INDIAN CHILD WELFARE ACT: A ROADBLOCK IN A NATIVE CHILD'S PATHWAY TO PERMANENCY

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ABSTRACT

The Indian Child Welfare Act (ICWA) requires the testimony of a qualified expert witness to support, beyond a reasonable doubt, the termination of parental rights in cases involving Native children. Initially, Congress expressed a preference for qualified expert witnesses to possess intimate knowledge of Native tribes' childrearing norms and practices. However, the permissive language of the 2016 Regulations has deemphasized this preference. Instead, the Alaska Supreme Court has interpreted the 2016 Regulations as requiring an expert to be qualified to testify about the mental, emotional, and physical wellbeing of children, therefore requiring formalized education in these areas of study. This has disqualified many Native witnesses who previously testified as experts based on their firsthand experience and knowledge of tribal norms. This resulted in many parental termination decisions being appealed, and eventually overturned, therefore increasing the time a Native child must wait to achieve permanency through adoption.

As the nation awaits the U.S. Supreme Court's ruling on the constitutionality of ICWA's placement preferences, Alaska's interpretation of the 2016 Regulations continues to prevent Native children from achieving permanency. The 2016 Regulations have permitted the Alaska Supreme Court to return to the standard it created under the 1979 Guidelines – a categorical determination that numerous ICWA termination hearings do not require expert cultural witness testimony.

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State v. Cissy A., *a recent Alaska Supreme Court decision, marks yet another change to the expert witness requirement.* Cissy A. *provides a return to ICWA protections that adequately encourage and respect tribal cultural norms and increase positive outcomes for Native children. However, this case is only a starting point. As such, this Note suggests that Alaska's legislature should adopt its own state ICWA protections to better integrate Native voices in the parental termination process. In addition, this Note identifies and discusses concerns that lingered in* Cissy A. *and proposes ways these concerns could be addressed in the state ICWA provision.*

I. INTRODUCTION

In March of 2019, the Office of Children's Services (OCS) in Alaska discovered five children living in deplorable conditions.[1] The home's kitchen had a foul odor from spilled food and liquid that had been left unattended.[2] Dirty clothes and diapers were all over the bedroom and bathroom.[3] There was garbage in the sink and shower, and feces smeared on the walls.[4] The children also reported that there were frequently rats and "large black insects" crawling throughout the home.[5]

The children mirrored the condition of the home. They appeared and smelled as if they had not bathed in several days, an observation supported by the dirt lodged under their finger- and toenails.[6] The children reported spending days without eating, and hair follicle testing revealed that all five children were positive for methamphetamine due to their parents' drug use.[7] Two of the children also tested positive for amphetamine.[8] Each child had visible scars from physical abuse.[9] The mother routinely spanked the children with a wooden broom handle, while the father hit them with metal rods, canes, and wires.[10] To end the nightmare, the OCS removed the children from the home and placed them into foster care.[11]

Unfortunately, these children's stories are not unique. In the United States, there are nearly 424,000 children in foster care on any given day.[12]

1. Louis C. v. Dep't of Health & Soc. Servs., Off. of Child.'s Servs., No. S-18002, 2021 WL 5356514, at *1 (Alaska Nov. 17, 2021).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., NO. 27, THE

In 2019 alone, over 250,000 children *entered* the system.[13] And while foster care may grant children needed relief from unspeakable horrors that occur within the home—horrors that include neglect, parental drug abuse, physical abuse, abandonment, and sexual abuse[14]—foster care is only a *temporary* fix.

The temporary nature of foster care is exacerbated by frequent instability in placement. Within the first eighteen months of being in the system, 18.9% of children will be removed from their initial foster placement, and 8.5% experience at least three different placements.[15] Of children who were in foster care for two years or more, 64% experienced three or more foster placements.[16] These frequent changes in placement prohibit children in the foster system from achieving permanency. Permanency is a term used in family law to describe "legal membership in a safe, stable, nurturing family with relationships that are *intended to last for a lifetime*."[17] Lack of permanency can cause significant developmental deficiencies, such as an increased risk of behavioral, social, psychopathological, and academic problems.[18] Additionally, children are likely to develop a distrust of adult figures, negative self-esteem, and an inability to build secure attachments to subsequent caretakers or foster parents.[19] Comparatively, children in stable home conditions are less likely to develop delinquent behavior and psychopathology, and are more likely to have healthy brain development and favorable academic achievements.[20]

In the United States, permanency is often achieved via reunification of children with their parents or, when reunification is not feasible, adoption upon termination of the unfit parents' rights.[21] While

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ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) REPORT 1 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf.

13. *Id.*

14. *Id.* at 2.

15. Sonya J. Leathers et al., *Placement Disruption in Foster Care: Children's Behavior, Foster Parent Support, and Parenting Experiences*, 91 CHILD ABUSE & NEGLECT 147, 147 (2019).

16. *Id.* at 148.

17. *Is Permanency the Same as Adoption?*, AMPERSAND FAMILIES, https://ampersandfamilies.org/adopting-teens-minnesota/why-permanancy-matters/ (last visited Apr. 28, 2023) (emphasis added).

18. Carolien Konijn et al., *Foster Care Placement Instability: A Meta-Analytic Review*, 96 CHILD. & YOUTH SERVS. REV. 483, 484 (2019).

19. *Id.*

20. *Id.*

21. *Id.* at 483. In 2019, around half of the children discharged from the foster system were reunited with their parents, and over a quarter were discharged due to adoption. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 12,

reunification, when appropriate, is a desirable outcome for children and parents alike, this Note focuses solely upon situations, as exemplified above, where lingering safety concerns make reunification impossible. In these situations, the child can only achieve permanency if parental rights are terminated and long-term legal relationships with fit caregivers are created.[22] However, a child's pathway to permanency via termination proceedings is often a long, drawn-out legal process that leaves the child in a seemingly perpetual state of temporary placement.[23] The five children in the previous illustration spent twelve months in the system before the OCS filed a petition to terminate parental rights;[24] then, they spent an additional nine months awaiting the results of the termination hearing.[25] Even after the decision was rendered, the children remained in limbo for another ten months as the case worked its way through the appeals process.[26] For two years and seven months, these five children lacked the permanency necessary to improve their chances of healthy brain development and favorable academic achievements.[27]

While the permanency process is lengthy for children of *all* races and ethnicities, this burden falls disproportionately on Native children[28] in America. Research shows that Native children nationwide are overrepresented in the foster care system.[29] A 2017 study found that the proportion of Native children in foster care is 2.6 times greater than their proportion in the general population.[30] And this number did not include

at 3.

22. John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL'Y 51, 53 (2014).

23. Children in the American foster system spend an average of 19.6 months in foster care before permanency can be achieved. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 12, at 2. Almost 30% of the children in foster care spend at least two years in their placement, with over 20,000 children being in foster care for a period of five years or more. *Id.*

24. Louis C. v. Dep't of Health & Soc. Servs., Off. of Child.'s Servs., No. S-18002, 2021 WL 5356514, at *1, *2 (Alaska Nov. 17, 2021).

25. *Id.* at *2.

26. *Id.*

27. *See supra* text accompanying note 20.

28. The term "Native child" is federally defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Although the Indian Child Welfare Act uses the term "Indian," throughout this Note the term "Native" will be used to reference this population. This term is meant to also include American Indians and Alaska Natives.

29. *Disproportionality Table 2019*, NAT'L INDIAN CHILD WELFARE ASS'N (NICWA) (2019), https://www.nicwa.org/wp-content/uploads/2019/08/Disproportionality-Table-2019.pdf.

30. *Id.*

children receiving services from tribal governments, meaning that the rate is likely even higher.[31] This disproportionality has an even greater impact in Alaska, which is home to 228 federally recognized tribes[32] and is the most predominantly Native state in the nation.[33] Alaska Native children were found to be seven times more likely to be in foster care when compared to their white counterparts.[34] A study ranging from 2006 to 2013 found that around 2,000 Alaskan children were in foster care in any given month.[35] While only twenty percent of children in the state are Alaska Natives, sixty percent of those 2,000 children in foster care were Native.[36]

In 1978, Congress concluded that the disproportionate number of Native children in the foster care system was directly attributable to the nation's systematic mistreatment of the Native population.[37] As a result, Congress enacted the Indian Child Welfare Act of 1978, commonly referred to as "ICWA."[38] The Act provides extra protections for this vulnerable population by regulating various aspects of the child welfare

31. *Id.* The formula used to calculate these figures compared the total population of Native children in the state to the number of Native children in state care. *Id.* However, in some states, tribes are responsible for providing child welfare services to tribal children *on tribal lands*. *Id.* Therefore, since the state is not responsible for the care of these children, these children were not properly accounted for within the formula. *Id.*

32. *Alaska Region Overview*, U.S. DEP'T OF INTERIOR INDIAN AFF.S, https://www.bia.gov/regional-office/alaska-region (last visited Apr. 28, 2023).

33. *Census Shows Increase in Native Population*, NAT'L INDIAN COUNCIL ON AGING (NICOA) (Sept. 9, 2021), https://www.nicoa.org/census-shows-increase-in-native-population/. The 2020 U.S. Census reported that 6.6% of Alaska's total state population identifies as a combination of Native and another race. *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html (choose "What are facts for my state or county?"; then in the Group filter choose "American Indian and Alaska Native in combination"; then in the state and county filter, select "Alaska" and "Aleutians East Borough"; click the arrow to search). And 15.2% of Alaska's state population identifies as full Native. *Id.* (choose "What are facts for my state or county?"; then in the Group filter choose "American Indian and Alaska Native alone"; then in the state and county filter, select "Alaska" and "Aleutians East Borough"; click the arrow to search).

34. Lisa Demer, *Report: High Numbers of Alaska Children – Especially Native Children – in Foster Care*, ANCHORAGE DAILY NEWS (Sept. 28, 2016), https://www.adn.com/alaska-news/article/high-numbers-alaska-children-and-native-children-foster-care/2014/12/04/.

35. *Id.*

36. *Id.*

37. *See* discussion *infra* Section II.B.

38. 25 U.S.C. §§ 1901–63.

process[39]—including foster care placements,[40] voluntary termination of parental rights,[41] jurisdiction for tribal courts,[42] and, most relevant to this Note, involuntary termination of parental rights.[43]

These federal protections have been hotly contested within the courts and scholarly literature,[44] with the most recent attack being *Brackeen v. Haaland*.[45] In *Brackeen*, an en banc Fifth Circuit panel struck down several ICWA provisions as unconstitutional, specifically ICWA's active efforts,[46] expert witness,[47] and record keeping requirements,[48] for violating the Tenth Amendment's anti-commandeering doctrine.[49] Additionally, the divided panel affirmed the trial court's finding that ICWA's placement preferences, which give priority to Native foster and adoptive parents, violate equal protection and improperly commandeer state actors.[50] *Brackeen* echoes the major critique of ICWA—that it does not provide Native children equal protection of the law because of the different standards that are applied in Native child welfare cases,

39. *See id.* § 1902 ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.").

