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IN RE M.J.J., J.P.L., & J.P.G: THE “QUALIFIED EXPERT WITNESS” REQUIREMENTS OF THE INDIAN CHILD WELFARE ACT

Paul David Kouri*

I. Introduction

The 2003 Oklahoma Court of Civil Appeals decision *In re M.J.J., J.P.L., & J.P.G.*¹ is one of the more recent Oklahoma Appellate decisions to apply the Indian Child Welfare Act (ICWA).² *M.J.J.* construed amongst other provisions the provisions of the act that require testimony of a “qualified expert witness” in support of trial court orders placing children covered by the act³ in foster care⁴ or orders terminating the parental rights⁵ of a parent of a child covered by the act. While in many respects the *M.J.J.* decision was unremarkable in itself, the reasoning employed by the court (drawn from earlier mandatory Oklahoma authority⁶) gives pause for concern. State court judges have at times undermined ICWA through the use of creative interpretive devices that avoid strict application of the Act in some situations.⁷ The specific device involved in *M.J.J.* was the “qualified expert witness” requirement in deprived child termination of parental rights proceedings under ICWA.

M.J.J. will be examined through the prism of the most recent Oklahoma Supreme Court decisions construing ICWA’s qualified expert witness requirement. The paper will argue that Oklahoma’s ICWA jurisprudence in this area is out of step with the purposes of the expert testimony requirements of the act. This note will examine the reasoning and logic of *M.J.J.*, place the

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1. *In re M.J.L.*, 69 P.3d 1226 (Okla. Ct. App. 2003).

2. 25 U.S.C. § 1901 (2000).

3. The Act applies to all “child custody proceeding[s] involving an Indian child.” *Id.* § 1911.

4. *Id.* § 1912(e).

5. *Id.* § 1912(f).

6. Intermediate appellate decisions from Oklahoma’s Court of Civil Appeals (the COCA) are not binding on other courts but instead control only to the extent they are persuasive; Oklahoma trial courts need not adhere to the rules announced by COCA unless “ordered for publication” by the Oklahoma Supreme Court. 20 OKLA. STAT. § 30.5 (2001).

7. See, e.g., Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002).

case within the context of established Oklahoma law, and then argue that the Oklahoma Supreme Court missed an opportunity to provide the clarity that Congress itself failed to articulate in ICWA and indeed undermined the very purpose of the Act. Finally, the note will take a look at Minnesota's approach to the expert witness requirement and argue that Minnesota comes closer to fulfilling the mandate of ICWA.

II. The Indian Child Welfare Act

A. History

Recognizing "no resource . . . more vital to the continued existence . . . of Indian tribes than their children,"⁸ In 1978, Congress passed the Indian Child Welfare Act.⁹

ICWA was a response to congressional concern that Native-American culture was under a systematic assault from an Anglo-centric state court culture that seemed to think removal of Indian children from their native culture was, *de facto*, "in the best interest" of any child before the court.¹⁰ This Anglo "cultural bias" often that has propelled state judges in custody proceedings involving Indians to remove children from their Indian family based on Anglo notions of neglect that are in many cases out of step with Indian cultural norms.¹¹ The concern addressed by ICWA is that, as a result of this Anglo bias, courts find children "deprived" where the child is raised in a manner acceptable to tribal custom, but to the Anglo eye appears contrary to the welfare of the child.¹²

Specifically noted by Congress was the common example of an Indian child left in the care of relatives, such as a grandparent or a great-aunt, or even friends or neighbors, for an extended period.¹³ To many state courts this

8. Indian Child Welfare Act, 25 U.S.C. § 1901(3) (2000) (Congressional Findings).

9. *See supra* note 2.

10. H.R. REP. NO. 95-1386, 95th Cong., at 8-11 (1978). It is axiomatic in family law jurisprudence that the "best interest of the child" is the ultimate guide for judicial action in child custody matters. *See, e.g.,* Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 LAW & SOC'Y REV. 769 (2004). *But see* Christine Metleer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 442-44 (1998) (noting best interest of child is inappropriate consideration in ICWA jurisdictional determinations).

11. *See, e.g.,* Ester C. Kim, *Mississippi Band of Choctaw Indians v. Holyfield: The Contemplation of All, the Best Interests of None*, 43 RUTGERS L. REV. 761, 765-66 (1991).

