealed the termination of her parental rights. The mother of two acknowledged the superior court's classification of her children as children in need of aid under Alaska Stat. § 47.10.011(9)(2008) but appealed the court's conclusion that she had not remedied her behavior, that the Office of Child Services (OCS) had actively attempted to preserve her family, and that her actions were cause for termination under the Indian Child Welfare Act (ICWA) 25 U.S.C. § 1903(4) (2006).

Facts of the Case

Lucy and Rick were in a tumultuous relationship between 2001 and 2005. The relationship resulted in two children: Jack, born in 2003, and Carmen, in 2005. (These names are pseudonyms adopted by the court.) OCS was often involved due to allegations of neglect, abuse, and domestic violence. In 2004, Lucy was diagnosed with alcohol dependence and later admitted to drinking during her pregnancy with Carmen. Following each intervention, she had access to a range of social and psychological services that she utilized to various degrees. Despite successfully completing two treatment programs, she experienced frequent relapses and refused or terminated many recommended programs. In 2005, she ended her relationship with Rick because of domestic violence and moved to a shelter with her children. Throughout their lives, the children were left with inappropriate caregivers; just a few months after Jack was born, Lucy left him with a registered sex offender,

and in 2005, she indicated that Jack may have been sexually abused while being cared for by a babysitter who was on probation for rape. After a hearing in July 2006, the OCS gained custody of Jack and Carmen. The children were found to have long-standing physical and behavioral impairments (*e.g.* dental issues, posttraumatic stress disorder, enuresis, and aggression), which improved with treatment while they were in foster care.

Lucy's alcohol dependence was compounded by neurologic dysfunction. In July 2006, she received a diagnosis of static encephalopathy, a permanent, nonprogressive brain injury. She signed a release in March 2007 allowing the OCS access to the evaluation, after which her case manager incorporated the diagnosis into her treatment plan. In 2007, she had a daughter with another man. In a similar pattern, the OCS became involved within six weeks of the child's birth, in response to incidents in which she was found to be caring for her child while intoxicated.

In 2008, the OCS petitioned for termination of parental rights. The foster parents expressed a desire to adopt if the parental rights terminated. The district court considered a relatively strict standard for parental termination because Lucy's children met the requirements set forth in the ICWA 25 U.S.C. §§ 1901-1963 (2006) that active efforts be made to prevent the family breakup, that evidence beyond a reasonable doubt show that being in their mother's custody was likely to harm her children, and that a preponderance of the evidence show that the termination of her rights was in the best interest of her children. Still, the court ruled that clear and convincing evidence showed that Jack and Carmen were children in need of aid (Alaska Stat. § 47.10.011(8) (2008)), and Lucy had failed to remedy the conditions.

She did not challenge her children's classification as in need of aid. She did, however, raise four objections to the district court's verdict: that she had not remedied the conditions that put the children at substantial risk of harm; that the OCS provided sufficient effort to preserve the family; that her care would seriously damage her children emotionally or physically; and that the termination of her parental rights was in her children's best interest.

Ruling and Reasoning

The Alaska Supreme Court held that the OCS had met its burden of proof and unanimously upheld all

findings of the district court. The supreme court found clear and convincing evidence that Lucy had not remedied her substance use and pattern of neglect, overriding her argument that, at the time of the trial, she had been abstinent from substances for nine months, that there was insufficient evidence that her alcohol use impacted her parenting skills, and that there had been no allegations of neglect since 2006. The court cited her years of alcohol dependency, neglectful behavior, and failure to adhere to treatment programs. In addition, the court mentioned her tendency to minimize her usage and her refusal to support her claim of sobriety with urinalyses. It also noted that Jack and Carmen had been in foster care after 2006, during which time there had been no allegations of neglect.

The court also found clear and convincing evidence that the OCS had made active efforts to prevent the breakup of the family. It cited the inclusion of tribal leaders in Lucy's treatment plan and access to numerous services. She argued that the OCS did not accommodate her neurologic diagnosis under the requirements of the Americans with Disabilities Act (ADA, 42 U.S.C. §§ 12101-12213 (2006)). However, the court found that the requirements of the ADA for accommodating an individual's disability were satisfied by the substantial efforts to maintain the family system and were therefore already addressed. In addition, there was sufficient evidence that the disability was incorporated into her treatment plan, once she signed the release to allow it.