40. *See id.* § 1912(e) (setting the evidentiary standard required before a Native child can be removed from the custody of their caregiver); *id.* § 1915 (stating a preference for placing children in culturally appropriate homes).

41. *See id.* § 1913 (outlining the requirements needed for valid consent to terminate parental rights).

42. *See id.* § 1911 (prescribing the tribe's jurisdiction over Indian child custody proceedings).

43. *See id.* § 1912(f) (setting the evidentiary standard for an involuntary termination of parental rights).

44. *See* Glennas'ba Augborne Arents & April E. Olson, *Bent, But Not Broken: ICWA Stands: A Summary of* Brackeen v. Haaland, ARIZ. ATT'Y, July 2021, 62, 64 ("Since at least 2016, the Goldwater Institute, the National Council for Adoption, and other groups have filed at least 10 federal lawsuits attempting to dismantle ICWA.").

45. 994 F.3d 249 (5th Cir. 2021).

46. 25 U.S.C. § 1912(d) (requiring the party seeking foster care placement or termination of parental rights to prove that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful").

47. *Id.* § 1912(e)–(f) (requiring the testimony of a qualified expert witness before foster care placement is granted or parental rights are terminated).

48. *Id.* § 1915(e) (requiring foster placement of Native children to be maintained by the state, including information showing compliance with ICWA's foster care and adoption placement preferences).

49. *Brackeen*, 994 F.3d at 268.

50. *Id.*

specifically in the context of foster and adoptive placements.[51]

To clarify this constitutional question, the U.S. Supreme Court granted certiorari[52] to determine whether ICWA's placement preferences a) improperly discriminate on the basis of race, b) exceed Congress's power over Indian affairs, and c) impermissibly commandeer state courts and agencies.[53] But by narrowing the scope of the case to the constitutionality of ICWA's placement preferences,[54] the U.S. Supreme Court neglected to address a large harm facing Native children: the additional, time-consuming roadblock that ICWA's expert witness requirement for termination hearings places in a Native child's pathway to permanency.

In the context of involuntary terminations, ICWA requires the testimony of a qualified expert witness to support, beyond a reasonable doubt, the termination of parental rights.[55] However, beyond this baseline requirement, the Act remains largely silent and fails to describe the

51. *See id.* at 267–68 (holding that ICWA's raced-based definition of Indian child did not violate the equal protection clause, but the en banc court remained divided on whether ICWA's adoptive and foster placement preference for Indian families and foster homes violates the clause); Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD.'S LEGAL RTS. J. 1, 22 (2017) (arguing that there are six ICWA provisions that greatly diverge from welfare proceedings of non-Native children: "(1) jurisdictional rules that mandate transfer of child welfare cases to tribal court and give tribes rights as parties to these cases on a par with the rights of parents; (2) the 'active efforts' requirement that essentially requires child welfare workers to return children to the custody of unfit birth parents; (3) the 'clear and convincing evidence' standard applicable in foster care cases; (4) the 'beyond a reasonable doubt' standard that states must apply in termination of parental rights cases; (5) race-based foster and pre-adoptive placement preferences; and (6) race-based adoptive placement preferences").

52. *Brackeen v. Haaland*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/brackeen-v-haaland/ (last visited Apr. 28, 2023). Oral arguments were heard on November 9, 2022, and as of the writing of this Note, a written opinion has yet to be published. *Id.*

53. Brief for the Federal Respondents in Opposition at I, Brackeen v. Haaland, No. 21-380 (Dec. 2021), https://www.supremecourt.gov/DocketPDF/21/21-380/204565/20211208222853938_No.%2021-380%20Brackeen%20v.%20Halaand%20Final.pdf.

54. *See* Consolidated Brief in Opposition at 17–19, Brackeen v. Haaland, No. 21-380 (Dec. 2021), https://www.supremecourt.gov/DocketPDF/21/21-380/204468/20211208124941483_21-376_21-377_21-380%20Brief%20in%20Opposition.pdf (asking the court to determine whether various ICWA provisions violate the Tenth Amendment's anti-commandeering doctrine).

55. *See* 25 U.S.C. § 1912(f) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that 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.").

qualifications necessary for an expert, the number of experts required for termination, or the necessary content of their testimony. Instead, Congress has delegated the task of clarifying and reforming the expert witness requirement to the Bureau of Indian Affairs (BIA). Pursuant to this delegation, the BIA, in 1979 and again in 2015, issued *non-binding* guidelines for ICWA's qualified expert witness mandate.[56] Specifically, the guidelines emphasized, first, that at least *one* expert witness must testify[57] and, second, that the "qualified expert" status of the requirement is likely to be met if the witness has intimate knowledge of the culture and practices of Native tribes.[58] While the guidelines remained non-binding upon states, the Bureau intended for the guidelines to act as a manual of best practices for state courts to use in termination hearings for Native parents.[59]

However, in 2016, the BIA changed course and issued *binding* regulations upon the states.[60] These regulations were intended to promote uniform application of ICWA across the nation and raise the evidentiary standard required to terminate parental rights.[61] Specifically, the 2016

56. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67584 (Nov. 26, 1979) ("[The guidelines] are not published as regulations because they are not intended to have binding legislative effect."); Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10146–47 (Feb. 25, 2015) ("These updated guidelines provide guidance to State courts and child welfare agencies implementing the Indian Child Welfare Act's (ICWA) provisions[.]").

57. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. at 67592 (stating that courts cannot terminate parental rights unless the evidence includes "the testimony of one or more qualified expert witnesses"); Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10155 (stating that ICWA requires "the testimony of at least one qualified expert witness").

58. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. at 67593 (listing three types of witnesses likely to meet the qualified expert witness standard, with two of the three being individuals who had experience with and/or knowledge of the tribe's family and childrearing customs); Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10157 (listing a preferential order of witness qualifications which gives priority to witnesses with knowledge of tribal "social and cultural standards and childrearing practices").

59. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. at 67584 ("Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect."); Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10147 ("These updated BIA guidelines provide standard procedures and best practices to be used in Indian child welfare proceedings in State courts.").

60. 25 C.F.R. §§ 23.1–23.144 (2022).

61. BUREAU OF INDIAN AFFS., GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 5–6 (2016) [hereinafter 2016 GUIDELINES].

Regulations used permissive language in discussing the expert witness's exposure and knowledge of tribal norms, stating, "[an expert witness] *should* be qualified to testify as to the prevailing social and cultural standards of the Indian child's [t]ribe."[62] Meanwhile, witnesses *must* possess knowledge 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."[63] While this change to the standard for qualifying an expert witness seems minimal in nature, Alaska's case law exposes the dangers and shortcomings of this new regulation.

Specifically, this Note argues that Alaska's interpretation of the redefined expert witness requirement has removed Native voices from termination proceedings and caused a perverse outcome for Native children: a significant delay in permanency. This Note argues that Alaska could improve protections for Native children[64] and integrate Native voices in termination proceedings if the legislature adopted its own state ICWA protections. To achieve this aim, this Note identifies areas of improvement within the expert witness requirement and suggests ways for the state to implement these solutions within Alaska's ICWA provisions.

Part II introduces the complexities of family law and outlines the termination process for a non-Native child. Part II also provides insight into the historical mistreatment of the Native community and how these trends influenced the creation of ICWA. Part III dissects the language of the 1979 Guidelines, 2015 Guidelines, and 2016 Regulations, and analyzes the Alaska Supreme Court's interpretation under each scheme. Finally, Part IV concludes by suggesting changes that can be implemented at the state level, with each intended to improve outcomes for Native children.

62. 25 C.F.R. § 23.122(a) (2022) (emphasis added).

63. *Id.*

64. As exemplified by the previously cited empirical studies and census data, the disproportionality of Native children within the foster care system is an ever-present issue. One possible interpretation of this trend is to assume that ICWA's increased protections are inadequate, and reform is needed. Another suggests that the protections are adequate, however the enforcement and implementation of these protections are lacking. This Note explores the validity of these two interpretations, as mirrored in the BIA's approach to reform in the 2015 Guidelines and 2016 Regulations. *See* discussion *infra* Part III. However, the author recognizes that there is yet another interpretation: the disparity still exists because the Native population is more susceptible to factors that produce unsafe home environments (i.e. drug and alcohol dependency, poverty, physical abuse). While this is a valid social concern, this Note leaves this discussion for social scientists better suited to tackle this topic. Instead, this Note provides a legal framework for protecting the vulnerable Native population given the continued prevalence of these social conditions, conditions which are unlikely to change in the near future.

II. BACKGROUND

In the realm of family law, complex tensions exist between the federal and state government. Because the federal government is one of enumerated powers,[65] family law has traditionally been understood to "reside[] within the province of the states."[66] States were thought to hold the "locus of community dialogues on questions of values,"[67] therefore making them best equipped to govern the domestic sphere. And while there is a widespread belief expressed in this country's case law that family relations create a realm of privacy that the government cannot penetrate,[68] the reality is that the formation, maintenance, dissolution, and boundaries of domestic relations are nonetheless governed by state laws.[69]

One area that is largely governed by state legislatures is the child welfare process, which includes the involuntary termination of parental

65. *See* U.S. CONST. art. I, § 8 (enumerating the powers of Congress); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). The U.S. Supreme Court has suggested that national regulation of family law would eliminate the federalist system. *See* U.S. v. Lopez, 514 U.S. 549, 564 (1995) (rejecting the Government's argument that Congress, under the Commerce Clause, could regulate any activity "related to the economic productivity of individual citizens" because this unlimited federal power would permit Congress to regulate in areas "where States historically have been sovereign").

66. Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 197 (1999).

67. *Id.* at 199.

