Capacity Building
CENTER FOR COURTS

Exploring ICWA Practice
Yellowstone, Montana

Introduction

Congress passed the Indian Child Welfare Act (ICWA) in 1978 to respond to concerning trends related to the removal of Indian children from their families. ICWA sets out the legal requirements governing child welfare cases involving maltreated Indian children. Under ICWA, an "Indian child" is defined as a child this is either a member, or eligible for membership, in a federally recognized Indian tribe or a child that is the biological child of a member of a federally recognized Indian tribe and eligible for tribal membership.

The law has a variety of key tenets that ensure Indian children are not unnecessarily removed from their homes. For instance, the law requires child welfare agencies to apply higher standards of removal and engage in active efforts to avoid removal. The law also requires timely notice to all parties and identification of preferred placement of the child. Courts often struggle to apply ICWA.

ICWA application is rarely tracked and only a few states monitor ICWA compliance. Most states do not know whether ICWA is properly applied in child welfare cases. In 2018, several states, including Montana, expressed an interest in researching state-specific ICWA application. These states partnered with the Capacity Building Center for Courts (CBCC) to collect and analyze ICWA performance data. The CBCC assessed the state court in Yellowstone County, Montana to understand court related performance in Montana ICWA cases. Understanding ICWA related performance in Montana is critical not only because ICWA is a federal statute but also because historically Montana has experienced significant disproportionality rates among Indian children in foster care.

Study Overview

The purpose of the study is to examine data on child welfare performance related to ICWA application. For research purposes, ICWA application can be divided into two stages. The first stage is the judicial determination itself; that is, whether ICWA as a statue applies in the case. Without this determination further application with the law becomes problematic. Judges should inquire about ICWA applicability at each hearing because new parties, tribal members, family membes, kin, or stakeholders may be identified and present at later hearings. Furthermore, judges should make oral findings as to the applicability of ICWA to ensure all parties present at the hearing (e.g., attorneys, family members, and case workers) are aware of the finding. Finally, the court should ask parents and relatives about their Native American heritage because parents are likely to have the most accurate or comprehensive information. If the court finds that ICWA does not apply it has fulfilled its obigations under ICWA.

The second stage begins when the court finds that ICWA applies (or when the court has reason to know that the child may be an Indian child under the Act). If ICWA applies or a court has "reason to know" a variety of different factors must be taken into consideration. Some of these factors include (a) whether the agency sent proper notice of the hearings to the tribe and parents, (b) whether the agency made active efforts, (c) whether the child was placed according to ICWA's placement preferences, and (d) whether the agency engaged the tribe throughout the life of the case. ICWA cases are often complex. Determining what constitutes ICWA application implicates a number of factors. To attend to this complexity the researchers developed an ICWA performance measurement tool designed to capture information relevant to determining whether ICWA was applied in any given case. The tool captures a number of factors, including documentation of ICWA applicability, judicial findings on the record made at each hearing, hearing dates, case closure dates, final outcomes for the child (e.g., final placement), and allegations against the parents. ***This report is not meant to grade the site on performance; rather, it is meant to provide the site with data on its current practice for consideration of how this may relate to ICWA application***.

The results presented below provide information into how many cases were coded for the jurisdiction, as well as how many cases were considered ICWA and non-ICWA. Results also indicate the sample sizes for each hearing. For instance, the ICWA applicability section indicates

the sample size for the show cause, adjudication, treatment plan, first review, second review (if applicable), and permanency hearings. These numbers will not all be equal because each hearing was not necessarily held in each case or there was incomplete documentation in the file for a hearing type.