The supreme court also supported the district court's findings that returning the children to Lucy would be likely to result in harm and that terminating her rights would be in their best interest. She questioned the qualification of the expert witnesses and the likelihood of harm and emphasized that the children should remain within an American Indian community. However, the court cited the relevant experience of the expert witnesses and their findings that her care resulted in severe emotional and physical harm. In addition, the court clarified that the ICWA does not require the consideration of placement options within a termination hearing. Rather, the question considered was whether parental termination is in the child's best interest. The court considered the bond the children developed with their foster parents, the exemplary care they were receiving, and the improvements they were making and

concluded that termination was in the children's best interest.

Discussion

The balance between the competing priorities of family preservation and child welfare becomes increasingly complicated when cultural preservation is also considered. Within the context of maintaining Native American culture, the ICWA represents a shift toward the prioritization of the preservation of the family unit. The ICWA may have inspired other similar acts. The Adoption Assistance and Child Welfare Act (AACWA; Pub. L. No. 96-272)(1980) created the federal policy for foster care. States have widely interpreted it as promoting the reunification of families (Allen M, Bissell M: Safety and stability. . . . *Future Child* 14:49–73, 2004).

These acts represent a preventative, rather than reactive, approach. Instead of immediately displacing children, parents are provided with social support, including financial and housing assistance, as well as access to mental health treatment and parenting classes. The ICWA requires “active efforts” (*Lucy J.*, p 1111) to provide rehabilitative programs in comparison to the AACWA’s “reasonable efforts.” In addition, only the ICWA requires the use of experts in the family’s culture.

Almost 20 years after the AACWA, the balance between the perceived importance of family preservation versus child welfare shifted again. The Adoption and Safe Families Act of 1997 (Pub. L. No. 105-89)(1997) addressed the perception that child welfare was biased toward family preservation and that adoption as a permanent placement option was given little attention (Murray KO, Gesiriech S. Available at <http://pewfostercare.org/research/docs/Legislative.pdf>. Accessed September 1, 2012). However, the ICWA prevented this shift from affecting Native American families. In practice, it would be difficult to differentiate how the case if *Lucy J.* would have been handled if *Lucy’s* children had not met the ICWA standard. Other than the inclusion of tribal leaders and expert witnesses, the theoretical difference between the acts may not have a practical effect. When relevant personnel were questioned regarding the difference between active and reasonable efforts to prevent parental termination, 51 percent of state workers and 77 percent of tribal workers did not employ a different standard (Limb GE, Chance T, Brown EF: An empirical examination. . . . *Child*

Abuse Negl 28:1279–89, 2004). The researchers did not indicate whether this implied that all cases were judged at the higher active level or the lower reasonable level.

The definition of reasonable versus active efforts is even more complex in the context of addiction treatment. Research has consistently shown that, similar to chronic diseases, long-term recovery from alcohol addiction often requires repeated episodes of treatment (White WL, Boyle M, Loveland D: Alcoholism/addiction as a chronic. . . . *Alcohol Treat Q* 20: 107–29, 2002). In a termination case, the potential for protracted abstinence must be balanced against the harm children might endure if parental rights are retained. The ICWA adds a third element, cultural preservation, to the balance between family preservation and child welfare. The courts, with the aid of expert witnesses, are charged with ensuring that the best interests of the child are not outweighed in the required balancing act.

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Sleep Terrors and the Restriction of Expert Witness Testimony

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Expert Witness’ Testimony Can Reasonably Be Restricted if Unreliable

In *Rivera v. State*, 7 A.3d 961 (Del. 2010), the Supreme Court of Delaware considered whether the superior court, after a conviction of first-degree murder, had erred when it denied Mr. Rivera’s motion to suppress evidence found during a search of a motor vehicle and improperly restricted his psychiatric expert witness testimony at trial.