State in Interest of L.L., 2019 UT App 134, ___ P.3d ___ (Utah Ct. App. Aug. 1, 2019)

- **Holding:** Although entitled to *Chevron* deference, the Bureau of Indian Affairs regulation defining "qualified expert witness" (25 C.F.R. § 23.122(a)) requires such witness to possess the qualifications necessary to testify concerning whether a parent's continued custody likely will result in serious emotional physical injury to an Indian child but grants discretion to determine whether the witness's ability to testify concerning tribal social and cultural standards is necessary in the particular case.
- **Summary:** This appeal arose from a juvenile court's refusal to allow three therapists proffered by a guardian ad litem as "qualified expert witnesses" under 25 U.S.C. § 1912(e) to testify in a parental termination proceeding. In so ruling, the trial court relied on the 25 C.F.R. § 23.122(a) that provides in relevant part:

  > 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.

  As the court of appeals explained, "the juvenile court determined that the standard set forth in the BIA regulation precluded the court from qualifying any of the therapists as experts because none of them were qualified to testify about the prevailing social and cultural standards of the Tribe." The court of appeals disagreed with this interpretation of the regulation, reversed the juvenile court's decision and remanded for further proceedings consistent with its opinion.

  The panel concurred that BIA's construction of the term "qualified expert witness" in § 1912(e) warranted *Chevron* deference because (1) the statute (insofar as it does not define the term and "require[s] that an 'expert' be possessed of an extra set qualifications beyond traditional expertise") is ambiguous and (2) "it is not unreasonable to require expert testimony presented to a court to reflect and be informed by the cultural and social standards of the relevant Indian tribe." However, it parted ways with the juvenile court in requiring as per se matter that a witness possess the qualifications to testify as tribal social and cultural standards: "The second part of the definition, pertaining to the witness's qualification to testify regarding tribal social and cultural standards, uses the phrase 'should be' rather than 'must be.' It therefore grants state courts discretion to determine whether this type of qualification is necessary in any particular case.'" Consequently,

  > while it will generally be important for a qualified expert witness to have knowledge of tribal social and cultural standards, such specialized knowledge may not be necessary if tribal cultural standards are plainly irrelevant to the particular circumstances at issue. "In such a situation, a professional person with substantial education and experience in the area of his or her specialty may be a qualified expert witness, depending upon the basis urged for removal."

  The panel also reversed the juvenile court's refusal to allow testimony from two therapists on the basis of the therapist-patient privilege under the Utah Rules of Evidence.
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