12. *Id.*

13. H.R. REP. NO. 95-1386, at 10.

indicated neglect; the result, placement of the child in foster care, or, in the extreme case, termination of parental rights.¹⁴

In many Indian cultures, however, the child is not considered child of the parent alone, but rather child of the clan or tribe itself.¹⁵ Not only is it thus proper for the child to be cared for by her extended family; it is considered healthy.¹⁶ Blind application of the Anglo standard results in a child being unnecessarily removed from its family, clan, and tribe, further reducing the tribe's human capital.¹⁷ State judges, unwilling or incapable of recognizing the phenomenon, thus contributed to the breakdown of Indian society.¹⁸

Whatever one might say of the motivation behind the decisions of state court judges, the impact of this cultural bias was the removal and separation of Indian children from their families at rates far in excess of children of Anglo heritage.¹⁹ As one perceptive Oklahoma Supreme Court Justice put it, speaking in dissent in an ICWA case, "the majority, exercising traditional Anglo-Saxon notions of child custody proceedings, has failed completely to recognize essential tribal relations, and the right which Native Americans possess to preserve their identity as a people."²⁰

Another problem, also noted by Congress, concerns allegations of neglect or abuse stemming from a parent's use of alcohol.²¹ Here cultural bias may play an unseen but unfortunate role. It is argued that allegations of alcohol use unlikely to result in termination or foster placement of Anglo children are more likely to support termination in cases involving Indian children.²² Congress'

14. See *id.* at 765 n.28; see also *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

15. See, e.g., *Holyfield*, 490 U.S. at 37; *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1072 (Okla. 1985) (Kauger, J., dissenting).

16. See, e.g., *Baby Boy D.*, 742 P.2d at 1075-76 (Kauger, J., dissenting).

17. H.R. REP. NO. 95-1386, at 8-11.

18. See, *Indian Child Welfare Act*, 25 U.S.C. § 1901(5) (2000) (Congressional Findings).

19. Surveys conducted in 1969 and then in 1974 indicated that approximately twenty-five to thirty-five percent of American Indian children were placed in foster or adoptive homes and that nearly one in four Indian infants under one year of age was adopted. *Baby Boy D*, 742 P.2d at 1072 (Kauger, J. dissenting) (citing Gaylene J. McCartney, *The American Indian Child Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 COLUM. HUMAN RIGHTS L. REV. 529 (1975)).

20. *Id.*

21. See Kim, *supra* note 11, at 765-66 (arguing that the most frequent ground for removal of Indian children is alcohol use, but similar usage rates amongst whites results in removal far less frequently) (citing H.R. REP. NO. 1386, 95th Cong. (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532).

22. *Id.*

approach to reversing this blind application of Anglo cultural standards in Indian child custody proceedings is discussed below.

B. Purpose and Provisions of ICWA

The Act itself declares Congress' intent, to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."²³ ICWA was Congress' attempt to reverse the "wholesale separation of Indian Children from their families" by restoring tribal authority over Indian child custody proceedings.²⁴ The thrust of ICWA is to place limitations on the exercise of unbridled discretion of state court judges in cases involving Indian children.²⁵

Several methods are employed by ICWA; among the most significant: (1) tribal authorities are given priority in exercising jurisdiction over "Indian Child Custody Proceedings;"²⁶ (2) ICWA commands the states (and the United States, its territories, and other Indian tribes) to give full faith and credit to tribal authorities' proceedings;²⁷ (3) ICWA establishes "placement preferences" to be followed in determining foster placement and adoption of Indian children;²⁸ (4) it establishes procedural guidelines²⁹ for Indian child

23. 25 U.S.C. § 1902 (2000). The section states:

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.

Id.

24. Atwood, *supra* note 7, at 587-88.

25. See Joseph v. Twomey, *Considering a Native American Child's Need for Permanent Placement Under the Indian Child Welfare Act: In re S.E.G., A.L.W., & V.M.G.*, 521 N.W.2d 357 (Minn. 1994), 18 *HAMLIN L. REV.* 281, 289-90 (1994).

26. 25 U.S.C. § 1911(a) (2000). The section grants the tribe exclusive jurisdiction over child custody determinations of Indian children residing in or domiciled within the reservation, (b) requires state courts to transfer jurisdiction to the tribal authorities in any proceeding for foster care placement or parental rights terminations involving Indian children not domiciled within the reservation, (c) grants the tribes, and any "Indian custodian of the child" the right to intervene "at any point" in any state court proceeding for the foster care placement or termination of parental rights of an Indian child. *Id.*

27. *Id.* § 1911(d).