Results

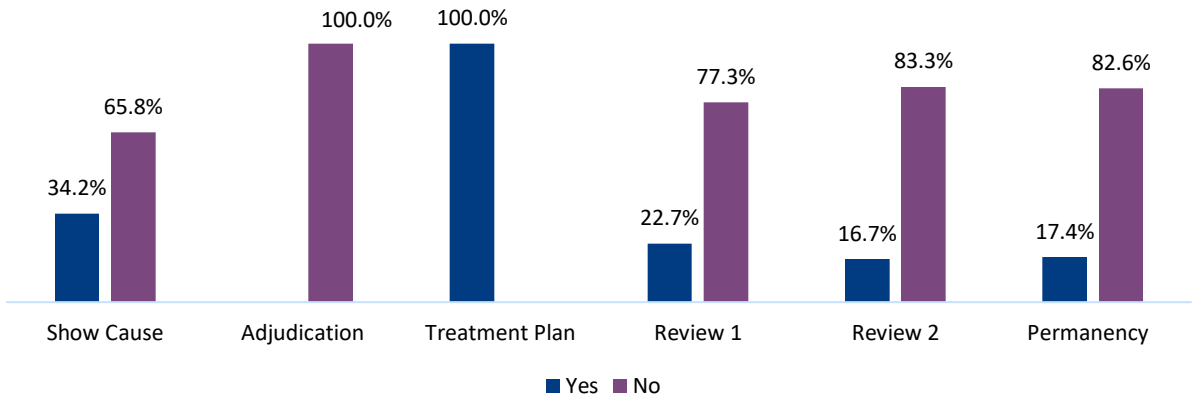
Of the 47 case files that were coded, 39 cases (83%) were identified as ICWA cases and 1 case (2.1%) was identified as non-ICWA; the remainder were unable to determine, as no ICWA finding was made (n = 7). Furthermore, 43 cases (97.7%) identified in the petition the ICWA applicability of the child. With regards to whether the petition identified the tribes, 97.6% of cases identified the tribe in the petition; roughly 2.4% of cases did not identify the tribe in the petition. The tribe moved to intervene in 52% of hearings.

ICWA Applicability

Judges should at each hearing inquire as to ICWA applicability because new parties (e.g., new family members) might be identified and present at later hearings. Once the court establishes applicability the judge should make a finding that ICWA applies to this case.

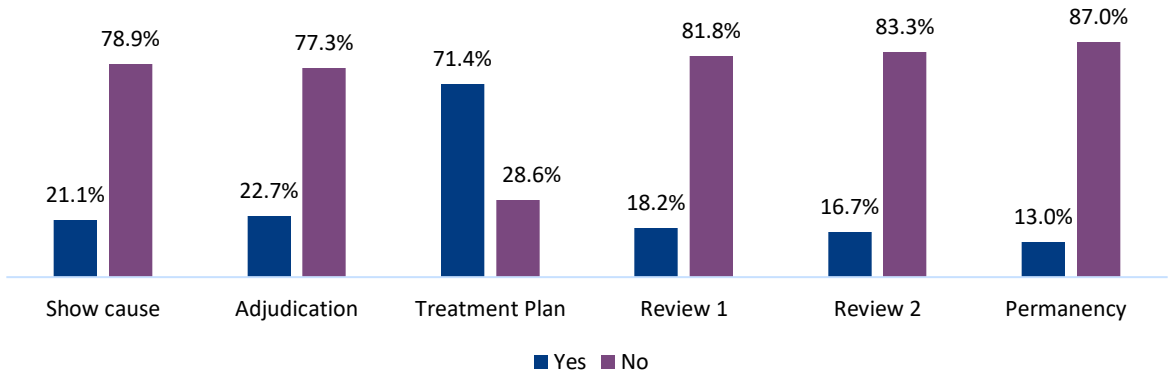
As demonstrated in Figure 1 (below), judges often did not inquire into ICWA applicability throughout the life of the case. Judges never inquired into ICWA applicability during adjudication (n = 22) hearings. Judges inquired less than half of the time in show cause (n = 38), first review (n = 22), second review (n = 6), and permanency (n = 23) hearings. Judges most often inquired into ICWA applicability during the treatment plan hearing (n = 7).

Figure 1: ICWA Cases Flagged for ICWA Applicability



With regards to ICWA applicability findings (see Figure 2 below), judges were unlikely to make an ICWA applicability finding in ICWA cases in show cause (*n* = 38), adjudication (*n* = 22), first review (*n* = 22), second review (*n* = 6), and permanency (*n* = 23) hearings. Judges often made an ICWA applicability finding in the treatment plan hearing (*n* = 7).

