Session 5&6 Chat Log

1. Having worked in every different attorney role and in several areas of the state, have never seen a case plan that was unique to the family. Have seen pushback from prosecutors AND judges on questioning the agency's judgment here. Is this an area judges receive training in? meaning that they have discretion to determine reasonable efforts?

A. Judges may have received training in these areas, depending on the judge. Recent Best Practices trainings have raised this topic as well for attorneys, social workers, and judges. One of the best ways to advocate for your client's interests as to case plan tasks is by attending the case plan meetings and working with the social workers to determine appropriate tasks.

2. I have been present in hearings where other attorneys and/or a judge has remarked that a lack of service in the area is not the fault of the parent, essentially if Agency sees an issue that needs to be addressed they have the burden of coming up with a solution. To the point that the court considers making a LoRE finding. How do we address that RE were made by the Agency if there is just a lack of services that would be offered/available in another county, perhaps even another county in the district that the Judge sees that service as normal/available?

A. I don't know that there is a definitive answer to this; but, we could perhaps use other permanency findings as our guide. The ASFA findings provide that the Court is to consider in state and out of state placement options – if that's the scope for placement, why not use a similar scope for things like resources? I think the Agency needs to work to identify any and all resources with as broad of a scope as possible.

B. This is very fact-specific but would probably rely heavily on showing to the court/attorneys that the agency has done what it can. This is likely going to mean showing the court more than just that the service isn't easily available or customary in the area but beyond that to show that the agency has truly exhausted the options for resolving that concern.

Here are some suggestions on questions to ask the other parties and the agency: Is the service truly that important to the case? What else could the agency do to provide that service? Can the client be transported to the service? Can the service be provided remotely? Can a local provider do a one-time program to resolve the same concerns?

For example, in my area there have been times when there have been no Anger Management providers. Agencies have been able to assist clients in getting online anger management classes that provide a certificate at the end, and agencies have also worked with clients' therapists to address anger management topics through their existing therapy. With such options available, it would not have been reasonable for the agency workers to simply throw up their hands and say that Anger Management isn't available.

3. Would ICWA have any application in a PFA case? Those are so often used to keep children away from a parent. Currently looking at a lifetime PFA with no contact with kids where there is tribal affilliation. Isn't that effectively a termination of parental rights?

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A. The Indian Child Welfare Act applies in child custody proceedings. 25 U.S.C.§ 1903 defines "child custody proceeding" as

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "proadaptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

The closest to the PFA scenario might be "foster care placement," but without placement in a foster home, the PFA scenario doesn't meet the right definition for ICWA to apply.

B. Generally, ICWA does not apply to custody/divorce disputes where the child is left with one of the parents. https://www.nicwa.org/wp-content/uploads/2018/01/NICWA-Guide-to-ICWA-Compliance.pdf

4. What do we do in an ICWA CINC case when there is a lifetime PFA against one parent? What should the agency/court parties do to exercise active efforts to reintegrate the family?

A. K.S.A. 38-2203(f) provides that "[a] court's order issued in a proceeding pursuant to this code, shall take precedence over such orders in a civil custody case, a proceeding under article 31 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto, protection from abuse act, or a comparable case in another jurisdiction, except as provided by K.S.A. 23-37,101 through 23-37,405, and amendments thereto, uniform child custody jurisdiction and enforcement act." The CINC Court would likely need to revisit the custody determination from the lifetime PFA to determine what active efforts might look like. If there was significant abuse perpetrated against the child which resulted in the PFA, active efforts would likely look very different compared to what active efforts might be under other circumstances.

B. This is too fact-specific to address in a short-written answer, but I would first determine whether the PFA circumstances are such that it would even be a good idea to try to lift the PFA. Active efforts could be shown between the agency and the parent (working on parenting, substance abuse or mental health issues, housing, etc.) even without contact with the child or the other parent.

5. What if the lifetime PFA was in a different county?

A. Statute doesn't provide for limits based on the venue of the order, the CINC Court orders take precedence over orders issued under the PFA statute.

6. There is a "reason to know" clause that was entered in 2017. In my understanding this means that the reason to know would be that the courts and DCF would treat this as a ICWA case until proven. Would my thinking be correct?

A. 25 CFR § 23.107(b) provides as follows:
(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an “Indian child,” the court must:
(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and
(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an “Indian child” in this part.

7. Would active efforts maybe include the agency paying for the attorney in the CINC case to enter on the PFA case?

The federal regulations to implement ICWA give eleven (11) examples of what can be considered Active Efforts, see 25 C.F.R. 23.2. *Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case.

8. They take precedence while they are open but after the CINC case closes, the domestic case is then active again, right?

9. Grant, can you provide a sample of copy so we can talk to our local providers about modifying forms.

10. Grant - KSA 38-2268 requires approval of the Secretary for a consent to adoption and I've run into issues with DCF not wanting to accept consents because they expire. As a parents attorney, how can be push to make that consent option more available for parents with familial resources?

11. Can you send me your email? I will try to connect you with the provider in our area to see if they've got a form!

12. Chris, under 15/22 would you want to talk some about tribal position on PRT and preferred alternatives?

A. Tribal position on PRT and preferred alternatives will vary by case and tribe. Some tribes may have cultural objections to PRT or have tribal court alternatives that the tribe sees as fitting the situation better. However, in other circumstances a tribe will see PRT as appropriate.