68. *See* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1790 (1995); *see, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("While this court has not attempted to define with exactness the liberty thus guaranteed . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right . . . [to] establish a home and bring up children . . . ."); Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

69. Dailey, *supra* note 68, at 1790. However, it should be noted that there has been a movement towards the federalization of family law which began during the New Deal legislation in the 1930s. *See* Linda D. Elrod, *The Federalization of Family Law*, 36 HUM. RTS. 3 (2009), at 6. Some of these regulations include the Parental Kidnapping Prevention Act of 1980 (PKPA), the Defense of Marriage Act (DOMA), the Violence Against Women Act of 1994 (VAWA), and the Adoption and Safe Families Act of 1997, just to name a few. *Id.* at 7–8. To state that the field of family law is strictly left to the state's discretion is an obvious fallacy.

rights.[70] In Alaska, this welfare process is called "Child in Need of Aid," or CINA.[71] Before a child can be removed from their home or parental rights are terminated, the Department of Family and Community Services of the State of Alaska must strictly comply with the CINA Rules.[72]

While appearing to fall within the state's purview, the requirements of the CINA Rules are amended for cases involving Native children by the requirements outlined in ICWA. The U.S. Supreme Court has read the Indian Commerce Clause of the Constitution[73] to grant the federal government exclusive power over Indian affairs to the exclusion of states and Native tribes.[74] Therefore, Congress's complete control over Indian affairs displaces state dominion over family law and permits Congressional changes to a state's child welfare system when Native children are involved.

Before introducing the changes made in the child welfare process by ICWA, it is important to have a general understanding of the CINA process in Alaska. Subsection A outlines the CINA process as it relates to a non-Native child. Subsection B discusses the historical landscape leading to ICWA's enactment and defines the main aims of the statute, specifically focusing on the three major harms identified by Congress. Finally, Subsection C dissects the statutory language of ICWA, identifies the additional protections granted to Native children in the involuntary termination process, and discusses how these protections alter the CINA process for Native children.

A. CINA: An Alaskan Child's Pathway to Permanency

When the Department of Family and Community Services of the State of Alaska (hereinafter, the "Department") receives an allegation of abuse, neglect, or abandonment, the Department must file a petition with the court.[75] The judge then schedules a hearing to discuss the contents of

70. *See State Statutes Search*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/systemwide/laws-policies/state/ (last visited Apr. 28, 2023) (providing a database of each state's child welfare statutes).

71. *See generally* ALASKA CHILD IN NEED OF AID R. P.

72. *See generally id.* at 1(c) ("These rules govern practice and procedure in the trial courts in all phases of child in need of aid proceedings[.]").

73. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .").

74. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1014 (2015). While one could argue the advisability of allowing the federal government unchecked power over Indian affairs, this is beyond the scope of this Note.

75. *Child In Need of Aid Proceedings*, THE ALASKA COURT SYSTEM, 2 https://public.courts.alaska.gov/web/forms/docs/pub-5.pdf.

the petition with all parties to the proceeding—usually the parents[76] and a Department social worker.[77]

From the petition, which details the child's situation, the judge must determine whether there is a good reason to believe the child is in need of aid.[78] The child is in need of aid when he or she is subject to any one of the twelve conditions outlined in the Alaska statute, including but not limited to abandonment, substantial physical harm, sexual abuse, mental injury, and neglect.[79] If there is good reason to suspect the child needs aid, the judge will: (1) order removal of the child from the home, (2) determine where the child will stay until the trial occurs, (3) schedule a trial, also called an adjudication hearing, and (4) inform all parties of their rights.[80] At the adjudication hearing, the judge must make the *final* determination of whether the child is in need of aid.[81] This means that the Department must prove that the allegations in the petition are true, and the parents and child are given the opportunity to present evidence and cross-examine witnesses to support or refute the Department's allegations.[82]

Upon determining that the child is in need of aid, the judge schedules a disposition hearing.[83] Prior to this hearing, the Department must submit to the court a written report (called a predisposition report) which explains the opinion of the social worker,[84] specifically listing the current case plan for the child and the social worker's recommendation as to what is in the child's best interest.[85] At the hearing, all parties are given the opportunity to present to the judge their opinion on the issue.[86] The judge then makes a determination as to where the child should be placed and what services the family should receive.[87] The parties have the option to appeal this decision if they disagree.[88]

76. The termination process can be initiated for any legal caretaker of a child, not just biological parents. However, for the sake of simplicity, this Note uses the term "parent(s)" when referring to the legal guardian whose rights are being terminated.

77. *Child In Need of Aid Proceedings*, *supra* note 75.

78. *Id.*

79. *See* ALASKA STAT. § 47.10.011.

80. *Child In Need of Aid Proceedings*, *supra* note 75, at 2–3. The judge can order the child to be temporarily removed from the home prior to the adjudicatory hearing via an emergency order. *Id.* at 2. Additionally, the parties can agree that the allegations in the petition are true and bypass the adjudicatory hearing process. *Id.* at 3. These steps have been omitted for simplicity.

81. *Id.* at 4.

82. *Id.* at 3–4.

83. *Id.* at 4.

84. *Id.*

85. ALASKA CHILD IN NEED OF AID R. P. 16(a)(1).

86. *Child In Need of Aid Proceedings*, *supra* note 75, at 4.

87. *Id.* at 4–5.

88. *Id.* at 4.

Within a year, the court must hold a permanency hearing, which is a hearing to determine if the child is still in need of aid.[89] If the child is still in need of aid, the judge also determines the best permanent placement plan based on the child's current situation.[90] Permanent placements can include developing a plan to return the child to their home, preparing the child for legal adoption, or placing the child in another permanent living arrangement.[91] Again, the Department must compile, before the hearing, a written report of its recommendations and the rationale behind such recommendations.[92] And all parties to the proceeding are given the opportunity to present to the court their opinion on the issue.[93] A permanency hearing is held every year until the permanent placement plan is successful.[94] If a party to the proceeding feels that there is good reason to hold a review hearing before the next permanency hearing—for example, there has been a change in circumstances in the home that would permit the child to return home sooner—the party can request such a hearing.[95]

If adequate efforts have been made by the Department to return the child to the home, but improvements have not occurred, the Department can begin the process to terminate parental rights.[96] To initiate the termination process, the Department must file and properly serve a petition seeking the termination of parental rights.[97] The court then must hold a termination hearing to determine if there is clear and convincing evidence that: (1) "the parent has failed, within a reasonable time, to remedy the conduct or conditions in the home that place the child in substantial risk so that returning the child to the parent would place the child at substantial risk of physical or mental injury," (2) the Department used reasonable efforts to provide support and services that are designed to enable the child to safely return home, and (3) the termination of parental rights is in the child's best interest.[98]

Upon finding termination proper, the judge severs the legal relationship between the parent and child, thereby allowing the child to obtain a permanent and developmentally beneficial placement,[99] typically

89. *Id.* at 5.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 6.
96. *Id.*
97. ALASKA CHILD IN NEED OF AID R. P. 18(a).
98. *Id.* 18(c). The court's finding that termination be in the child's best interest must be by a preponderance of the evidence. *Id.* 18(c)(3).
99. Halloran, *supra* note 22, at 53.

through adoption.[100] After a lengthy process, the child is permanently removed from the dangerous home environment and can pursue a safe alternative with the knowledge that this new placement is no longer a temporary fix.

As exemplified by Alaska's child welfare process outlined above, there are many stages in the process which can result in significant delay to a child's permanent placement. This is concerning because the longer a child remains in the foster care system, the more likely the child is to experience instability through multiple foster placements,[101] putting the child at risk for increased behavioral and social problems,[102] and an inability to form secure attachments with others in the future.[103]

B. Historical Treatment of the Native Population

To best understand the intended aims of ICWA and the rationale behind the changes it makes to CINA, it is necessary to explore the tragic history of nationwide mistreatment of Native populations through the child welfare system. The nation used cultural misunderstandings of the Native familial unit and home life as a justification for forced assimilation of Native children into white American culture. As a result, Native children were removed from their homes beginning in the late nineteenth century under the pretext of preventing "maltreatment." As this historical overview will suggest, this widespread practice resulted in ICWA's overarching goal: to eliminate cultural insensitivity as a means for removing Native children from stable home environments.[104]

Following the historical overview, the subsection proceeds to discuss the three areas of improvement designated by Congress during the drafting of ICWA: (1) rejection of the widespread belief that cultural differences result in social and psychological abuse of children; (2) protection of the emotional and social health of Native children; and (3) increased due process protection for Native parents before children are removed from the home. These areas of improvement directly influenced

100. Adoption proceedings are a separate procedural process, which is beyond the scope of this Note.

101. *See* Leathers et al., *supra* note 15, at 147–48 (finding that 64% of children who were in foster care for two years or more have experienced at least three different foster placements).

102. Konijn et al., *supra* note 18, at 484.

103. *Id.*

104. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67584 (Nov. 26, 1979) ("The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions.").

the changes Congress made to state child welfare systems through the enactment of ICWA.

1. Forced Assimilation: The Boarding School Era

Beginning in the late nineteenth century, the United States implemented programs designed to assimilate Natives into white culture.[105] The programs began by creating government-approved boarding schools for Native children on reservations.[106] The schools taught children traditional American values such as Christianity, private property, nuclear family structures, and material wealth.[107] Native parents who resisted enrollment were coerced to send their children to the schools under threat of imprisonment.[108] By the 1880s, 6,200 Native children were enrolled in one of the sixty on-reservation schools approved by the government.[109]

Upon finding that on-reservation schools were not an effective assimilation method, the U.S. government created off-reservation boarding schools.[110] Here, Native children were forced to leave behind their cultural identities—their braids were cut off, they were required to wear uniforms, they were punished for speaking their native language, their names were anglicized, and they were taught history from the white perspective.[111] Native children faced harsh punishments if they were caught engaging in Native cultural norms—their mouths were washed out with soap, they were deprived privileges, they endured corporal punishment, and their diets were restricted.[112] During the summers, Native children were housed with white families, and female students were expected to complete domestic labor while male students were expected to complete agricultural labor.[113] Native children faced severe sexual and physical abuse in addition to the emotional toll of being separated from their families.[114] By 1900, there were 460 Native boarding schools across the country with tens of thousands of Native children

105. Elizabeth Low, Comment, *Keeping Cultural Bias Out of the Courtroom: How ICWA "Qualified Expert Witnesses" Make a Difference*, 44 AM. INDIAN L. REV. 43, 44 (2019).
106. *Id.* at 45.
107. *Id.*
108. Courtney Lewis, *Pathway to Permanency: Enact a State Statute Formally Recognizing Indian Custodianship as an Approved Path to Ending a Child in Need of Aid Case*, 36 ALASKA L. REV. 23, 26 (2019).
109. Low, *supra* note 105, at 45.
110. *Id.*
111. *Id.*
112. *Id.* at 46.
113. *Id.*
114. *Id.* at 47.

being forced to attend.[115] Despite a 1928 study, the Meriam Report, revealing the horrors of the off-reservation boarding schools,[116] the boarding school era in the United States continued through the 1970s.[117]

1. Post-Boarding School Era: The Indian Adoption Project

As boarding schools began to wane, another government initiative continued to promote the separation of Native children from their cultural roots—the Indian Adoption Project. The Indian Adoption Project was implemented from 1958 to 1967 at the direction of the Children's Bureau, the BIA, and the Child Welfare League of America.[118] In response to the lack of white children available for adoption, the Indian Adoption Project encouraged white couples to adopt Native children to "help" a population "plagued by" unwed parents, impoverished conditions, rampant alcohol abuse, and "deviant" extended family structures.[119] In reality, implementers of the Project were promoting traditional American values taught in boarding schools and punishing families that did not conform by removing children from their homes.[120]

The Director of the Indian Adoption Project used the BIA and state social workers to convince Native mothers to relinquish their infants at birth.[121] The Director also supported the removal of older children from homes that showed signs of "neglect."[122] Children who shared a bed or room with their parents were placed into white foster families.[123] Children who were raised by their aunts, uncles, and grandparents were removed from their homes by state child welfare agencies.[124] Households that lacked indoor plumbing were deemed neglectful environments.[125] And parents who sought to obtain government help and financial assistance risked losing custody of their children.[126]

115. Lorelei Laird, *Children of the Tribe: Lawsuits Claim the Indian Child Welfare Act is Not Always in the Best Interests of Those It's Meant to Protect*, ABA J., Oct. 2016, at 40, 44.