Figure 2: ICWA Applicability Finding Made

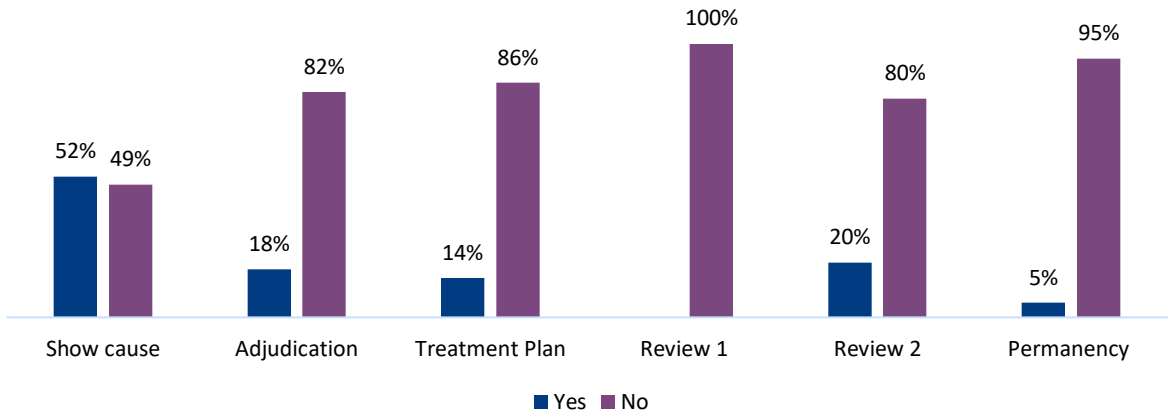


Notice

Notice of a petition filing was provided to tribes in 85% of the cases (100% of the cases later determined to be ICWA). The median time from petition filing to notice sent to the tribe (per the case file review documentation) was 1 day. The median time from petition filing to receipt by the tribe that a petition had been filed was 12 days. In addition, reviewers identified when notice was provided of future hearings. As depicted in Figure 3 below, judges overwhelmingly did not provide

notice of the next hearing in adjudication (*n* = 17), treatment plan (*n* = 7), first review (*n* = 21), second review (*n* = 5), and permanency (*n* = 19) hearings; judges did provide more notice in show cause hearings (*n* = 33).

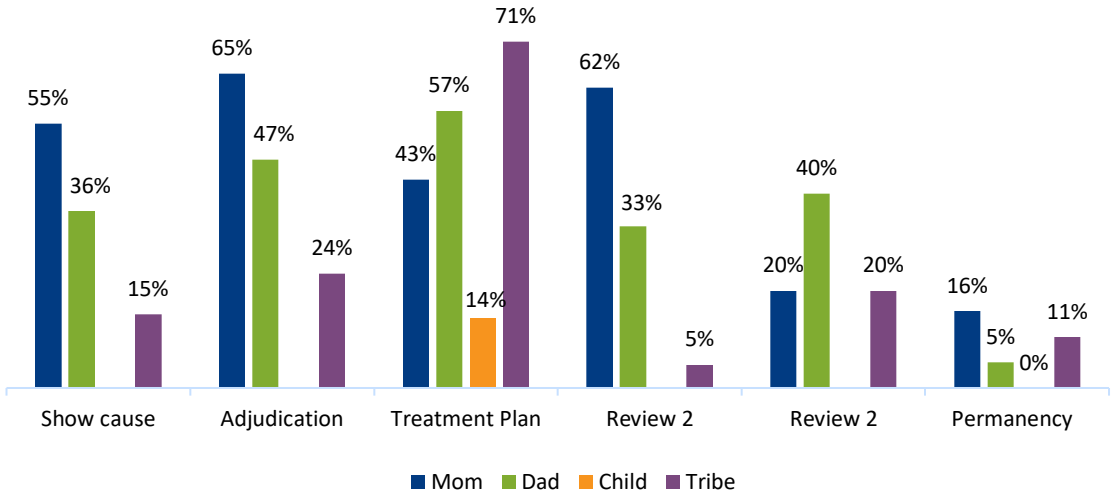
Figure 3: Notice of Next Hearing in ICWA Cases



