



## Active Efforts and The Futility Doctrine

by Judge Leonard Edwards (ret.)

Active efforts is a concept created by Congress with the passage of the Indian Child Welfare Act in 1978 (the ICWA).<sup>1</sup> It refers to the obligation of social workers to provide services and support for Native American families who come to the attention of child protection authorities because of suspected child neglect or abuse. The law states, in part, that the state must use active efforts to prevent removal of an Indian child from parental care and to reunite an Indian child with parents should that child be removed.<sup>2</sup> Active efforts has received significant attention in 2021. In *Brackeen v Haaland*,<sup>3</sup> the Fifth Circuit court, *en banc*, ruled that parts of the ICWA were constitutional and parts were unconstitutional.

The decision in the *Brackeen* case is very complex. Sixteen federal judges participated in the 325-page opinion. Neither of the principal opinions garnered a majority on all issues. A seven-page addendum summarizes the various positions taken by different judges, the issues they agreed on, and those that they reversed. The justices agreed that three provisions in the ICWA are unconstitutional: active efforts, (§ 1912(d)), expert witness, (§1912(e)), and recordkeeping requirements (§1915(e)). Several of the participating parties have already filed petitions in the United States Supreme Court to accept review of the case. Whether the Supreme Court will hear the appeal remains to be seen.

Until 2021, few state supreme courts have addressed the active efforts issue.<sup>4</sup> In 2021, state supreme courts in South Dakota and Washington issued opinions on the active efforts issue. Both decisions emphasized the importance of the active efforts mandate contained in the ICWA. In South Dakota, in *People in the Interest of C.H.*,<sup>5</sup> C.H., an Indian child, was removed from her home due to allegations of substance abuse and hazardous conditions in the home. At the end of 2019, the Department announced that it would seek to terminate the mother's

1 See 25 C.F.R. § 2.23 for the federal definition of active efforts.

2 25 U.S.C. 1912(d).

3 994 F.3d 249 (2021)

4 For a review of appellate caselaw addressing active efforts, see Edwards, L., "Defining Active Efforts in the Indian Child Welfare Act," *The Guardian*, Jan/Feb 2019, at pp 1-8.

5 962 N.W.2d 632, 2021 S.D. 41 (2021).



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## QUESTIONS JUDGES AND ATTORNEYS SHOULD ASK SOCIAL WORKERS ABOUT ACTIVE EFFORTS

1. What steps did you take to determine whether the child is an Indian child within the meaning of the Indian Child Welfare Act?
2. When did you meet each of the biological parents?
3. If a parent was missing, what steps did you take to locate them?
4. What tribe(s) are the parents connected to?
5. What is their status regarding their tribe? Are they members of their tribe?
6. What do you know about the parents' tribal culture?
7. Have you met with the Tribal Representative?
8. What is their name?
9. Is the child eligible for membership?
10. Have you discussed tribal culture with any other members of the tribe?
11. What steps have you taken to create a case plan for each parent?
12. Was each parent present when you created that plan?
13. What steps did you take to develop the services that are a part of the case plan for each parent?

parental rights, due to a lack of progress in treatment services. The Department also stated that they would give the mother several months to show that she could be successful. The court issued seemingly inconsistent orders: that “reasonable and active efforts will be made to reunite the family” and that “no further efforts be made by the Department of Social Services to reunite [C.H.] with” the mother or father.<sup>6</sup>

After this hearing it is undisputed that the Department made no further efforts to reunify the mother and C.H. The termination of parental rights hearing took place in December of 2020. The court terminated the mother’s parental rights and found, beyond a reasonable doubt, that the State “made reasonable and active efforts to provide remedial services designed to prevent the breakup of the family and those rehabilitative programs have been unsuccessful.”<sup>7</sup>

The South Dakota Supreme Court reversed the trial court’s findings. It found that the state did not prove beyond a reasonable doubt that active efforts had been provided.<sup>8</sup> The court found that the record was clear that the Department ceased providing any efforts towards reunification after the December 2019 hearing.<sup>9</sup> The Supreme Court noted that the Department cannot simply give a parent a case plan and wait for the parent to complete the plan. “Rather, active efforts require that DSS take the parent through the steps of the case plan to prepare the parent for reunification.”<sup>10</sup> The Supreme Court returned the case to the trial court for further proceedings consistent with South Dakota law and ordered the trial court to appoint an attorney for the child.<sup>11</sup>