116. Low, *supra* note 105, at 47.

117. Lewis, *supra* note 108, at 26.

118. *Id.*

119. Low, *supra* note 105, at 48–49.

120. *Id.* at 48.

121. *Id.*

122. *Id.* In comparison, Alaska law defines child abuse or child neglect as "the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health or welfare is harmed or threatened thereby[.]" ALASKA STAT. § 47.17.209(3).

123. Low, *supra* note 105, at 50.

124. *Id.* at 49.

125. *Id.* at 50.

126. *See id.* (detailing a case in which a grandmother sought financial aid from local welfare authorities to raise six children after their parents died and the

The widespread removal of Native children from their homes resulted in approximately twenty-five to thirty-five percent of all Native children being placed in foster homes, adoptive homes, or institutions.[127] In states that have a large Native population, the impact of the Indian Adoption Project was even more profound. The Project not only removed children from their homes, but also removed them from their *states*. Sixteen western states, including Alaska, placed Native children in eastern states with non-Native families.[128] From 1973 to 1976, Native children in Alaska were adopted at rates 4.6 times higher than non-Native children.[129] And Native children were found to be three times more likely to be in foster care.[130]

3. Congressional Recognition of the Harm Inflicted Upon Native Children

In 1978, Congress came face to face with compelling statistical evidence detailing high rates of removal for Native children and a large disparity in the number of Native children in the foster system.[131] Surveys completed by the Association on American Indian Affairs in states with large Native populations revealed that twenty-five to thirty-five percent of all Native children were removed from their homes and placed in the foster system.[132] Because of this, Congress finally acknowledged its part in the creation of this harmful system, and publicly announced the need for uniform national change.[133] Congress identified three specific areas for improvement. First, it supported the rejection of the notion that "poverty and cultural differences constitute social deprivation and psychological abuse."[134] As seen in the historical treatment of Native populations, the standards used for measuring "neglect" and "abuse" failed to account for the cultural norms of the Native population.[135] Not only did this prompt the unnecessary removal of Native children from their family structures, but it also disqualified Native couples from acting as foster or adoptive parents.[136] As a result, Native children removed from their homes were

authorities removed four of the children from the home).

127. H.R. REP. NO. 95-1386, at 9 (1978).

128. Lewis, *supra* note 108, at 26.

129. *Id.* at 27.

130. *Id.*

131. *See* H.R. REP. NO. 95-1386, at 9 (1978) (citing various studies from differing states, each finding a large disparity in placement rates between Native and non-Native children).

132. *Id.*

133. *Id.*

134. *Id.* at 10.

135. *Id.*; *see also* 25 U.S.C. § 1901(5) ("[T]he States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.").

136. H.R. REP. NO. 95-1386, at 11 (1978).

not placed in culturally similar placements.[137] In fact, a 1969 survey of sixteen states found that approximately eighty-five percent of all Indian children in foster care were placed in non-Native homes.[138]

Second, Congress sought to protect the emotional and social health of Native children.[139] Removal of children from the care of their parents and family members understandably results in trauma.[140] However, for Native children who are thrust into non-Native foster placements and institutions due to the lack of state-approved Native adoptive and foster parents, the trauma of separation is augmented by the need to adjust to a differing social and cultural environment.[141] Therefore, in addition to implementing standards that account for cultural differences, Congress saw the need to express a preference for children removed from their home to remain in their Native community.[142]

Third, Congress sought to remedy denial of due process of law to Native parents before terminating parental rights or taking custody of their children.[143] In addition to skewed standards, Native parents before 1978 found themselves facing harsh procedural barriers. Parents were often not represented by counsel or given access to the supporting testimony of expert witnesses during termination hearings.[144] In many cases where courts found extreme neglect or abuse, the waiver of parental rights was obtained without undergoing an adjudicatory process.[145] Boiling down these aims, Congress created federal standards for the removal of Native children from their families,[146] standards that differ from those applied for non-Native children, in order to address the historical mistreatment of the Native population through the child welfare system.

C. The Enactment of ICWA

ICWA, enacted pursuant to the Indian Commerce Clause, permits Congress to outline family law standards and procedures that differ from

137. *See* 25 U.S.C. § 1901(4) ("[A]n alarmingly high percentage of [Indian] children are placed in non-Indian foster and adoptive homes and institutions. . . .").
138. H.R. REP. NO. 95-1386, at 9 (1978).
139. *See id.* ("In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own.").
140. *Id.*
141. *Id.*
142. *Id.* at 23.
143. *Id.* at 11.
144. *Id.*
145. *Id.*
146. 25 U.S.C. § 1902.

those applied to non-Native children. Most importantly, ICWA expresses a "clear preference for keeping Indian children with their families . . . and placing Indian children who must be removed from their homes within their own families or Indian tribes."[147] If states wish to deviate from these preferences, the federal act mandates that the courts must "follow strict procedures and meet stringent requirements to justify any result contrary" to these preferences.[148] Therefore, in lieu of the broad discretion normally granted to state judges to determine whether removal is in the best interest of the child, ICWA details specific standards for removal.[149] As such, this subsection dissects the statutory language of ICWA, specifically focusing on the legal differences in the treatment of Native children and non-Native children pursuing permanency.

1. ICWA: The Statutory Language

In the context of involuntary termination proceedings, ICWA's statutory protections require the following:

> No termination of parental rights may be ordered . . . in the absence of a determination, supported by **evidence beyond a reasonable doubt**, including **testimony of qualified expert witnesses**, that 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**.[150]

The statutory provision can be broken down into three elements: (1) termination of parental rights under ICWA requires a heightened evidentiary standard—beyond a reasonable doubt, (2) there must be testimony from a qualified expert witness, and (3) the expert must be qualified to testify about how the parent's conduct and conditions in the home are likely to *cause* serious emotional and/or physical damage (the causation requirement). However, beyond these barebone requirements, Congress failed to provide states with much clarity and guidance. What makes an expert witness "qualified"? How many expert "witnesses" are required to support a termination order? At what point do parental behaviors turn from being *unlikely* to cause harm to the child to *likely* to cause harm? What standard is to be used to measure "serious emotional damage"?

147. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67585–86 (Nov. 26, 1979).

148. *Id.* at 67586.

149. *See* 25 U.S.C. § 1912(f) (stating the evidentiary standard applied for termination of parental rights in ICWA cases).

150. *Id.* (emphasis added).

2. ICWA: 1979 Guidelines

In an effort to remedy these confusions, the BIA published in 1979 non-binding guidelines to provide guidance to state courts.[151] Aligned with ICWA's initial intention, the 1979 Guidelines emphasized that cultural insensitivity could no longer justify the removal of Native children from their homes. Therefore, for a state to prove adequate causation, the evidence presented at the termination hearing must reveal particular conditions in the home that would likely cause harm to the child.[152] Community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior alone do not rise to this threshold.[153] Comparatively, evidence of a parent continually exposing their child to risk of sexual abuse does rise to the standard necessary for termination of parental rights.[154]

The 1979 Guidelines further outlined that the evidence presented must include the testimony of *one* expert witness who meets the heightened standards dictated by the statutory language of ICWA.[155] As a shortcut for state courts, the 1979 Guidelines provided three types of individuals who possess characteristics likely to meet the qualified expert witness standard:

> (i) A member of the Indian child's tribe who is recognized by the tribal community as **knowledgeable in tribal customs** as they pertain to family organization and childrearing practices.
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and **extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe**.
> (iii) A professional person having substantial education and

151. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67584 (Nov. 26, 1979) ("[The Guidelines] are not published as regulations because they are not intended to have binding legislative effect.").

152. *Id.* at 67593 ("To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.").

153. *Id.*

154. *See* Marcia V. v. State, 201 P.3d 496, 505–06 (Alaska 2009) (holding that the trial court did not err in finding that there was a likelihood of serious emotional or physical damage to the child based on testimony that the mother left the child in the care of convicted sex offenders and someone who had previously sexually abused the child in the past).

155. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67592 (Nov. 26, 1979) (stating that courts cannot terminate parental rights unless the evidence includes "the testimony of one or more qualified expert witnesses").

experience in the area of his or her specialty.[156]

In accord with the aims of ICWA, two of the three explicitly listed expert witnesses are able to provide state courts with an integral perspective—that of the tribe. However, under the 1979 Guidelines, Alaska did not interpret the expert witness requirement to prohibit termination based on the testimony of an expert without knowledge of the tribe.[157] The Alaska Supreme Court determined that witnesses falling within the third category could qualify as an expert "[w]hen the basis for termination is unrelated to Native culture and society and when any lack of familiarity with cultural mores will not influence the termination decision or implicate cultural bias in the termination proceeding[.]"[158]

3. ICWA: The Delay in a Native Child's Pathway to Permanency

Despite the differing requirements under ICWA, many of the preparatory stages in the child welfare process remain the same between Native and non-Native children.[159] However, ICWA does alter the standard used in the child welfare process for two specific contexts: first, when a Native child is removed from the home,[160] and second, when the parties proceed to the termination hearing. These changes increase the evidentiary burden required to terminate parental rights which also increases the number of issues that can be brought on appeal of a termination order, thereby delaying a Native child's pathway to permanency.