Parties Present

In ICWA cases, children and tribes were almost never present (see Figure 4 below). Children were only present at the treatment plan hearing, whereas tribes were infrequently present at all hearings. Parents, on the other hand, were frequently at ICWA hearings. Specifically, parents were frequently at show cause, adjudication, treatment plan, and first review hearings. The sample size for each hearing is the same as that presented in the notice of next hearing section.

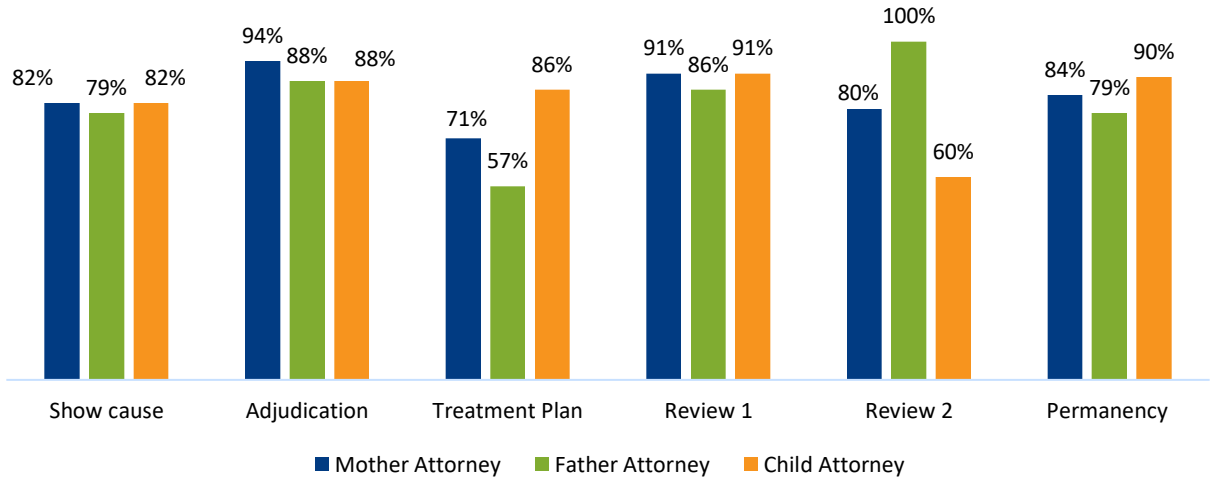
Figure 4: Parties Present in ICWA Cases



Attorneys Present

In ICWA cases, attorneys for mothers, fathers, and children were almost always present across hearing types; parent attorneys were least likely to be present during treatment plan hearings (see Figure 5 below). The sample size for each hearing is the same as that presented in the notice of next hearing section.

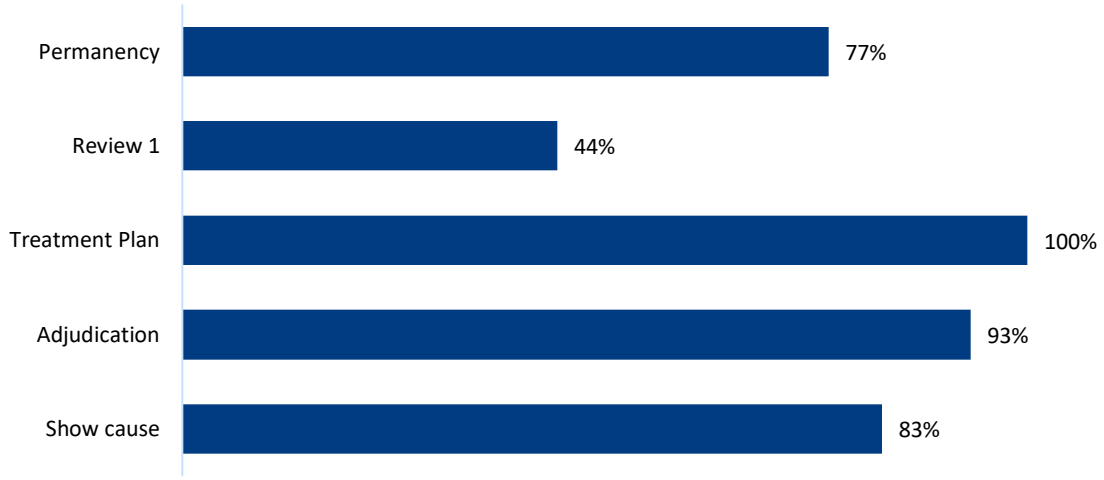
Figure 5: Attorneys Present in ICWA Cases