28. *Id.* § 1915(a) (listing adoptive preference in the following order of preference: (1) a member of the child's extended family; (2) other members of Indian child's tribe; (3) other Indian families); *id.* § 1915(b) (determining foster placement, in the absence of good cause to

custody proceedings, including a requirement that notice be given to both the parents and the tribe of any pending action;³⁰ (5) it mandates appointment of counsel to indigents affected by the act;³¹ (6) it requires that a party seeking to effect the foster care placement or adoption of an Indian child show attempts were made to “provide remedial services and rehabilitation programs” to help prevent breaking up the Indian family;³² and, (7) finally, ICWA requires that any court order placing an Indian child in foster care³³ or terminating the rights of an Indian child’s parents,³⁴ be supported by sufficient evidence including testimony of “qualified expert witnesses.”³⁵

It is the last requirement of ICWA, that proceedings be supported by the testimony of a qualified expert witness, that is the focus of this paper.

C. The Qualified Expert Witness Requirement

The “qualified expert witness” is not defined in ICWA; thus it is up to the state courts to define the term on their own. This matter has generated substantial litigation and divergent interpretations in various state courts.³⁶ As with most debates, there are two extremes as well as a third option falling somewhere between those extremes.³⁷

1. “Indian” Expert Witness?

At one extreme are cases that *seem to say* the phrase “qualified expert witness” conveys a requirement that the expert, or at least one expert, *in every*

vary, in the following order of preference: (1) a member of the Indian child’s extended family; (2) a foster home licensed, approved, or specified by the Indian child’s tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; (4) an institution for children approved by an Indian tribe or operated by an Indian organization “which has a program suitable to meet the Indian child’s needs”).

29. Procedural provisions that often have substantive effect where they rise to a due process concern. *See, e.g., In re N.L.*, 754 P.2d 863, 872-73 (Okla. 1988) (Opala, J., dissenting).

30. 25 U.S.C. § 1912(a) (2000).

31. *Id.* § 1912(b).

32. *Id.* § 1912(d).

33. *Id.* § 1912(e).

34. *Id.* § 1912(f).

35. By “clear and convincing evidence” in the case of foster care placement orders, *id.* § 1912(e), and “beyond reasonable doubt” in termination proceedings, *id.* § 1912(f).

36. *See infra* notes 36-41 and accompanying text.

37. *See infra* notes 41-44, 70-82 and accompanying text; *see also* Michael C. Snyder, *An Overview of the Indian Child Welfare Act*, 7 ST. THOMAS L. REV. 815, 834 (1995) (citing cases from which the three approaches may be discerned).

case, be someone qualified in “Indian cultural affairs.”³⁸ This camp seems to read “qualified” as “Indian” and sees a requirement of the testimony of an “Indian” expert witness.³⁹ Of course, the “fly in the ointment” with this approach is that Congress did not use the word “Indian” in the statute. If an Indian witness was intended by ICWA, Congress could have required an “Indian expert witness” rather than simply a “qualified expert witness.”

2. Any “Expert” Witness?

At the opposite extreme are cases that seem to imply that the language chosen by the drafters of ICWA connotes no special requirement relating to “Indian-ness” and that any expert on child rearing or custody issues may be “qualified.”⁴⁰ Cases adopting this position find that all that is required by ICWA is that the proceedings include the expert testimony of some professional witnesses with experience in assessing the needs of the child, and the ability of the parent to fulfill those needs.⁴¹

While the “any expert witness” approach does make some sense, arguing solely from the text, it ignores the underlying purposes of the Act.⁴²

3. The Middle Ground: The Cultural Bias Standard

The middle approach reserves the requirement of an “Indian” expert witness only for those cases in which “cultural bias” is “implicated” by the particular issues raised in the determination before the court.⁴³ This approach recognizes that ICWA may always mandate “expert” testimony, but presumes that ICWA only mandates “Indian” testimony when Indian cultural values are at issue in the particular action.⁴⁴ The problem with this view lies not so much in its theoretical underpinning but in its application. The state judge may not be the

38. See, e.g., *In re the Welfare of B.W.*, 454 N.W.2d 437 (Minn. 1990); *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992); *In re L.N.W.*, 457 N.W.2d 17 (Iowa 1990); *In re D.S.*, 577 N.E.2d 572 (Ind. 1991).

39. See, e.g., *B.W.* 454 N.W.2d at 437.

40. See, e.g., *In re C.E.H.*, 837 S.W.2d 947 (Mo. 1992); *In re C.W.*, 479 N.W.2d 105 (Neb. 1992); *Rachelle S v. Arizona Dep’t of Econ. Sec.*, 958 P.2d 459 (Ariz. 1998); *In re M.S.*, 624 N.W.2d 678 (N.D. 2001); *In re Michael M.*, 2002 WL 31832560 (Cal. App. 4 Dist. 2002); *Burks v. Ark. Dep’t of Human Serv.*, 61 S.W.3d 184 (Ark. Ct. App. 2001).