As previously discussed,[161] in a *non-Native* termination hearing, the judge must determine if there is clear and convincing evidence that: (1) the child is in need of aid, (2) the parent has either "not remedied the conduct or conditions in the home that place the child at substantial risk

156. *Id.* (emphasis added).
157. *See Marcia V.*, 201 P.3d at 503.
158. *Id.*
159. *See* discussion *supra* Section II.A for the general outline of the child welfare process.
160. *Compare* ALASKA CHILD IN NEED OF AID R. P. 10.1(a)(1)(B) ("At any other hearing at which the court is ordering a non-Indian child's removal from the home, the court shall inquire into and determine whether the Department has made *reasonable efforts* . . . to prevent out-of-home placement[.]") (emphasis added), *with* 25 U.S.C. § 1912(e) ("No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that 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."), *and* ALASKA CHILD IN NEED OF AID R. P. 10.1(b)(1) ("At each hearing at which the court is authorizing an Indian child's removal from the child's parent or Indian custodian . . . the court shall inquire into and determine: . . . (B) whether *active efforts* have been made to provide remedial services and rehabilitative programs[.]") (emphasis added).
161. *See supra* Section II.A.

of harm" or "failed, within a reasonable time, to remedy the conduct or conditions in the home that place the child in substantial risk so that returning the child to the parent would place the child at substantial risk of physical or mental injury," and (3) the Department of Family and Community Services of the State of Alaska used reasonable efforts to provide support and services that are designed to enable the child to safely return home.[162] The court must also find, by a preponderance of the evidence, that the termination of parental rights is in the child's best interest.[163]

Comparatively, in a Native termination hearing, the state must prove the above requirements *in addition* to: (1) the heightened evidentiary standard required by ICWA—termination of parental rights must be proved beyond a reasonable doubt, (2) the requirement that a qualified expert witness must testify, (3) the need for the expert's testimony to support a finding that the parent's conduct and conditions in the home are likely to cause serious emotional and/or physical damage to the child,[164] and (4) clear and convincing evidence that the Department made *active* efforts to "provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family *and* that these efforts have proved unsuccessful."[165] Importantly, these demands do not permit state judges to exercise discretion via a fact-specific inquiry process, and they greatly increase the evidentiary burden upon the state.

The increased evidentiary burden for ICWA cases also increases the number of issues that can be brought on appeal of a termination order.[166] Studies show that, on average, there are 200 appellate decisions each year (both published and unpublished) pertaining to ICWA protections.[167] A comprehensive report of all ICWA cases on appeal, both in federal and state courts, found that in the year 2019, there were a total of 226 ICWA decisions, forty-two of which were published.[168] And of the forty-two published decisions, twelve cases involved appeals relating to the qualified expert witness requirement, six of which were reversed and/or remanded.[169]

162. ALASKA CHILD IN NEED OF AID R. P. 18(c).
163. *Id.* 18(c)(3).
164. *See* 25 U.S.C. § 1912(f).
165. ALASKA CHILD IN NEED OF AID R. P. 18(c)(2)(B) (emphasis added).
166. *See* Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 8 AM. INDIAN L. J. 105, 110–12 (2020) (listing nineteen issues that can be appealed based on ICWA protections; two of which include the burden of proof in termination hearings and the qualified expert witness requirement).
167. *Id.* at 105.
168. *Id.* at 112.
169. *Id.* at 151–52.

When an appeal occurs after the termination of parental rights, a child in the foster care system is again caught in a lengthy period of limbo. Legally, the child continues to be in the custody of the state agency and remains unable to create stable legal relationships with capable caregivers. Therefore, a child must wait until the appeals process has finished before achieving finalized permanency. In extreme cases, a termination decision can be overturned or remanded, therefore forcing the child to endure the termination hearing process again or requiring the child to return to the review period while the state attempts to fix its evidentiary mistake. Therefore, the increase in issues that can be brought on appeal also increases the likelihood of a Native child's delay in permanency.

Take, for instance, three-month old Kevin, an Indian child who was found abandoned in fourteen-degree weather.[170] His mother was intoxicated in the home nearby, and his father was in prison for a probation violation.[171] In December 2013, Kevin was removed from his home.[172] Even though the Department provided services to treat the parents' severe alcohol dependency, the parents failed to remain sober or complete a substance abuse treatment program.[173] Kevin's termination *petition* was filed in November of 2016, almost two years after his removal.[174] His termination *hearing* was held in July of 2017.[175] And an appellate opinion issued March 8, 2019, five years and three months after the child had been removed, stated that Kevin would have to endure the termination process all over again.[176] The court found that the witness did not meet the heightened standard for expert testimony under ICWA.[177]

For over five years and three months, Kevin faced an uncertain future. And while he remained in a safe home with caretakers, a *state agency* possessed legal custody over him. Kevin did not legally belong to the foster families that essentially raised him from birth. This psychological, mental, and emotional burden should not be placed on Native children. In summary, while ICWA provides important protections for Native children in the foster care system, it also presents a time-consuming roadblock in the pathway to permanency.

170. Eva H. v. State, 436 P.3d 1050, 1051 (Alaska 2019).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*

III. ALASKA'S INTERPRETATION OF ICWA'S CHANGING LANDSCAPE

Although the 1979 Guidelines clarified many of the questions that were left unanswered by the statute, the 1979 Guidelines were explicitly held as *non-binding* on the states.[178] Therefore, state courts were free to rely on the guidelines but ultimately retained the responsibility of interpreting ICWA's statutory language for themselves—meaning that the courts were free to disregard the guidelines.[179] State court discretion resulted in a lack of uniform application throughout the states—a problem which remained largely unaddressed until thirty-six years later.[180]

In 2015, the BIA updated the ICWA guidelines for the first time.[181] The 2015 Guidelines[182] were intended to provide further clarity and encourage consistent application of ICWA throughout the states.[183] However, as with the 1979 Guidelines, states were not bound to the suggestions outlined in the 2015 Guidelines.[184] However, in 2016, the BIA changed course, issuing for the first time *binding* regulations. While the regulations on their face appear to make minimal changes to the 2015 Guidelines, Alaska Supreme Court's interpretation of these regulations has caused many termination hearings to be appealed and overturned, increasing the amount of time a Native child in the foster system must

178. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67584 (Nov. 26, 1979) ("Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect.").

179. *Id.* ("Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance . . . . Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.").

180. *See* 2016 GUIDELINES, *supra* note 61, at 6 (finding that implementation of ICWA has been widely inconsistent throughout the states since enactment of the federal statute, and there was a need to implement binding regulations upon the states to ensure consistent minimum Federal standards).

181. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10147 (Feb. 25, 2015).

182. *Id.* at 10146–59.

183. *Id.* at 10150.

184. *See id.* at 10146–47 ("These updated guidelines provide *guidance* to State courts and child welfare agencies implementing the Indian Child Welfare Act's (ICWA) provisions . . . . Effective immediately, these guidelines supersede and replace the guidelines published in 1979.") (emphasis added); Marcia V. v. State, 201 P.3d 496, 504 (Alaska 2009) ("The legislative history and ICWA guidelines are not regulations and are not binding.").

wait to reach permanency. Subsection A outlines the Alaska Supreme Court's interpretation of ICWA requirements using the 1979 Guidelines. Subsection B discusses the changes made in the 2015 Guidelines and tracks the changes in interpretation. Subsection C concludes by repeating the same process, this time with the 2016 Regulations and Guidelines, focusing specifically on identifying the unintended consequences of the 2016 Regulations.

A. The 1979 Guidelines: Creating the Carveout

Using the 1979 Guidelines' third category of qualified witnesses, "[a] professional person having substantial education and experience in the area of his or her specialty,"[185] Alaska courts interpreted the Guidelines as creating a carveout that permitted the termination of parental rights without hearing qualified witness testimony about the tribe's cultural norms and childrearing practices. In *L.G. v. State*, the Alaska Supreme Court observed that "virtually all the courts that have considered the question have concluded that so long as a termination proceeding *does not implicate cultural bias*, ICWA's proof requirements can be satisfied by a qualified expert witness without any special familiarity with Native cultural standards."[186] As such, the court held that testimony from an expert in Native cultures is unnecessary "where there is clear evidence that a child faces a serious risk of *physical neglect* if she remains in her parent's care."[187]

Likewise, in *Marcia V. v. State*, the Alaska Supreme Court found that cultural bias was not implicated in a case where there was sufficient evidence of "addiction[ ], violent behavior, incarceration, inability to provide a stable home, neglect, exposure of [the child] to sex offenders, domestic violence in the home, and abandonment of [the child]."[188] In *Thea G. v. State*, the Alaska Supreme Court confirmed that cultural expert witnesses were not required for cases involving parental substance abuse since these cases "do not implicate cultural mores."[189] Notably, the Alaska Supreme Court stated that it was the burden of the Native parents to prove that the reasons for removal of the child from the home implicated

185. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67592 (Nov. 26, 1979). *See supra* Subsection II.C.2.

186. L.G. v. State, 14 P.3d 946, 953 (Alaska 2000) (emphasis added).

187. *Id.* (emphasis added).

188. *Marcia V.*, 201 P.3d at 503.

189. Thea G. v. State, 291 P.3d 957, 964 (Alaska 2013). *See also* Payton S. v. State, 349 P.3d 162, 172 (Alaska 2015) ("[T]ermination proceedings under ICWA do not require testimony by an expert in Native culture if the grounds for termination do not implicate cultural biases—such as in a case like this one involving parental substance abuse.").

cultural bias and therefore, required testimony from a cultural expert witness.[190]

Within *each* of these cases, the Alaska Supreme Court referenced Congress's goal to "keep Native children from being separated from their families solely on the basis of testimony from social workers who lacked the familiarity with Native culture necessary to distinguish between 'the cultural and social standards prevailing in Indian communities and families' and actual abuse or neglect."[191] Yet by creating carveouts for specific risk factors, Alaska courts permitted non-tribal state judges to make the determination of which risk factors do not implicate cultural norms and, therefore, do not require a cultural expert witness. In doing so, the Alaska courts bypassed language in the 1979 Guidelines which state that "Congress . . . expressed its clear preference for keeping Indian children with their families, *deferring to tribal judgment* on matters concerning the custody of tribal children[.]"[192]

Additionally, the Alaska Supreme Court within each of these cases also outlined the same two-part inquiry for determining if termination is proper: (1) whether the parent's conduct is likely to harm the child, and (2) if it is, whether the parent's conduct is unlikely to change in the future and, therefore, likely to cause the child harm in the future.[193] And while this two-part inquiry was endorsed by the 1979 Guidelines,[194] the state courts' implementation failed to properly comply with the additional guidance provided by the 1979 Guidelines. By creating carveouts, the courts failed to recognize that "[d]etermining the likelihood of future harm frequently involves predicting future behavior—which is influenced to a large degree by culture."[195] The influence of culture on future behavior means that "[s]pecific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm."[196] Without a cultural expert witness providing the necessary cultural context, Alaska courts were

190. *See Payton S.*, 349 P.3d at 172 ("[The mother]'s assertion that '[c]ultural mores and society were implicated in this termination trial' does not appear to have been raised in the trial court, and she presented no evidence to support it.").

