

Expert Witness Testimony on Mental Injury to a Child

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Terminating Parental Rights on the Basis of Mental Injury to a Child Requires Express Qualification and Opinion of an Expert Witness

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An Alaska superior court terminated parental rights upon finding that the parents had caused mental injury to a child, based partly on testimony from a therapist who had not been qualified as an expert witness. In *Cora G. v. State*, 461 P.3d 1265 (Alaska 2020), the Alaska Supreme Court concluded that this mental injury finding required express qualification and opinion of an expert witness.

Facts of the Case

The Office of Children's Services (OCS) in Alaska received a report in 2016 alleging that a child had been physically and sexually abused by his mother, Cora G., and neglected by his father, Justin D. (both pseudonyms). The OCS initially removed the child from the mother's care and placed him with his father. A superior court denied visitation with Ms. G.; upon discovering that the father had taken the child to see her, the OCS later removed the child from the father's care, which was upheld in court. The father subsequently moved out of Alaska for work and allegedly maintained little to no contact with the child for a period of time. The child was seen by at least two therapists, who identified behavioral concerns potentially related to trauma and expressed concern about child visitation with Ms. G.

In 2018, the OCS filed a petition to terminate parental rights to the child. During a termination trial, the child's second therapist, who was unlicensed but held a master's degree in marriage and family therapy, testified that the child had demonstrated adverse reactions regarding visitation with Ms. G. Based in part on results of a neuropsychologist's evaluation of the child, the therapist also testified that she had diagnosed the child with mental disorders including acute stress disorder and reactive attachment disorder. The OCS did not expressly offer this therapist as an expert witness or request to qualify her as an expert witness on these matters. According to Alaska Stat. § 47.10.011(8) (1998), a court may find a child in need of aid (CINA) if the conduct or conditions created by parents have resulted in mental injury to a child. The superior court ordered termination of parental rights, finding that the child was in need of aid under this mental injury provision. The parents appealed the decision, including a challenge that the court did not qualify an expert witness to support the mental injury finding.

Ruling and Reasoning

The Alaska Supreme Court vacated the superior court's termination order of parental rights and remanded the case for further proceedings. The court pointed out that trial courts often have discretion about whether qualified expert witness testimony is indicated in criminal or civil cases but statutes may delineate expert witness requirements for specific cases. An Alaska CINA statute required that the existence of a mental injury to a child must be "supported by the opinion of a qualified expert witness" (Alaska Stat. § 47.17.290(10) (2019)).

As noted by the court, the statute did not define whether "qualified" referred to a witness's professional background and experience, as opposed to formal qualification of an expert witness by the trial court. After reviewing materials, including legislator statements and committee reports, to determine legislative intent, the court inferred that the language of a "qualified expert witness" in the Alaska CINA statute was derived from the federal Indian Child Welfare Act (ICWA; 25 U.S.C. §§ 1901–1963 (1978)).

The court examined conflicting case law from Montana (*In re K.H.*, 981 P.2d 1190 (Mont. 1999)) and Arkansas (*Howell v. Arkansas Department of Human Services*, 517 S.W.3d 431 (Ark. Ct. App.

2017)). In the Montana case, the Montana Supreme Court reversed termination of a mother's parental rights, concluding that the burden under the ICWA fell upon the state to produce expert witness testimony in these cases. By comparison, in the Arkansas case, an intermediate appellate court concluded that a mother had not objected to an ICWA's expert witness qualifications in trial court and therefore could not raise this challenge on appeal. The Alaska Supreme Court supported the analysis in the Montana decision and held that, "in this limited context of a judge-trying CINA matter, it is legal error for a trial court not to expressly qualify an expert witness to testify about a child's mental injury under Alaska Stat. § 47.10.011(8)(A) and Alaska Stat. § 47.17.290(10)" (*Cora G.*, p 1285).

Applying such reasoning to this case, the court noted that the child's second therapist who testified at the termination trial had not been qualified as an expert witness. Although the superior court relied on other evidence, such as a neuropsychologist's written report, the Alaska Supreme Court noted that the CINA statute required qualified expert witness opinion for a mental injury finding and that nontestimonial statements did not fulfill this requirement. The court added that, while the therapist held a master's degree in marriage and family therapy, she was unlicensed and there was "no ready indication she could have been qualified as an expert for diagnosing complex mental injury to a child or opining on the cause of such an injury" (*Cora G.*, p 1287). Absent qualified expert witness opinion on the matter, the court could not "conclude that the superior court's finding that [the child] had a mental injury caused by parental conduct or conditions, rather than congenital conditions, is sound" (*Cora G.*, p 1288).

Dissent

Chief Justice Bolger wrote a dissenting opinion, stating that the court had misinterpreted the meaning of a "qualified" expert witness. Referring to Alaska Evidence Rule 702, he wrote that a witness becomes "qualified" as a result of factors including knowledge, training, and experience, as opposed to a requirement for affirmative qualification in open court. Citing prior cases in Alaska, he wrote, "If the opposing party believes that a witness is not properly qualified, then that party must raise an objection to the

witness's expert testimony when it is offered" (*Cora G.*, p 1289).