41. See, e.g., *In re C.E.H.*, 837 S.W.2d 947 (Mo. 1992).

42. See *infra* notes 8-23 and accompanying text.

43. See, e.g., *In re N.L.*, 754 P.2d 863 (Okla. 1988); *L.G. v. Dep’t of Health & Soc. Servs.*, 14 P.3d 946 (Ala. 2000); *In re Michael V.*, No. A093487, 2001 WL 1337880 (Cal. App. 1 Dist., Oct. 31, 2001); *In re Baby Boy Doe*, 902 P.2d 477 (Idaho 1995).

44. See, e.g., *See N.L.*, 754 P.2d at 867.

best person to determine if cultural bias is likely to distort the court's decision. Indeed the state judges' cultural bias is at the heart of the problems addressed by ICWA.⁴⁵ It may be that "Indian" expert testimony is required to answer the bias question as a threshold matter.⁴⁶ The middle ground approach will be discussed at length below, as this is the approach adopted by Oklahoma.

4. BIA Guidelines: Compounding Confusion

As noted, Congress did not define the phrase "qualified expert witness." The Bureau of Indian Affairs (BIA), however, has issued "non-binding" guidelines for state courts to use in qualifying a witness under the Act.⁴⁷ The guidelines first describe the purpose of the qualified expert testimony:

[r]emoval of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.⁴⁸

According to the BIA, there are three "characteristics . . . most likely to meet the requirements for a qualified expert witness" under the Act:⁴⁹

(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 experience in the area of his or her specialty.⁵⁰

The purpose of ICWA, as stated by Congress, would be best served by an "Indian expert witness."⁵¹ Indeed, the first two BIA "characteristics" seem to

45. See *supra* note 40.

46. See *supra* notes 41-44 and accompanying text; see *infra* notes 70-82 and accompanying text.

47. 44 Fed. Reg. 67, 584 (1979).

48. *Id.* (D.4 Qualified Expert Witnesses).

49. *Id.*

50. *Id.*

51. This is the view of those courts that always require "Indian" witness testimony in these hearings. See *supra* note 36.

indicate a preference for experts with specialized knowledge of Indian affairs and culture. The first two BIA Guidelines indicate a preference for “Indian” expert testimony. However, the BIA did include the third characteristic. Further, the three are listed disjunctively; thus, if satisfaction of the third characteristic, “a professional person” alone suffices, the BIA guidelines, applied literally, require no cultural sensitivity in Indian child foster placement or termination proceedings. This seems to contradict the purpose of ICWA and effectively render the first two expert “characteristics” superfluous.⁵² If the third “characteristic” alone suffices to qualify all experts for ICWA purposes, the BIA may have created an “exception” that swallows any “rule” indicated by the first two characteristics. Indeed, the commentary to the BIA Guidelines notes: “The second subsection makes clear that knowledge of tribal culture and child rearing practices will frequently be very valuable to the court”⁵³; hardly a mandate for Indian expertise in every case. This is unfortunate.

5. *Deducing Congressional Intent*

While the ICWA provisions outlining the qualified expert witness do not list the criteria to be used in qualifying the expert witnesses, Congress’ express findings in ICWA provide substance to the requirement. One of those findings states that

the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.⁵⁴

The finding points clearly toward a congressional intent to reduce the number of Indian children removed from their homes based upon cultural bias that fails to recognize differences between Anglo and Indian cultural norms. Surely, Congress’ findings should set the purpose and overall tenor of the Act; accordingly, it seems clear the qualified expert witness requirement is aimed at reducing the likelihood that foster care and parental termination proceedings are driven by cultural bias.⁵⁵ If so, perhaps an expert uniquely qualified to

52. It seems likely that most witnesses who qualify under either of the first two BIA guidelines will also be a “professional person having substantial education in the area of his or her specialty.”

53. 44 Fed. Reg. 67, 584 D.4 commentary (1979) (emphasis added).

54. 25 U.S.C. § 1901(5) (2000).

55. Twomey, *supra* note 23, at 286-88.

determine whether these proceedings have been driven off track by cultural bias is in order. Perhaps ICWA, according to its stated purpose, *does demand* a determination in each case that cultural bias is not implicated in these proceedings; in which case only an “Indian” expert witness is qualified to make this initial determination.

III. The Qualified Expert Witness in Oklahoma Jurisprudence

Prior to the Oklahoma Court of Civil Appeals decision in *M.J.J.*, the Oklahoma Supreme Court had itself addressed the qualified expert witness in at least two opinions. It did so in depth in 1988 with *In re N.L.*⁵⁶ and in a more perfunctory manner in 1992 with the deprived child proceeding of *In re S.C. & J.C.*⁵⁷ The Oklahoma Supreme Court, in *S.C. & J.C.*, with no discussion of its reasoning, simply determined that the testimony of “case workers” satisfied the expert witness requirement of ICWA.⁵⁸ The *N.L.* case laid the foundation for Oklahoma’s application of the qualified expert witness standard and bears consideration in depth.