Active Efforts

An active efforts finding was made at least once across the life of ICWA cases for 94% of cases reviewed when a child was removed from his or her parent(s) or other legal guardian(s). Figure 6 illustrates the percentage of how often the finding *was* made. The finding was made during the show cause (*n* = 29), adjudication (*n* = 15), treatment plan (*n* = 5), first review (*n* = 18), and permanency (*n* = 17) hearings. This finding was not made in the second review (*n* = 3) hearing.

Figure 6: Active Efforts Findings



Qualified Expert

The qualified expert witness testimony finding was made on the record in ICWA cases where the child was removed from his or her parent(s) or other legal guardian(s). It was made 55.2% of the time in show cause hearings, 60% in adjudication hearings, 80% in treatment plan hearings, 11.1% in first review hearings, 33.3% in second review hearings, and 5.9% in permanency progress hearings. The sample size for each hearing is the same as that reported in the active efforts section.

Emotional/Physical Damage and Clear/Convincing Evidence

The emotional/physical damage and clear/convincing evidence findings were made on the record in ICWA cases where the child was removed from his or her parent(s) or other legal guardian(s). Emotional/physical damage was made 62.1% of the time in show cause hearings, 60% in

adjudication hearings, 40% in treatment plan hearings, 11.1% in first review hearings, 33.3% in second review hearings, and 11.8% in permanency hearings.

With regards to clear/convincing evidence, the finding was made 51.7% of the time in show cause hearings, 53.3% in adjudication hearings, 40% in treatment plan hearings, 16.7% in first review hearings, 33.3% in second review hearings, and 11.8% in permanency hearings. The sample size for each hearing is the same as that reported in the active efforts section.

Imminent Damage, Placement Preference, and Good Cause

The imminent damage, placement preference, and good cause findings were made on the record in ICWA cases where the child was removed from his or her parent(s) or other legal guardian(s). The imminent damage finding was made 6.9% of the time in show cause hearings, 0% in adjudication hearings, and 20% in treatment plan hearings.