191. *L.G.*, 14 P.3d at 951 (quoting H.R. REP. NO. 95-1386, at 2 (1978)). *See also Marcia V.*, 201 P.3d at 504; *Thea G.*, 291 P.3d at 964.

192. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67585 (Nov. 26, 1979).

193. *See L.G.*, 14 P.3d at 950; *Marcia V.*, 201 P.3d at 503; *Thea G.*, 291 P.3d at 964.

194. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67593 (Nov. 26, 1979) ("[T]wo questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?").

195. *Id.*

196. *Id.*

using the 1979 Guidelines to make Native termination decisions outside of the tribal context—the exact issue ICWA was created to rectify.

B. The 2015 Guidelines: Presuming Tribal Voices as Qualified

In the involuntary termination context, the 2015 Guidelines closely mirrored the practices outlined in the 1979 version. Beyond rephrasing for clarity, the BIA did not make substantive changes to the causation requirement.[197] Likewise, the 2015 Guidelines simply reemphasized the previous version's goal of promoting tribal voices in termination hearings, stating "a qualified expert witness *should* have specific knowledge of the Indian tribe's culture and customs."[198]

However, the 2015 Guidelines noted the glaring issue in Alaska's interpretation of the previous guidelines—reliance on witnesses who, while qualified in childcare or other areas of expertise, did not possess expert knowledge of tribal communities.[199] To rectify this issue, the BIA established a preferential order of expert witnesses in the 2015 Guidelines to "ensure that the expert witness with the most knowledge of the Indian child's tribe is given priority."[200]

> Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:
> (1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
> (2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indian and the Indian child's tribe.
> (3) A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
> (4) A professional person having substantial education and experience in the area of his or her specialty who can

197. *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10156 ("Clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding.").
198. *Id.* at 10157.
199. *Id.* at 10149.
200. *Id.*

> demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe. [201]

Notably, *all* expert types explicitly listed in the 2015 Guidelines have some expert knowledge of the cultural components of Native tribes, and those who have the most knowledge are expected to be given preferential treatment by state courts.[202]

Under the 2015 Guidelines, Robin Charlie, a Yupik woman who possessed six years of social service experience within her tribe, qualified as an ICWA expert witness for the termination hearing of Maggie and Bridget, Native children as defined by ICWA.[203] Maggie and Bridget were found to be abused and neglected due to their mother's illegal drug use and her physical discipline methods.[204] The OCS in Alaska took emergency custody of the children and placed them with their maternal grandmother after the mother exposed Maggie to marijuana and allowed the child to be driven by a drunk driver.[205] During the entire process, from removal in January of 2013 to the termination hearing in February of 2016, the mother failed to successfully engage in services to assist in reunification.[206]

During the termination trial, Charlie testified that, in her expert opinion, Maggie and Bridget were "at risk of harm if returned to Caitlyn's custody because of her substance abuse and verbal abuse."[207] To support this assertion, Charlie testified that it was not normal in the Yupik community to use substances in the presence of children or to verbally abuse family members.[208]

With relative ease, the Alaskan court presumed Charlie to be a qualified witness under category two of the 2015 Guidelines.[209] Charlie, a member of the Native Village of Tununak, possessed intimate knowledge

201. *Id.* at 10157.

202. *See* Caitlyn E. v. State, 399 P.3d 646, 652 (Alaska 2017) ("Unlike the earlier 1979 BIA Guidelines, all four of the presumptively qualified expert categories in the 2015 BIA Guidelines include knowledge of prevailing social and cultural standards or child-rearing practices within the tribe, or both.").

203. *Id.* at 649–51.

204. *Id.* at 649.

205. *Id.*

206. *Id.* at 649–50.

207. *Id.* at 651.

208. *Id.*

209. *See id.* at 652 ("Charlie was qualified under the second category as '[a] member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.'") (quoting Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10157 (Feb. 25, 2015)).

of Native cultural norms and childrearing practices due to her Yupik upbringing.[210] Moreover, she spent six years providing social services to the tribe, five of which involved working with children on cultural and subsistence awareness.[211] In addition, she acted as Social Services Director supervising departments for ICWA, rural child welfare, and youth services.[212] Therefore, in light of the 2015 Guidelines,[213] the mother's assertion that Charlie lacked the necessary education in social work and substance abuse to be qualified as an expert witness fell flat.[214] Ultimately, the court found Charlie's qualifications aligned with the aims of ICWA—to prioritize witnesses who possess cultural knowledge to avoid termination based on culturally insensitive assumptions.[215]

Maggie and Bridget's case exemplified the approach of Alaska courts under the 2015 Guidelines—to make sure that tribal voices and opinions were present and given adequate consideration in *all* termination hearings involving Native parents. Under the 2015 Guidelines, elders and members of the tribe who had extensive knowledge of the applicable social and cultural norms (specifically family organization and childrearing practices) were valued voices in the termination process. However, after recent changes to ICWA, the qualification of such witnesses has been called into question.

C. The 2016 Regulations & Guidelines: The Exclusion of Tribal Voices

Shortly following the 2015 Guidelines, the BIA changed course, issuing for the first time binding regulations to supplement the statutory text. Finding implementation and interpretation of ICWA to be inconsistent among and within the states, the BIA saw a need to issue uniform national standards.[216] The BIA claimed that the Regulations were created to reflect state interpretations and best practices, state court decisions, state law implementing ICWA, and state guidance documents.[217] The 2016 Regulations were accompanied by the 2016 Guidelines, which were intended to give further direction and explanation to states implementing the new regulations.[218]

210. *Id.*
211. *Id.*
212. *Id.*
213. The court took notice of the tribe's approval of Charlie's qualification as an expert witness under ICWA. *Id.*
214. *Id.*
215. *Id.* at 653.
216. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38779 (June 14, 2016).
217. *Id.*
218. *See generally* 2016 GUIDELINES, *supra* note 61.

Again, the BIA did not make substantive changes to the causation requirement.[219] However, unlike in the 2015 Guidelines, the 2016 Regulations made drastic and harmful changes to the expert witness requirement. Using permissive, instead of restrictive language, the BIA stripped ICWA of its previous mandate under the 2015 Guidelines to include cultural voices in termination hearings.[220] The 2016 Regulations state that qualified expert witnesses "*should* be qualified to testify as to the prevailing social and cultural standards of the Indian child's [t]ribe."[221] The 2016 Guidelines further clarify, "while a qualified expert witness *should normally be required* to have knowledge of Tribal social and cultural standards, that may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding."[222] Meanwhile, the expert "*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."[223] While appearing to be a minor change to the ICWA requirements, Alaska courts implementing this standard have returned to the carveout scheme crafted under the 1979 Guidelines, meaning tribal expert testimony is no longer required in many termination contexts.

1. Alaska's Return to the Carveout Scheme from the 1979 Guidelines

In *In re April S.*,[224] the Alaska Supreme Court returned to the 1979 Guidelines carveout scheme using the 2016 Regulations and Guidelines. April, a Native teenager, was removed from her home and placed in an out-of-state residential mental health treatment facility.[225] While at the facility, April was injured by a staff member, prompting her to request a placement review.[226] At the time of the hearing, April's mother wished for April to be returned to her custody, meaning the court had to follow the procedures outlined in ICWA for removal from the home.[227] On appeal,

219. *See* 25 C.F.R. § 23.121(c)–(d) (2022) ("[T]he evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.").

220. *Id.* § 23.122(a).

221. *Id.* (emphasis added).

222. 2016 GUIDELINES, *supra* note 61, at 54 (emphasis added).

223. *Id.* (emphasis added).

224. 467 P.3d 1091 (Alaska 2020).

225. *Id.* at 1092–93.

226. *Id.* at 1093.

227. *Id.* at 1093–94; *see also* 25 U.S.C. § 1912(e) ("No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that 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.").

April attempted to argue that her therapist, who was testifying as a mental health professional, was improperly qualified as an ICWA expert witness.[228] But the court upheld April's transfer to a new residential psychiatric treatment center based on the testimony of her therapist.[229]

The Alaska Supreme Court emphasized that tribal witnesses were not required in a *limited* number of circumstances and, because of this, "courts should exercise extreme caution in determining that cultural knowledge is plainly irrelevant[.]"[230] Yet the court determined that this case, which involved "heightened mental health needs," fell within this exception and, therefore, did not require tribal witness testimony.[231] And since the expert witness requirement for removal mirrors that of the termination context,[232] the Alaska Supreme Court's holding in *In re April* is also applicable to expert witnesses in termination hearings. In addition, the court's holding grants trial court judges the authority to decide which risk factors implicate tribal norms and, therefore, require a tribal witness.[233] In doing so, the Alaska Supreme Court ignored the BIA's clear disapproval of the suggestion that "[s]tate courts or agencies are well-positioned to assess when cultural biases or lack of knowledge is, or is not, implicated."[234]

2. Disqualifying Tribal Experts for Lack of Education

In addition to returning to the carveout scheme, Alaska's interpretation of the 2016 Regulations and Guidelines has permitted the state to bar previously revered tribal voices from acting as qualified experts in termination hearings. Under the 2016 Regulations, Alaska has interpreted the driving force of the qualified expert witness requirement to be the expert's ability to testify as to whether the parent's behavior is likely to *cause damage* to the child, instead of the expert's ability to provide insight into Native cultural norms.[235] For termination to occur, Alaska

228. *In re April S.*, 467 P.3d at 1092.
229. *Id.* at 1091.
230. *Id.* at 1098.
231. *Id.* at 1099.
232. *See* 25 U.S.C. § 1912(f) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that 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.").
233. *In re April S.*, 467 P.3d at 1099 ("The superior court carefully, thoughtfully, and correctly determined that knowledge of the [t]ribe's culture was unnecessary in this case because of [the child]'s very heightened mental health needs[.]") (internal quotations omitted).
234. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38830 (June 14, 2016).
235. *See* 25 C.F.R. § 23.122(a) (2022).

requires there to be testimony on the record about how the conditions created in the home by the parents' behavior are likely to cause specific mental health or physical harm to the child.[236] And to be qualified to draw such a conclusion, Alaska courts now require ICWA expert witnesses to possess "professional tools . . . for recognizing mental health issues."[237] Since many cultural experts do not have formalized training, and instead have lived experience, the Alaska Supreme Court has overturned a string of termination cases that relied upon a tribal voice as the sole ICWA expert witness.