A. In re N.L.

1. Factual Setting

The *N.L.* case gave the Oklahoma Supreme Court the opportunity to construe several provisions of ICWA in depth.⁵⁹ *N.L.* was born out of wedlock in 1984. Several months after his birth, custody of *N.L.* was placed temporarily with his maternal grandmother. The state later filed a petition alleging that due to his mother’s “pattern of leaving [him] in the care of various neighbors for indefinite periods of time,” *N.L.* was a deprived child.⁶⁰ Knowing *N.L.* to be eligible for membership in both the Kaw and Creek Indian tribes, the state notified the tribes of the pending proceeding,⁶¹ but the tribes did not intervene in the action.⁶² The mother, “whereabouts unknown,” also

56. *See supra* note 41.

57. *In re S.C.*, 833 P.2d 1249 (Okla. 1992).

58. *Id.* at 1257.

59. Including the “qualified expert witness” requirement, the “good cause” exception to ICWA’s mandate that jurisdiction be transferred to the tribal court in certain cases, and ICWA’s “placement preferences.”

60. Per 10 OKLA. STAT. § 1101 (1981).

61. ICWA does not define “Indian” for purposes of determine coverage under the Act. Once a state knows or has reason to know that the child is eligible for Indian tribal membership, however, the act’s notice requirements are triggered. 25 U.S.C. § 1912(a) (2000).

62. 25 U.S.C. § 1911(c). The section grants the tribes the right to intervene in any state

did not attend the hearing and N.L. was adjudicated deprived with custody to continue with the maternal grandmother.⁶³

Two months later, the court issued another order placing custody temporarily with the maternal grandmother.⁶⁴ Nearly a year later⁶⁵ and after the grandmother had suffered an “incapacitating injury,” a “redispositional” hearing was held at which the mother finally appeared with counsel. By then, the grandmother had voluntarily placed N.L. with a neighbor family. The trial court made the placement official, granting the neighbors temporary custody of N.L. At the hearing, the mother was given three months in which to meet certain conditions in order to avoid termination of her parental rights.⁶⁶

Later, however, the original adjudication of “deprived child” was set aside since the mother had not received adequate notice of the proceeding. Two days later, an amended petition was filed, again alleging that N.L. was a deprived child (for the same reasons as alleged in the original petition). The court issued a new order placing temporary custody with the grandmother’s neighbor.

The mother then filed a petition to transfer the proceedings to the Court of Indian Offenses.⁶⁷ The mother’s transfer petition was denied;⁶⁸ N.L. was again adjudicated deprived⁶⁹ and made a ward of the court.⁷⁰

court proceeding “for the foster care placement of, or termination of parental rights to, an Indian child” at any point in the proceeding.

63. The court ordered these actions as well as an investigation by the Oklahoma Department of Human Services in a single hearing on June 25, 1984. *In re N.L.*, 754 P.2d 863, 865 (Okla. 1988).

64. This order was issued on August 9, 1984.

65. June 17, 1985.

66. The court does not say what those conditions were.

67. In Kay County, Oklahoma.

68. On May 7, 1986. Title 25 U.S.C. § 1911(b) provides that upon the petition of either parent, “in the absence of good cause to the contrary,” the trial court “shall transfer such proceedings to the jurisdiction of the trial court.” 25 U.S.C. § 1911(b) (2000). The Oklahoma Supreme Court in *N.L.* found “good cause” to deny the transfer for two reasons: (1) all parties (except the mother, a resident of Oklahoma County), witnesses and evidence to the proceedings were located in the Okmulgee County (in which the state court action was pending) while the tribal court was in Kay County, and (2) the “best interests of the child” supported a finding of good cause to deny the transfer request. *N.L.*, 754 P.2d at 869.

69. In the May 7, 1986 order.

70. *Id.*

2. Procedural Setting

The mother appealed the court's orders alleging a host of errors.⁷¹ Prominent among them, the mother claimed that the order terminating her parental rights was not supported by the evidence adduced at trial.