Discussion

The Alaska Supreme Court's conclusions in *Cora G.* may have several implications for trials involving mental injury and child welfare, as well as the roles of expert witnesses. First, the court clarified that a mental health professional is not necessarily assumed to be an expert witness in CINA cases on the basis of professional background and credentials. Instead, to terminate parental rights on the basis of mental injury to a child, a trial court must expressly qualify an expert witness to support this finding. In laying out this procedural requirement, the court seems to have raised the bar for expert witness testimony under these circumstances.

Second, the *Cora G.* case addressed whether specific professional credentials might qualify someone to testify as an expert witness on mental injury to a child in a CINA case. The court expressed doubts about whether an unlicensed therapist with a master's degree in marriage and family therapy had the qualifications to be an expert witness on the matter. Clinicians with expertise in child and adolescent mental health are often in short supply, particularly in rural areas; as a result, courts may face a balancing act between maintaining high standards for expert witness qualification in these contexts and finding available mental health professionals who can meet these standards and are willing to provide expert witness opinions.

Third, this decision might more broadly influence the ways in which mental health professionals enter into expert witness roles. For many mental health professionals, the nuances of legal proceedings, including the standards for providing expert witness testimony, can be unfamiliar. Courts often require evidence of specialized knowledge, training, and experience for expert witness qualification, and academic degrees alone may not be sufficient for these purposes. If asked to provide opinions or testimony to courts, mental health professionals might wish to clarify what services are being requested and whether their backgrounds fit these needs. Discussing these matters early on with retaining attorneys or court officials may help mental health professionals navigate the complexities of expert witness

requirements, which can vary between jurisdictions and types of legal proceedings.

Knowledge of Native Culture in Expert Witness Testimony

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Knowledge of Alaska Native Culture Not Relevant under ICWA to Qualify Expert Witness Regarding Determination of a Minor's Present Danger to Self/Others

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In *In re April S.*, 467 P.3d 1091 (Alaska 2020), April S. appealed a superior court of Alaska's decision on the basis that it had erred, under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963 (1978), in allowing expert witness testimony by a therapist who did not have specific knowledge of her Native culture. The superior court found that knowledge of Native culture was irrelevant when assessing if a minor with mental illness was safe at home. The Alaska Supreme Court affirmed the superior court's ruling.

Facts of the Case

April S. is an Alaskan Native minor who was taken into custody by the Office of Children's Services (OCS) in 2018 and later placed in a residential treatment facility in Utah. This occurred after April S. had been at a youth shelter and her mother indicated she "can't handle [April] anymore" and wanted OCS to "take her." April S. received a diagnosis of bipolar disorder and posttraumatic stress disorder. She was reported to also be experiencing symptoms of paranoia at the time of the incident. OCS found that April S. qualified as a child in need of aid (CINA) because she did not "have a parent ensuring her medical and mental health needs are met, nor [was] anyone willing or able to provide her shelter or meet

her other basic needs" (*In re April S.*, p 1093) and placed her in their care. She was later transferred to a residential treatment program in Utah, Provo Canyon.

April S. filed a motion for a placement review hearing after an incident in 2019, in which a staff member was applying restraints and April S. injured her arm. In this motion, April S. stated she no longer "felt safe" at the facility. She also filed a motion requesting the court to determine if her removal was justified under the ICWA and if placement in a residential facility was warranted under Alaska Stat. § 47.10.087 (2003).

April S. argued that the placement was inappropriate and that, under ICWA, the expert witness was unqualified as she did not have "cultural competency regarding the Native Village of Kotzebue" (*In re April S.*, p 1094). The expert witness for the state, Jennifer Oxford, testified to the severity of April S.'s mental illness, her progress at Provo Canyon, and that her identity as an Alaska Native did not affect the self-harm risk assessment. Specifically, the state argued that Native culture was not relevant to this case because "a mental illness in which the child's behavior places her at substantial risk of harm . . . [is] going to be true regardless of what her culture is" (*In re April S.*, p 1095). The superior court referenced the Bureau of Indian Affairs' (BIA) Guidelines in their ruling and found that Ms. Oxford qualified as an expert witness, despite her lack of knowledge regarding Native culture, as it was "plainly irrelevant to the particular circumstances at issue in the proceeding" (BIA, U.S. Department of the Interior, Guidelines for Implementing the Indian Child Welfare, p 54 (2016)). The court also found that April S.'s removal and placement in a residential facility was permissible under Alaska Stat. § 47.10.087.

April S. later appealed the decision, arguing that the superior court had erred in their determination that Ms. Oxford qualified as an expert witness under ICWA. Specifically, she argued that Ms. Oxford's lack of knowledge regarding how the Native culture of Kotzebue addresses mental illness made her unfit to determine even whether Native culture was irrelevant to the case. OCS maintained that knowledge of April S.'s Native culture was not necessary in determining her safety in the home and cited a previous Alaska Supreme Court ruling that "cultural expertise is not essential in every case" (*Eva H. v. State*, 436 P.3d 1050 (Alaska 2019), p 1054).