The Washington Supreme Court also addressed the active efforts issue in the case of *In the Matter of the Dependency of G.J.A., A.R.A., S.S.A., J.J.A., and V.A.*<sup>12</sup> In this case, five children (confirmed to be Indian children for the purposes of the ICWA and the WICWA) were removed from their mother. At the dispositional hearing, the court ordered the Department to provide services to the mother, including a parenting assessment, family therapy, a chemical dependency assessment, mental health treatment, pain management, and domestic violence services. The court also ordered the Department to provide visitation and establish a visitation schedule.<sup>13</sup>

Throughout the reunification period, there were communication difficulties between the social worker and the mother. The mother requested a referral to a detox facility, which the social worker did not provide — and the worker also declined to drive the mother to

<sup>6</sup> *Id.* at 636.

<sup>7</sup> *Id.* at 639.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 640; see also 25 C.F.R. § 23.2, which parallels what the Supreme Court wrote.

<sup>11</sup> *People in the Interest of C.H.*, 962 N.W.2d 632 at 643.

<sup>12</sup> 197 Wash.2d 868, 489 P.3d 631 (2021).

<sup>13</sup> *Id.* at 876-877.

14. Did you actively connect the parents with the substantive services identified in the case plan?
15. Have you documented the active efforts you have provided?
16. Have you determined what the prevailing social and cultural conditions and way of life of the Indian child's Tribe are?
17. Will the case plan include a partnership with the Indian child, the parents, extended family members, Indian custodians, and Tribe?
18. Have you conducted a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal?
19. What services have you identified that will help the parents overcome barriers they may face?
20. Have you actively assisted the parents in obtaining such services?
21. Have you identified, notified, and invited representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family?
22. Have you held a family team meeting?
23. Who participated in that meeting?

the facility. The mother admitted herself to the hospital, completed a detox program, and entered a sober living facility, which she had to leave because of the cost of rent.<sup>14</sup>

The social worker submitted a referral for family therapy four months after she first communicated with the mother. The therapist did not meet with the children, said he was not a specialist, would only meet with the mother and one child at a time, and had no experience working with Native American clients.<sup>15</sup> The social worker also requested that any visitation be therapeutic.<sup>16</sup>

The mother submitted a declaration to the court that the Department had not provided active efforts. The trial court found that the Department had provided active efforts. The trial court also accepted the Futility Doctrine — that even if the services had been delivered in a timely fashion, the mother would not have been able to be successful in her reunification efforts.<sup>17</sup>

The Washington Supreme Court reversed the trial court's findings. It pointed out that the ICWA and the WICWA provide a number of heightened protections for Indian families.<sup>18</sup> These include, at a minimum, culturally appropriate engagement with the Indian family and deference to the tribe at each step of the dependency process.<sup>19</sup>

The court noted that active efforts must be “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family” and consistent and culturally appropriate.<sup>20</sup> The court noted that “the Department cannot simply provide a referral and leave the parent to engage with providers and complete services on their own.”<sup>21</sup>

The Washington Supreme Court held that the Department failed to provide active efforts. “The Department did little more than provide referrals for court-ordered services, and even then, the referrals were untimely and inadequate...Yet, the Department did not make any referrals for visitations and prevented [the mother] from seeing her children for over five months.”<sup>22</sup>

Even though the trial court recognized that there were communication problems and suggested that the Department provide the mother with a cell phone, the Department took no steps to do so.<sup>23</sup> The Washington Supreme Court also stated that the trial court did not fulfill its responsibility and stated that “the abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life.”<sup>24</sup>

14 *Id.* at 880.

15 *Id.*

16 *Id.* at 878-879.

17 *Id.* at 883-884.

18 *Id.* at 887.

19 *Id.*; see also 25 C.F.R. § 23.2.

