New Mexico v. Douglas B., --- P.3d ---, 2023 WL 6209568 (N.M., Sept. 25, 2023).

- **Holding**: The Indian Child Welfare Act establishes two distinct testimony requirements for qualified expert witnesses in foster care placement proceedings that must not be conflated: witnesses must be separately qualified to testify regarding (1) the likelihood of serious emotional or physical damage to the child, and (2) the tribe's prevailing social and cultural standards as they apply to familial relationships.
- **Summary**: The Children, Youth, and Families Department (CYFD) took custody of a child after learning of concerns about self-harm and severe domestic violence. After discovering that the child was eligible for membership in the Wichita and Affiliated Tribes of Oklahoma (Tribe), the Tribe was notified, and intervened in the case. At an adjudicatory hearing, CYFD proffered as an expert witness Ms. Ahtone, who worked for the Tribe to monitor state cases involving children of the Tribe to ensure ICWA compliance. Ms. Ahtone was not a member of the Tribe, but was a member of the Apache Tribe of Oklahoma.

  Over parents' objections, the court found Ms. Ahtone to be a qualified expert witness (QEW), citing her experience testifying as an Indian Child Welfare Act (ICWA) expert in over 50 ICWA cases, and the court's finding that she was designated by the child's Tribe as an ICWA expert.

  At issue on appeal was 25 U.S.C. § 1912(e), which provides:

  > 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.

  The BIA's ICWA regulations provide that:

  > 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.
  >
  > 25 C.F.R. § 23.122.

  The New Mexico Supreme Court affirmed the court' of appeals' holding that § 23.122 defines two discrete categories of expert testimony: (1) whether custody by parent would result in serious or physical damage to the child, and (2) the prevailing social and cultural standards of the child's tribe, such that the court must independently analyze qualification in the two categories of required QEW testimony under ICWA. It further concluded that the testimony can come from one or multiple experts.

  Applying New Mexico's rules of evidence, the court concluded that CYFD did not lay the proper foundation required by Rule 11-702 to qualify Ms. Ahtone to testify about serious damage to the child, but Ms. Ahtone was presumed qualified to talk about the Tribe's prevailing social and cultural standards because she had been designated by the Tribe as its ICWA expert, although the court noted

that “we emphasize that knowledge about a tribe's spiritual customs and ceremonial events is not necessarily sufficient to qualify anv expert to testify about the tribe's societal and cultural attitudes surrounding familial relationships” (below, Ms. Ahtone had appeared confused when asked about expectations for family organization and operation within the Tribe, and had fallen back on her experiences with her own family).

- **Relevant (2023) Deskbook Section**: 13:26