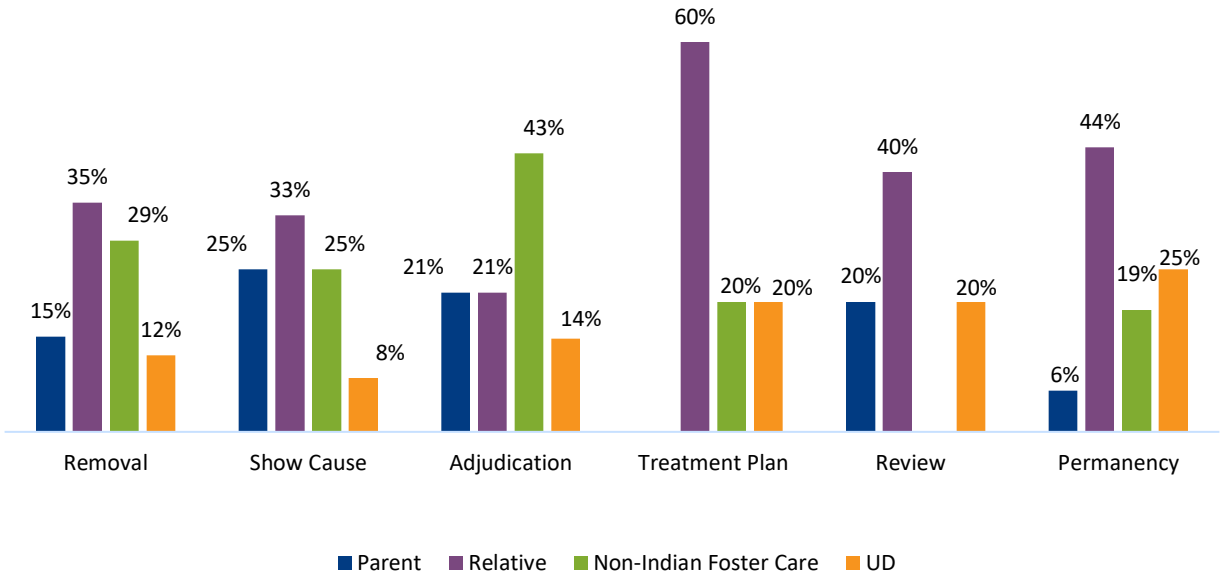
A finding that placement preferences were followed was made 10.3% of the time in show cause hearings, 13.3% in adjudication hearings, 20% in treatment plan hearings, 11.1% in first review hearings, 0% in second review hearings, and 11.8% in permanency hearings.

The court never made a good cause finding to deviate from the placement preferences. The sample size for each hearing is the same as that reported in the active efforts section.

Placement

As depicted in Figure 7 below, children were predominantly placed in one of three placement types throughout an ICWA case: parent, relative, and non-Indian foster home. Furthermore, children were most likely to be placed with a relative at each hearing. Children were sometimes placed in Tribal/Indian foster homes or institutions, but never in group homes. More specifically, children were placed in institutions 8.8% of the time at removal, 8% of the time at show cause hearings, and 10% of the time at the first review hearing. With regards to Tribal/Indian foster homes, children were placed here 10% of the time at the first review hearing and 6% of the time at the permanency progress hearing. The sample size for each hearing is as follows: removal (n = 34), show cause (n = 24), adjudication (n = 14), treatment plan (n = 5), first review (n = 10), second review (n = 1), permanency (n = 16).

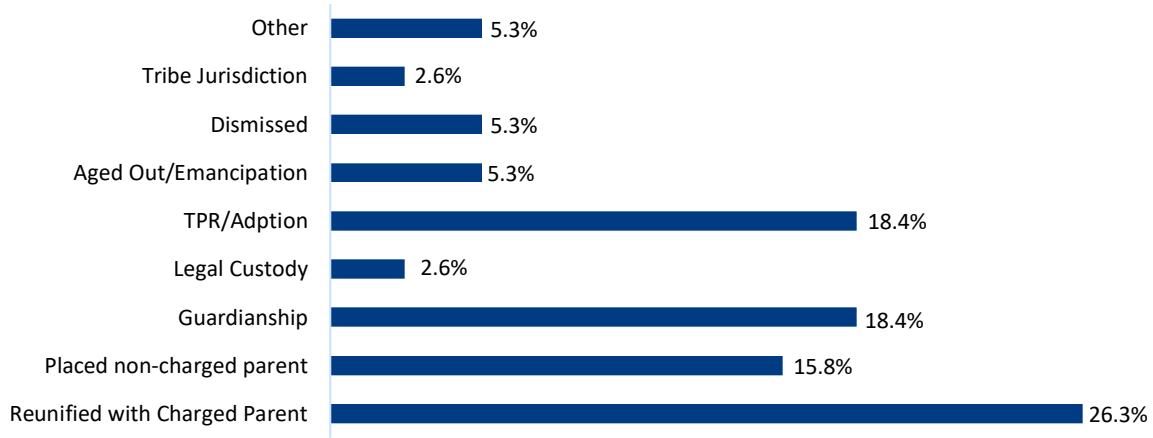
Figure 7: Child Placement at Each ICWA Hearing



Case Outcomes

Roughly 97.3% of the ICWA cases reviewed were closed (36 cases out of 39). With regards to outcomes, 26% of cases ended in reunification with charged parent; 18% ended with guardianship and an additional 18% ended with TPR/adoption. Children, on average, experienced 1.10 placement changes during the entirety of their cases. There was an average of 4.33 hearings per case.