ICWA provides:

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.⁷²

Similar testimony is required to support a foster care placement decision regarding an Indian child (although the finding of damage to the child need only be by "clear and convincing evidence" in this context).⁷³

B. Oklahoma Approach: Adopting the Middle Ground in N.L.?

1. Cultural Bias as the Threshold

In *N.L.*, the Oklahoma Supreme Court seems to have adopted the middle ground approach to defining ICWA's "qualified expert witness" requirement. Accordingly, where cultural bias is involved, the court should hear testimony from "Indian" experts; where cultural bias is not involved, other experts will suffice.⁷⁴ Unfortunately, the court put the cart before the horse with the manner in which it determined cultural bias was not implicated. The decision

71. The *N.L.* case provides a primer on ICWA jurisprudence in Oklahoma. The case deals with several of the "flashpoints" discussed by Barbara Ann Atwood, see *supra* note 7, including: (1) the notice requirements of ICWA and the "affidavit" requirement of the Oklahoma ICWA; (2) the good cause exception to the motion to transfer under ICWA; (3) the placement preferences set out in 25 U.S.C.A. § 1915 (and the "good cause" exception to the operation of those placement preferences), and; (4) ICWA's "qualified expert witness" requirements for determining foster placement and terminating parental rights. *In re N.L.*, 754 P.2d 863 (Okla. 1988).

72. 25 U.S.C. § 1912(f)(2000).

73. *Id.* § 1912(e). Additionally, the Oklahoma version of ICWA, 10 OKLA. STAT. § 40.5 (2001), says "no pre-adjudicatory custody order shall remain in force" for more than thirty days without a determination by the court and supported by "the testimony of at least one qualified expert witness," that custody of the child with the parent or (Indian custodian) is likely to result in serious emotional or physical damage to the child.

74. *N.L.*, 754 P.2d at 867-68.

makes clear if the court itself may make this determination on its own. So, what rule did the Oklahoma court announce and how did it formulate that rule?

2. *Borrowing from Oregon Precedent*

The Oklahoma Supreme Court drew from an Oregon intermediate appellate decision⁷⁵ in determining its qualified expert witness requirement. First, the court examined the purpose of qualified expert testimony. It noted specifically, expert testimony is supposed to “provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias.”⁷⁶ After citing the BIA guidelines as an aid in qualifying the expert, the court focused on the third guideline, a “professional person having substantial education and experience in the area of his or her specialty.”⁷⁷ The court noted that knowledge of Indian life is not necessary where the professional person testifies on matters “not implicating cultural bias.”⁷⁸

In the Oregon case, noted the Oklahoma court, the issue was whether the mother’s mental illness would result in serious emotional harm to the child. “There was no dispute about that condition or its severity.”⁷⁹ Nor did the “termination” have anything to do with the “mother’s fitness to care for the child according to the cultural dictates of her tribe.”⁸⁰ Thus, according to the court, there was no need for culture testimony in the Oregon case.⁸¹

In *N.L.*, while the court noted that expert testimony provides “evidence of tribal customs as they relate to family practices in raising children,”⁸² the court went on to say that where cultural bias is “clearly not implicated, expert witnesses who do not possess special knowledge of Indian life may provide the necessary proof that continued custody of the child by the parent will result in serious emotional or physical harm to the child.”⁸³ While this statement is probably true as far as it goes,⁸⁴ the case, unfortunately, cut against the purpose

75. *State ex rel. Juvenile Dep’t v. Tucker*, 710 P.2d 793 (Or. Ct. App. 1985).

76. *N.L.*, 754 P.2d at 867. The Oklahoma high court quoted from *Tucker*, adopting the reasoning of that court in its entirety.

77. *Id.*

78. *Id.*

79. *Id.* at 868.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. It stands to reason that while an Indian expert should testify as to matters of bias, other experts should be qualified to testify as to other matters involved in the determination of the

of ICWA; the judge (or in this case, the Justices) makes the determination that cultural bias is not implicated.

3. *Analysis of N.L.: Exception That Swallows the Rule*

The Oregon case adopted by the Oklahoma Court may be an instance of the *easy case making bad law*.⁸⁵ It is hard to quibble with the result since the mother's serious mental illness caused her to neglect her child. However, applying that standard across the board and allowing the trial court to make the initial determination whether cultural bias is implicated, negates the purposes of ICWA. In *N.L.*, the mother's rights were terminated because she left her child with neighbors for an extended period; thus *N.L.* presented precisely the type case that gave rise to congressional concern about the improper imposition of Anglo cultural bias.⁸⁶ The basic premise of ICWA is that the child belongs to the tribe; thus that it may be proper to leave the child in the care of the "tribal" family.⁸⁷ The mother's actions in *N.L.* may have been within the norms of Kaw or Creek tradition. There are two ways to make this determination, allow the trial judge (or the supreme court), unfamiliar with tribal custom, to decide, or hear testimony from an "Indian" expert witness who has the knowledge needed to assess whether the mother was acting within the custom of her tribe, or whether she has simply abandoned the baby. In *N.L.* the Court simply declared that the termination "had nothing to do with the mother's fitness to care for the child according to the cultural dictates of her tribe."⁸⁸ The Court ignored the fact that the underlying reason for the termination was the mother's "abandonment" of the child to her grandmother and neighbors. By not making clear which is required, *N.L.* paves the way for Oklahoma trial courts to make the determination without the assistance of the "Indian" expert.

