

Qualified Expert Witnesses in ICWA Cases



In state court, ICWA puts extra checks in place before the State can remove an Indian child from her home, decide to keep a children out of her home, or terminate her parents' rights.

This is because of every state's history of removing too many native children from their homes, and traumatizing whole native communities as a result.

One of these checks is a Qualified Expert Witness – a person who *should* be qualified to testify about the social and cultural standards of the child's Tribe and can assess whether the removal of a child from his or her family in a particular case is consistent with those standards.

The state is required in many ICWA hearings to call a qualified expert witness to validate the state social worker's decision to remove or terminate, looking at the risks to the child if returned home.

FREQUENTLY ASKED QUESTIONS ABOUT QEW's

What is a Qualified Expert Witness?

A special type of witness, just for Indian Child Welfare Act cases.

What is the purpose of a QEW?

The QEW requirement makes it harder for states to remove an Indian child from her family and to terminate the rights of a parent of an Indian child. This extra hurdle imposed on states is meant to help preserve Indian families whenever possible and safe for the children.

In court, who is responsible for identifying and calling a QEW to testify?

ONLY the state has to call a QEW. The Tribe is never responsible for calling a QEW.

Does this requirement apply in all states?

Yes. ICWA is a federal law that all states must follow.

If the Tribe doesn't agree with the state's position in a case, does it have to call its own QEW?

No. The Tribe can object to the qualifications of the state's proposed expert, or can argue that the expert's opinion should not carry much weight.

Can the Tribe call its own QEW if it wants to?

Yes, but it is never required to call one.

How does the court use a QEW's testimony?

The QEW's testimony aids the court in deciding whether a child is at risk of serious emotional or physical harm.

The court is only allowed to order the removal of an Indian child, if there is clear and convincing evidence, including testimony of a QEW, that the child in the case or the continued removal of an Indian is at risk of serious emotional or physical harm.

The court is only allowed to terminate parental rights of an Indian child if there is evidence beyond a reasonable doubt, including testimony of a QEW, that the child in the case is at risk of serious emotional or physical harm.

What makes a Qualified Expert Witness “qualified”?

According to the 2016 ICWA regulations at Section 23.122:

A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe

When should an expert have knowledge of social and cultural standards of the Tribe?

According to the comments to the regulations:

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.

The QEW requirement “ensures that relevant cultural information is provided to the court and that the expert testimony is contextualized within the Tribe’s social and cultural standards. Thus, the Department believes that the question of whether 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 is one that should be examined in the context of the prevailing cultural and social standards of the Indian child’s Tribe.”

When is cultural knowledge “plainly irrelevant” to a case?

The Tribe should weigh in on that question. The commentary lists as an example:

“. . . a leading expert on issues regarding sexual abuse of children may not need to know about specific Tribal 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.”

Some Tribes believe that cultural knowledge is wrapped up in all ICWA cases, because you cannot separate individuals from their culture.