For instance, the court found Deborah Reichard, an experienced attorney and former guardian ad litem in the Yukon-Kuskokwim Delta for over 18 years, unqualified to serve as an ICWA expert witness under the 2016 Regulations.[238] During the termination hearing, Reichard, who had served as an expert witness for the OCS numerous times in the past several years, testified that she was typically retained to provide her opinion on "[w]hether or not return of the child or children to their parents is likely to result in serious emotional and physical damage."[239] She stated that the court routinely accepted her as a testifying expert on "[t]he delivery of child protective services to families on the [Yukon-Kuskokwim] Delta."[240] During the termination hearing, Reichard testified that because of the parents' lack of engagement in services between the child's removal in December of 2013 and the termination hearing in July of 2017, the parents' history strongly suggested that returning the child to his parents would result in severe emotional or physical damage.[241]

Despite Reichard's rich experience in the tribe and her extensive history as an ICWA expert witness, the Alaska Supreme Court determined that the 2016 Regulations required reversal of termination of parental rights in this case. The court found Reichard qualified to testify on the delivery of child protective services to families on the Yukon-Kuskokwim Delta.[242] However, Reichard's qualifications did not permit her to testify as an expert on whether the causation requirement was met in this case.[243] Simply put, due to Reichard's lack of professional training in mental health and substance abuse, she wasn't qualified to testify to the mental and emotional harms that would occur if the child were returned home, despite her depth of experience with other relevant

236. Eva H. v. State, 436 P.3d 1050, 1057 (Alaska 2019).
237. *Id.* at 1058.
238. *Id.* at 1051–52.
239. *Id.* at 1053.
240. *Id.*
241. *Id.*
242. *Id.* at 1056.
243. *Id.* (quoting 5 C.F.R. § 23.122(a) (2018)).

aspects of the termination process for Native families.

In another termination case, Richard Encelewski, president, chairman of the board, and chief executive officer of Ninilchik Natives Association and president of Ninilchik Village, also failed to meet the heightened standard for expert witness qualification.[244] During the termination hearing for four Native children, Encelewski testified that because of the parents' history of domestic violence and substance abuse, the children would be likely to suffer physical, mental, and emotional harm if returned to the home.[245] Encelewski expressed extreme tribal disapproval of the parents' behavior, testifying that the Ninilchik Village tribe's prevailing cultural norms and traditions relating to child-rearing did not include the pattern of behavior exhibited by the parents.[246]

The Alaska Supreme Court, upon reversing the termination, noted that the 2015 Guidelines would presume Encelewski to be a qualified witness.[247] However, under the 2016 Regulations, the court found that Encelewski did not have a formal education beyond high school, and although he spent *seventy years* of his life working within the tribe with children suffering from trauma and mental health issues, he did not have formal training in these areas.[248] Therefore, Encelewski was not qualified to offer an expert opinion regarding whether return to the home would result in specific physical or mental harm to these Native children.[249]

Interestingly, the causation requirement that the Alaska Supreme Court heavily relies upon in its interpretation of the 2016 Regulations is not a new development. Instead, it has been required since the enactment of ICWA in 1979.[250] The Alaska Supreme Court has noted as such, explaining that while the causation requirement has been around since ICWA's inception, the changes made to the expert witness requirement—meaning the permissive "should" instead of a preferential list emphasizing cultural knowledge—no longer permits the court to rely on reasonable inferences that previously permitted cultural testimony.[251] Without the preferential list, testimony on the cultural norms of a tribe is no longer coming from a *qualified* witness and therefore can no longer

244. Oliver N. v. State, 444 P.3d 171 (Alaska 2019).
245. *Id.* at 175–76.
246. *Id.*
247. *Id.* at 177.
248. *Id.* at 179.
249. *Id.*
250. *See* 25 U.S.C. § 1912(f) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that 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.").
251. *Oliver N.*, 444 P.3d at 1056–58.

prove likelihood of harm to a child.[252] Without formalized education on the physical, mental, and emotional harms parental behavior may present to a child, a cultural witness is unqualified to testify under the court's interpretation of ICWA. This has prompted the disqualification of many expert witnesses in Alaska, including experts who were previously qualified.

3. The Unintended Consequences: Inappropriate Reliance Upon Mental Health Experts

As these recent Alaska Supreme Court cases illustrate, by purging the categorical groupings of tribal witnesses, the 2016 Regulations bring to the forefront the 1979 Guidelines' third category of qualified witnesses: "A professional person having substantial education and experience in the area of his or her specialty."[253] The 2016 Regulations' permissive language of the tribal knowledge requirement caused this category of experts to be resurrected with new power.

Viewed in isolation, this heightened evidentiary requirement seems appropriate. To eliminate the wrongful termination of Native parental rights, the state must meet a heightened standard—one that bases the conclusion that a child will be harmed upon returning to the home on the opinion of those with adequate mental health training. However, the effectiveness of this requirement relies upon a dangerous assumption that educated experts in various fields of science, psychology, and psychiatry who do not have exposure to the cultural norms of Native populations will not exhibit a negative bias towards Native approaches to childrearing. If cultural ignorance is no longer the primary concern and, rather, cases involve clear abuse (e.g., sexual and physical abuse) that are not related to areas susceptible to cultural ignorance, then this assumption might be proper.

However, this does not appear to be the case, and the BIA has admitted as much. In enacting the Regulations, the BIA stated that the heightened requirements were necessary because "Native American children . . . are still disproportionately more likely to be removed from their homes and communities than other children."[254] In fact, the BIA found that the disparity in the proportion of Native children in the foster system to the general population *increased* from 2000 to 2013.[255] While other factors are likely to also influence this disparity, the fact is that

252. *Id.*
253. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67592 (Nov. 26, 1979).
254. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38779 (June 14, 2016).
255. *Id.* at 38784.

Native populations are still subject to harm at the hands of the child welfare system.

Yet the BIA created binding regulations that no longer require evidence of the cultural and social standards of the tribe to be present in termination hearings. Finding an expert witness who possesses the proper formal education *and* appropriate tribal knowledge *and* is available for hundreds of termination hearings each year is an impossible task for some states.[256] One of the requirements must go, and the 2016 Regulations make clear that tribal knowledge is the requirement courts should disregard. Despite receiving criticism regarding this approach,[257] the permissive language in the Regulations[258] has required courts to terminate parental rights without hearing testimony from culturally sensitive sources. Simply put, the new regulations are not in accord with the initial intent of ICWA, the statutory language of ICWA, or the purpose for the guidelines that were enacted only one year earlier: to eliminate cultural ignorance.

IV. ELIMINATING THE ICWA ROADBLOCK

While Alaska's case law presents a gloomy image of the future of ICWA protections, there is still hope for reform that would bolster, instead of diminish, protections for Native children in the child welfare system. The ideal reform would occur at the federal level, specifically with Congress altering the statutory language of ICWA to make the requirements clear or with the BIA issuing a new set of guidelines. However, as this Part explores, implementation of a federal change is unlikely to occur. Additionally, while an en banc Fifth Circuit decision in *Brackeen v. Haaland* does not bind Alaskan trial courts, the federal appellate court's finding that the expert witness requirement is unconstitutional for improperly commandeering state actors suggests that more challenges to this ICWA requirement (and possibly others) are on the horizon. Additionally, although the U.S. Supreme Court's decision in this case will not alter ICWA's expert witness requirement,[259] the fact

256. *See id.* at 38831 (criticizing the 2016 Regulations because "it may not be possible to find experts in each unique village or [t]ribe that can be available at hundreds of hearings held each year" in places like Alaska).

257. *See id.* ("[T]he preference order is important because in some counties, the State worker is accepted as an expert witness to circumvent the [t]ribe's opinion, if it is known that the [t]ribe has an opposing opinion.").

258. *See* 25 C.F.R. § 23.122(a) (2022) ("[An expert witness] *should* be qualified to testify as to the prevailing social and cultural standards of the Indian child's [t]ribe.") (emphasis added).

259. There is, of course, the possibility that the U.S. Supreme Court will find ICWA as a whole unconstitutional, thereby eliminating the expert witness

that ICWA's protections are being challenged in the nation's highest court suggests that additional state protections are necessary to ensure Native children remain protected if the federal scheme is found unconstitutional.

There are ways Alaska and similarly situated states can reduce the harmful effects resulting from the 2016 Regulations. In fact, such changes are already being explored. In 2022, the Uniform Law Commission created an Indian Child Welfare Act Issues Committee, which is tasked with determining if a uniform or model act is necessary to facilitate the application of ICWA in state courts.[260] Additionally, states such as Iowa, Michigan, Minnesota, Nebraska, Oklahoma, and Washington have enacted their own state ICWA provisions.[261]

Although Alaska implemented the Alaska Tribal Child Welfare Compact in 2017,[262] the state has yet to enact its own ICWA protections even though ICWA, the 2016 Regulations, and the 2016 Guidelines each expressly permit more stringent standards to be set by state law.[263] As such, Part IV argues that the state should implement its own ICWA protections and discusses concerns that should be considered in the drafting of such provisions. These concerns stem from a recent Alaska Supreme Court decision, *State v. Cissy A.*,[264] in which the court attempts to reverse the harmful carveout standard it created under the 1979 Guidelines and 2016 Regulations.

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requirement in full. However, this seems *extremely* unlikely given Congress's plenary power over Native tribes and the need to rectify the damage inflicted by the widespread, historical mistreatment of the Native population.

260. *Indian Child Welfare Act Issues Committee*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=e983f06e-0c39-4722-a248-6f93ce7be349 (last visited Apr. 28, 2023).

261. *State Statutes Related to the Indian Child Welfare Act*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 12, 2019), https://www.ncsl.org/human-services/state-statutes-related-to-the-indian-child-welfare-act.

262. *See* Alaska Tribal Child Welfare Compact, Alaska-Certain Alaska Native Tribes and Tribal Orgs., Dec. 15, 2017, https://dfcs.alaska.gov/ocs/Documents/icwa/TribalCompact.pdf.

263. *See* 25 U.S.C. § 1921 ("In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard."); 25 C.F.R. § 23.106(b) (2022) ("Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard."); 2016 GUIDELINES, *supra* note 61, at 54 ("A more stringent standard may, of course, be set by State law.").