The problem with this approach is that it flies in the face of congressional findings that state court judges are themselves either unable or unwilling to set aside their own biases to properly determine whether tribal cultural values are at stake.⁸⁹ If trial court cultural bias is the problem to be addressed by ICWA,

child's interests.

85. See Metleer, *supra* note 10 (discussing the *hard* cases making bad law where state court judges avoid strict application of ICWA in order to reach a desired result).

86. See *supra* notes 8-23 and accompanying text.

87. See *supra* note 13.

88. *N.L.*, 754 P.2d at 868.

89. See *supra* notes 8-23 and accompanying text.

determining whether Anglo cultural bias exists should not be left to the sole discretion of the Anglo judge.

The court in *N.L.* remanded, telling the trial court to determine not whether cultural bias was implicated but instead, having declared cultural bias was not an issue, the Court simply ordered the trial court to qualify a BIA “professional person” to determine if continued custody by the mother would result in harm to the child.⁹⁰ The court provided Oklahoma trial judges with the means to avoid the act; the trial judge need only declare that cultural bias is not at issue and continue on without input on tribal cultural considerations. Ironically, it seems, the BIA guidelines provide the very means to foil ICWA.

D. The Rule of N.L. Applied: In re M.J.J., J.P.L., & J.P.G

1. Factual Setting

In this case, referred to herein as *M.J.J.*, the mother of three Chickasaw children appealed from a trial court ruling terminating her parental rights. In the trial court, the mother stipulated to allegations of marijuana use and emotional abuse, and seems to have acknowledged that her boyfriend physically abused the children. The trial court adjudicated the children deprived and removed them from the mother’s custody. The court then established a treatment plan designed to “correct the conditions which led to the adjudication” and return the children to her care.⁹¹

Ten months later the state, contending that the mother had failed to abide by the treatment plan, moved to terminate her parental rights.⁹² The mother waived a jury trial and the court ordered termination.⁹³

2. Application of the “Qualified Expert Testimony” Requirement

During the trial, testimony was offered by a social worker with the Chickasaw Nation child welfare department. The social worker “was a member of the Chickasaw Nation and was familiar with that culture.”⁹⁴ The substance of the testimony was that the actions leading to the termination, allegations of “emotional abuse and use of marijuana and other drugs,” in no way implicated Chickasaw Tribal customs.⁹⁵ The court, citing both *N.L.* and

90. *N.L.*, 754 P.2d at 868.

91. *In re M.J.J.*, 69 P.3d 1226, 1227 (Okla. Ct. App. 2003).

92. *Id.* at 1227.

93. *Id.*

94. *Id.* at 1228.

95. *Id.*

the Oregon decision from which *N.L.* was derived,⁹⁶ determined that “there is no evidence that Mother’s deficiencies were in any way associated with the cultural dictates of her tribe.”⁹⁷ The court held that “in the absence of implication of cultural bias, the expert testimony may be [sic] a social worker who possesses expertise beyond the normal social worker qualifications.”⁹⁸

Another expert, a Department of Human Services worker with the requisite “expertise beyond that of the normal social worker,” but with no particular “Indian” expertise, provided sufficient testimony concerning the likelihood of harm to the child.⁹⁹ The trial court was affirmed.

3. *Analysis of M.J.J.: Error of N.L. Revisited*

While it is hard to fault the result in *M.J.J.*, the case may have, as did *N.L.*, put the cart before the horse; it allows trial judges to avoid the purpose and goals of ICWA by “declaring” cultural bias to be non-existent. While the *M.J.J.* court heard the testimony of the one “Indian” witness that cultural bias was not at play, the court’s holding is more expansive. It does not seem to *require* such testimony, indeed at the outset the court noted “there is . . . no absolute requirement that the ‘qualified expert witness’ . . . be an ‘Indian expert witness.’”¹⁰⁰ Ultimately, all that seems to be required by *M.J.J.*, like *N.L.*, is that the trial court, *by whatever means*, find an “absence of implication of cultural bias.”¹⁰¹ Perhaps in Oklahoma, Indian expertise is entirely optional after all. It seems *M.J.J.* compounded the error of *N.L.* Perhaps Oklahoma did not adopt the middle approach after all, but rather the “no Indian expertise” model instead.

