

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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**Key words:** expert witness qualification; Indian Child Welfare Act; Native culture; present danger to self/others

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).

Ruling and Reasoning

The Alaska Supreme Court held that expert witness testimony given by Ms. Oxford qualified under section 1912(e) of the ICWA because knowledge of the minor’s specific Native culture was not directly relevant to the determination of present danger to herself or others as the result of a serious mental illness. The court examined the ICWA and its regulations, the BIA Guidelines, and prior Alaska case law. ICWA identifies the requirements for child custody proceedings involving Indian children. It states that any removal of an Indian child from the parent must be in settings where “the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child” (25 U.S.C. § 1912(f)).

The ICWA regulations also outline requirements for expert witness testimony. Though ICWA regulations indicate a qualified expert witness is someone who has knowledge on “the prevailing social and cultural standards of the Indian child’s Tribe” (25 C.F.R. § 23.122(a) (2019)), the BIA has published further guidelines for interpreting the requirements. These guidelines indicate that knowledge of Alaska Native culture “may not be necessary if such knowledge is 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)). Additionally, the Alaska Supreme Court identified the holding in *Eva H.* as precedent that “a qualified expert witness under ICWA need not always have knowledge of Native culture” (*In re April S.*, p 1099).

On the basis of the above reasoning, the Alaska Supreme Court agreed with the superior court’s analysis and affirmed the ruling. They found Ms. Oxford was qualified as an expert witness under ICWA even though she had little knowledge of the Alaska Native culture.

Discussion

This case further outlines who may qualify as an expert witness under the ICWA. In the past several years, we have seen continued regulation of how to interpret and apply the ICWA. For instance, in 2016, the BIA formalized their prior recommended guidelines for interpreting the ICWA into regulations and stated that “a qualified expert witness must

be qualified to testify regarding whether the child’s continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child’s Tribe” (25 C.F.R. § 23.122(a)).

The Alaska court system has also ruled previously on when someone may not qualify as an expert witness (*Bob S. v. State*, 400 P.3d 99 (Alaska 2017)) and noted instances where cultural knowledge may not be required to qualify as an expert witness (*Oliver N. v. State*, 444 P.3d 171 (Alaska 2019)).

It will be important to monitor whether this ruling, and the reasoning supporting it, is used as precedent in future cases involving the ICWA. In particular, given the recent emphasis on inherent bias within a variety of systems in our society, it may be useful to track cases that are recognized as the “limited exception” to the requirement that an expert witness have knowledge of Native culture when considering a Native child’s needs. Broadly speaking for expert witnesses, it may be prudent to consider asking questions about a potential evaluatee’s identified culture, the potential impact of culture on the matters relevant to the case, and whether the expert can assess relevant cultural factors prior to accepting a case. For example, when considering whether to work on a case involving Native children, experts should have knowledge of the ICWA and be able to discuss with attorneys and courts whether it applies to a particular case. In addition, experts should have the ability to discuss exceptions to ICWA and when they apply with attorneys and courts. The development of continuing medical education courses focused on the application of cultural formulation and cultural competency in the forensic settings would be valuable in assisting experts in such cases.

## Lack of Adequate Mental Health Treatment for Prisoners Constitutes Cruel and Unusual Punishment

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