264. 513 P.3d 999, 1008 (Alaska 2022).

A. Altering the Expert Witness Requirement at the Federal Level

Given the clear danger the 2016 Regulations present to a Native child in foster care and the current constitutional challenges to ICWA, ideally changes would be implemented at the federal level. However, the likelihood of implementation is low. First, the BIA when enacting the 2016 Regulations was *insistent* upon uniform application among the states.[265] The intention was to grant Native children the same protections regardless of their state of residence.[266] As such, the BIA wants to eliminate the discretion given to state court systems, therefore preferring bright line rules that can be applied throughout the nation at large.[267] Although this is an honorable aim, Alaska's case law exemplifies the dangers that can occur if rigid rules are applied in the context of family law.

Second, the BIA published and invited comments and concerns from the public regarding the new regulations.[268] Then, in enacting the Regulations, the BIA listed the comments, criticism, and questions they received, followed by the BIA's commentary on how the Regulations "address" and "account for" these concerns.[269] Therefore, the BIA clearly feels that it has addressed the pressing issues presented and is unlikely to make needed changes to the Regulations in the short term.

Third, Congress has expressed its contentment in delegating the refinement of ICWA's protections to the BIA. Since its enactment in 1978, ICWA's statutory language has not changed. Thus, while Congress is at liberty to override the federal regulations, history reveals that chances of this change are even lower than a change implemented by the BIA. Overall, it is unlikely that grand federal change will occur—especially not in the foreseeable future.

B. Alaska's Call for Reformation: *State v. Cissy A.*

Cissy A. involved two ICWA termination cases involving the same expert witness, a licensed psychologist.[270] In both cases, the court found that termination was not proper because the OCS had "failed to properly contextualize the cases within the culture and values of the children's

265. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38779 (June 14, 2016).
266. *Id.*
267. *Id.*
268. *Id.* at 38779–80.
269. *See id.* at 38790 (outlining common public comments and the BIA's response in the section entitled "Discussion of Rule and Comments").
270. State v. Cissy A., 513 P.3d 999, 1004–05, 1007–08 (Alaska 2022).

[t]ribes."[271] The court qualified the psychologist as an expert in child welfare and parental risk assessment, and the psychologist testified at both trials that the Native children would be at risk of harm if returned to their parents' custody.[272] The expert based her opinion on the fact that the parents struggled with substance abuse issues, had sporadic visitation with the children,[273] and financially relied upon others.[274] Additionally, both cases had tribal witnesses who were called to testify but were given minimal time to review the case files and were asked few substantive questions on direct examination.[275]

At the end of both trials, the superior court judge determined that the children were in need of aid, the OCS had made active efforts to reunify the family, the parents had failed to rectify their harmful behavior, and that termination was in the children's best interests.[276] However, the trial court, interpreting *Oliver N. v. State*[277] as requiring a cultural expert witness in *every* termination case to opine on causation, felt that there was not enough tribal background in the record to conclude that the children were, beyond a reasonable doubt, likely to suffer serious damage if returned to the custody of their parents.[278]

Although the Alaska Supreme Court held that the trial court's interpretation of *Oliver N.* was incorrect, the Alaska Supreme Court affirmed the superior court's decision, stating that "without cultural expert testimony, the court could not confidently weigh the evidence."[279] Interestingly enough, the Alaska Supreme Court in *Cissy A.* found the permissive language of the 2016 Regulations to create a default rule, stating: "[t]he BIA's choice of the word 'should' indicates that, as a default rule, the need for cultural expert testimony is to be presumed."[280] The court in *Cissy A.* further clarified that only in cases where knowledge of the tribal culture is *plainly irrelevant*, as outlined in the 2016 Regulations,

271. *Id.* at 1008.
272. *Id.* at 1004–05, 1007–08.
273. The expert found the sporadic visits to be harmful to the children based on attachment theory, which is a theory based on the need for children to "maintain close proximity to form bonds with their caretakers." *Id.* at 1013.
274. *Id.* at 1015.
275. *See id.* at 1005 (stating that one of the case's tribal witness only had ten minutes before testifying to review the case materials and was only asked two substantive questions during direct examination); *id.* at 1007 (stating that the other case's tribal witnesses had little or some knowledge of the facts of the case and one witness was not given any case documents to review before testifying).
276. *Id.* at 1007–09.
277. 444 P.3d 171 (Alaska 2019).
278. *Cissy A.*, 513 P.3d at 1008.
279. *Id.* at 1011.
280. *Id.* at 1012.

is cultural expert testimony *not* presumed to be required.[281] The court clarified that this inquiry was to be fact-based, not based on categorical carveouts that had previously been established in *L.G. v. State*[282] and *Thea G. v. State*.[283] The court also abrogated its suggestion in *In re April S.*[284] and *Payton S. v. State*,[285] making clear that the burden was on the State, *not* the Native parents, to prove that the rationale being used to terminate their parental rights implicates cultural bias.[286]

While supporting the inclusion of tribal witnesses at termination hearings, the Alaska Supreme Court also clarified that "a cultural witness need not testify to the causal connection between the parent's conduct and serious damage to the child so long as there is testimony by an additional expert qualified to testify about the causal connection."[287] Confirming the licensed psychologist as the qualified expert testifying about the likelihood of future harm to the children,[288] the court stated that "[i]t is permissible to satisfy ICWA's expert witness requirement by aggregating the testimony of expert witnesses."[289] Therefore, the role of the tribal witness is not to testify on causation but instead to contextualize the parents' conduct and answer cultural questions that the court may have.[290] The court determined that, in order to provide this testimony, the witnesses need to be (1) provided reasonable opportunity to view the case documents in preparation of trial and during testimony, and (2) asked detailed questions that provide context.[291]

C. Altering the Expert Witness Requirement in Alaska

While *Cissy A.* returns Alaska's case law to the practices used before the 2016 Regulations, the case still raises important concerns about the protections granted to Native children and the ability of decisionmakers to grant or eliminate these protections. As such, Alaska's legislature

281. *Id.* at 1010.
282. *See* 14 P.3d 946, 953 (Alaska 2000) (finding cultural witnesses to be unnecessary for cases involving physical neglect).
283. *See* 291 P.3d 957, 964 (Alaska 2013) (finding cultural witnesses to be unnecessary for cases involving substance abuse).
284. 467 P.3d 1091 (Alaska 2020).
285. 349 P.3d 162 (Alaska 2015).
286. *Cissy A.*, 513 P.3d at 1014.
287. *Id.* at 1015–16.
288. *See id.* at 1016 ("In each termination trial OCS presented testimony from Dr. Cranor, who was qualified to testify about the relationship between the parents' conduct and serious damage to the children, and did testify on this topic.").
289. *Id.*
290. *Id.*
291. *Id.* at 1017.

should enact further ICWA protections at the state level that combat these concerns and clarify the requirements necessary to terminate parental rights.

One concern that *Cissy A.* raises is that trial judges are still the individuals tasked with determining whether cultural knowledge is plainly irrelevant to the facts of the case. Although the court in *Cissy A.* establishes a presumptive requirement of cultural testimony, *Cissy A.* also affirmed the use of a fact-based inquiry to overcome this presumption.[292] However, as seen in *In re April S.*,[293] this fact-based inquiry is still susceptible to cultural bias. As the concurrence in *In re April S.* pointed out, the majority ignored the fact that "some of April's heightened needs may [have been] caused, or at least exacerbated, by being in a facility entirely disconnected from her culture."[294] And as the court stated in *Cissy A.*, "judges who may be unfamiliar with Alaska Native cultures are generally not well-equipped to know when evidence of harm rests on cultural assumptions that may not apply to Indian children."[295] Yet the only guidance provided to trial judges is the sexual abuse exception listed in the 2016 Regulations: "a leading expert on issues regarding sexual abuse of children may not need to know about specific [t]ribal social and cultural standards in order to testify as a qualified expert witness regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child."[296]

Therefore, the state legislature, after receiving ample input from Native tribes, needs to create an *extremely limited* and exhaustive list of categorical exceptions that do not require the testimony of a cultural expert. Ideally, this list would be limited to sexual assault, which is already suggested in the 2016 Regulations as an exception, and physical abuse, which is unacceptable in all cultures.[297] All other bases for termination would require tribal witnesses to testify. This would ensure that state courts return to a standard that has been in place since the enactment of ICWA: "[e]vidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and

292. *Id.* at 1012.
293. 467 P.3d 1091 (Alaska 2020).
294. *Id.* at 1099.
295. *Cissy A.*, 513 P.3d at 1011.
296. 2016 GUIDELINES, *supra* note 61, at 54.
297. The author notes that the definition of physical abuse could be subject to cultural interpretation (i.e. using spanking as a method of punishment) and therefore suggests that this term be defined to include only repeated acts or threats of serious physical abuse.

convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child."[298] The exhaustive list would also remove the power to exclude tribal voices from judges who are not "well-positioned to assess when cultural biases or lack of knowledge is, or is not, implicated."[299]

Another concern implicated by *Cissy A.* is that the trial courts are given the discretion to determine the depth of the cultural witness's testimony. Although the trial judge in *Cissy A.* identified the deficiencies in the testimony provided by the cultural witnesses, Alaska's case law suggests that this is the exception rather than the rule. Given the Alaska Supreme Court's prior approval of numerous exceptions to the cultural witness requirement, it would be fair to assume that the state judicial system as a whole was not actively policing the adequacy of cultural testimony. Therefore, the state should first codify the presumption that both a cultural expert and a causation expert are required for termination hearings. This would, of course, be subject to the exception that one witness, if qualified, could act as both a cultural and a causation expert. Second, the state legislature, after again receiving input from Native tribes, should issue guidance on what is expected from a direct examination of a qualified expert witness. In providing clear guidance to the OCS attorneys, the state not only takes discretion away from the trial judge, but also reduces the likelihood of the termination being overturned in the future. In crafting a state ICWA provision that proactively addresses these concerns, Alaska's legislature can eliminate reversals of termination decisions, which removes a harmful and time-consuming roadblock in a Native child's pathway to permanency.

V. CONCLUSION

In summary, because of the BIA's 2016 Regulations, ICWA protections have resulted in a lack of permanency for Native children. To rectify these concerns, federal reform is necessary, although there are protections that can be implemented at the state level in the interim. Ultimately, federal and state legislation should conform to the original intent of ICWA: prevent the removal of Native children from stable home environments for culturally insensitive reasons. The only way this can be accomplished is if cultural voices are present, respected, and celebrated within termination hearings.

298. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67593 (Nov. 26, 1979).

299. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38830 (June 14, 2016).