IV. *Reconciling the Expert Witness Requirement with the Purposes of ICWA*

The Oklahoma Supreme Court clearly identified the purpose behind ICWA’s qualified expert witness requirement — “to provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias.”¹⁰² Perhaps the simplest way to ensure that this purpose is served is to require that in any case in which ICWA’s expert witness

96. “Under the circumstances there, the Court found termination had nothing to do with the mother’s fitness to care for the child according to the cultural dictates of her tribe.” *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1228-29.

100. *Id.* at 1228.

101. *Id.*

102. *In re N.L.*, 754 P.2d 863, 867 (Okla. 1988).

requirement is triggered, the court require "Indian" testimony at the outset as to whether cultural bias is an issue in the case. If it is shown that the parties' Indian cultural heritage does not bear on the specific allegations involved, the court may proceed with other qualified expert witnesses providing the necessary quantum of proof. If, however, the Indian expert makes a showing that cultural norms are implicated, the court should give greater consideration to those cultural concerns.

It would be a simple matter for Congress, or perhaps the United States Supreme Court to clarify the qualified expert witness requirement. Given, however, that congress has not done so in the years since enacting ICWA, and given that the Supreme Court has decided the substance of ICWA in only one case,¹⁰³ for now it is up to the legislatures and courts of the individual states to clarify the requirement. The Oklahoma high court missed the opportunity with *N.L.*; The Minnesota Supreme Court has, on the other hand, determined that ICWA requires "Indian" expert testimony in all cases.

In 1990, the Minnesota high court reversed an earlier determination that "Indian" expert testimony was not required.¹⁰⁴ Although the decision was partially based on state law,¹⁰⁵ a Minnesota DHS manual added to the BIA's third "guideline"¹⁰⁶ a requirement that the "professional" have "substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community."¹⁰⁷ The Minnesota high court appears to have determined that *all* qualified expert witnesses may be Indian witnesses.¹⁰⁸ The court, noting that "[n]on-Indian lawyers, social workers and judges perceive the necessity of terminating parental rights of Indian citizens through quite different cultural lenses," recognized that where the expert witnesses are not "conversant with Indian culture and child-rearing practices, the problems that Congress has tried to remedy may remain, despite the adoption of the Indian Child Welfare Act."¹⁰⁹ While the Minnesota court may

103. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *see also* Metleer, *supra* note 10, at 420-24 (discussing *Holyfield* and congressional attempts to amend ICWA).

104. *In re the Welfare of B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990) (reversing *In re Welfare of T.J.J.*, 366 N.W.2d 651 (Minn. Ct. App. 1985)).

105. ICWA preempts state law except where state law provides greater protection than does ICWA, in which case the state law *must* be applied. 25 U.S.C. § 1921 (2000).

106. *See supra* note 46.

107. *B.W.*, 454 N.W.2d at 442.

108. *Id.* at 446; *see also* Lynn Klicker Uthe, *The Best Interests of Indian Children in Minnesota*, 17 AM. INDIAN L. REV. 237, 258-60 (1992).

109. *B.W.*, 454 N.W.2d at 444.

have gone even a bit too far by requiring every expert be versed in Indian culture,¹¹⁰ it at least went in the right direction.

Conclusion

With the Indian Child Welfare Act, Congress established procedures to guide state trial court judges in proceedings to remove Indian children from their parents. Congress's stated goal was to reverse the trend whereby Anglo cultural bias was allowed to contaminate the proceedings. Congress hoped to prevent the unnecessary removal of Indian children from their Indian parents and tribal associations. However, by failing to define its "qualified expert witness" requirement, Congress left a gaping hole in ICWA, one through which state judges, by design or ignorance, may avoid the purposes of ICWA in foster placement and parental termination proceedings. It is left to the states to flesh out the expert witness requirement. Unfortunately Oklahoma seems to have followed the lead of Congress and the Bureau of Indian Affairs and failed to articulate clear guidelines with respect to application of the qualified expert witness requirement, even undermining the very purpose of ICWA. This is unfortunate and Oklahoma would be better served had its courts taken their cue from the Minnesota Supreme Court and mandated expert testimony concerning whether cultural bias is implicated in every case in which ICWA applies.

110. Other courts recognize that ICWA only requires a single qualified expert witness. *See, e.g., In re Krefl*, 384 N.W.2d 843, 847 (Mich. Ct. App. 1986). If this is so, and if Minnesota indeed requires that where there are multiple witnesses, all be "Indian" experts, the decision probably goes too far. *See supra* notes 36-41 and accompanying text.