Figure 8: Case Outcomes

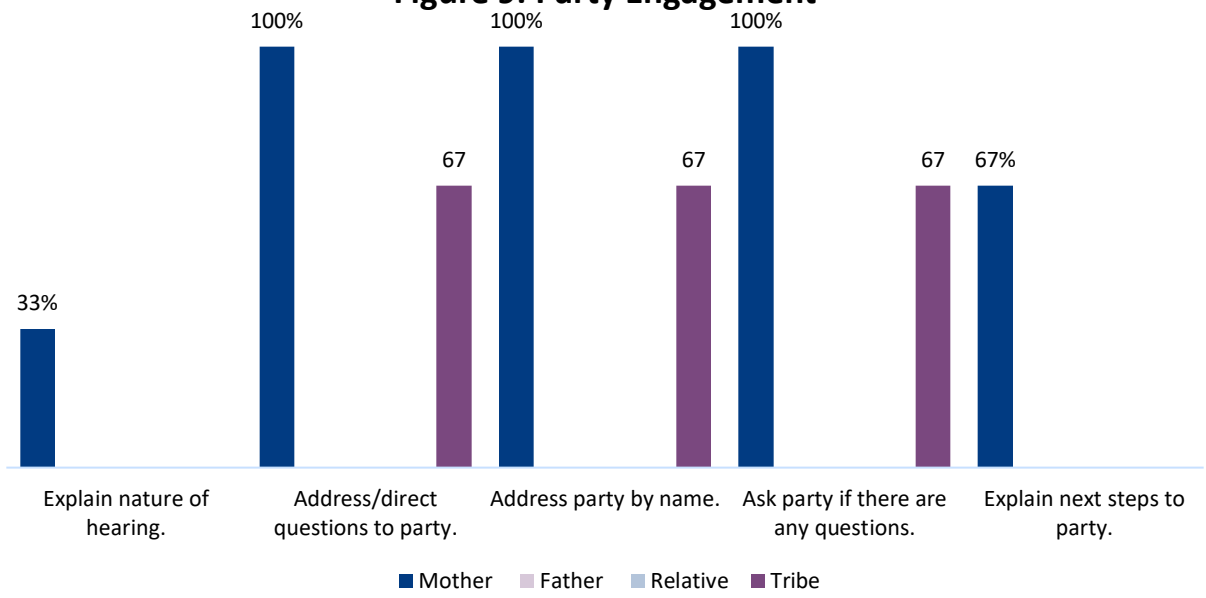


Court Observation

Along with case file reviews, court observations were also conducted in this jurisdiction. The court observations collected information about whether judges made findings on the record; whether certain discussions took place; and whether mothers, fathers, children, and tribes were engaged in discussions during the case. There was a total of 7 court observations conducted for this jurisdiction.

As depicted in Figure 9 below, tribal representatives (*n* =3) were frequently engaged in discussion during the hearing. As for mothers (*n* =3), they were always engaged during the hearing. Fathers, children, and relatives were not present at the hearings observed.

Figure 9: Party Engagement



Summary

There was a range of practice related to ICWA compliance. It was not entirely clear as to whether judges made inquiry into ICWA applicability; judges were also unlikely to make ICWA applicability findings on the record. Furthermore, notice was often not given to parties regarding the next hearing date and time. With regards to parties present, mothers and fathers were often at hearings; children and tribal representatives were less likely to be present at hearings. Parent attorneys were also likely to be present at hearings in the case. With regards to findings made on

the record in cases in which a child had been removed, judges were likely to make many findings on the record. Indeed, judges routinely made active efforts, as well as emotional/physical damage findings. With regards to placement and outcomes, children were most likely to be placed with a relative during the case and just over a quarter of children were reunified with the offending parent.