20 *In re G.J.A.*, 197 Wash.2d 868 at 875; see also 25 C.F.R. § 23.2.

21 *In re G.J.A.*, 197 Wash.2d 868 at 891-892.

22 *Id.* at 894.

23 *Id.* at 898.

24 *Id.* at 902 (quoting H.R. REP. NO. 95-1386, at 11 (1978)).

24. Have you consulted with the parents and tribal members on the resolution of placement issues?
25. Have you conducted or caused to be conducted a diligent search for the Indian child's extended family members?
26. Did this search include Family Finding?
27. Have you contacted and consulted with extended family members to provide family structure and support for the Indian child and the Indian child's parents?
28. Have you offered and employed all available and culturally appropriate family preservation strategies and facilitated the use of remedial and rehabilitative services provided by the child's tribe?
29. Have you taken steps to keep siblings together?
30. Have you set up regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits for the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child?

The Washington Supreme Court ruled that the Futility Doctrine is inapplicable to child welfare cases involving Indian children.<sup>25</sup> The Futility Doctrine provides that even if the Department had provided timely and effective services, the mother would not have successfully been able to provide a safe home for her child. The Washington Supreme Court noted, however, that the law states that in all cases involving Indian families, the Department “shall satisfy the court that *active efforts* have been made...and that these efforts *have proved unsuccessful*.”<sup>26</sup> The court added that the Futility Doctrine is speculative, and such speculation is not permitted under the plain language of the ICWA and the WICWA.<sup>27</sup> At the outset of many dependency cases the parents appear to be unable to rehabilitate and provide a safe home for their child. But the law is clear that as hopeless as the situation may appear, the parents are entitled to participate in reunification efforts.<sup>28</sup>

The Washington Supreme Court concluded that the dependency trial court failed its responsibility under the ICWA and the WICWA. When the trial court stated it “is not the court’s role” to “critique how social workers could do better in every case,” the Washington Supreme Court replied: “That is incorrect. It is precisely the court’s role to assess whether the Department meets its burden to provide active efforts.”<sup>29</sup>

The Washington Supreme Court reversed the dependency court’s finding that the Department provided active efforts and remanded the case to the trial court with instructions to order the Department to provide active efforts in accordance with the Supreme Court’s ruling. Also, it ordered the dependency court not to proceed to hear the termination petitions until the Department has provided active efforts.<sup>30</sup>

The two state supreme court cases have much in common. They stress the importance of social workers actively working with an Indian client. Each court points out that active efforts are not simply handing the client a series of referrals and leaving the client to figure out how to engage in the services on her own. Both supreme courts criticized the trial courts for not providing oversight of social worker actions. In the South Dakota case, the social worker stopped providing services and the trial court indicated there would be no further services and that the client was on her own.<sup>31</sup> In the Washington case, the social worker provided no

25 *Id.* at 903.

26 *Id.* (emphasis in original).

27 *Id.*

28 The author when sitting as a dependency judge often heard cases that many thought were ‘hopeless’, but that ended with successful reunification.

29 *In re G.J.A.*, 197 Wash.2d 868 at 908.

30 *Id.* at 913-914.

31 The South Dakota Supreme Court went further and discussed issues not raised in the appeal, stating that “there are glaring defects involving ICWA mandates in the underlying proceeding that we cannot ignore.” It wrote that an attorney should have been appointed for the child throughout the proceedings. Then the Court cited 25 U.S.C. § 1912(f), “[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, 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.” (emphasis in original). “Here, however, the ICWA expert called by the State opined only that continued custody could be “detrimental” to C.H., and like DSS, he was not basing his opinion on Mother’s current circumstances.” Finally, it wrote that termination of Mother’s parental rights was not the “least restrictive alternative commensurate with C.H.’s best interests.” *People in the Interest of C.H.*, 962 N.W.2d 632 at 641-42.

31. Have you identified community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisted the Indian child's parents, or, when appropriate, the child's family, in utilizing and accessing those resources?
32. Have you determined that the services outlined in the case plan are available and accessible immediately by the parents? For example, what substance abuse services are available for the parents that are available and accessible?
33. Have you had regular contact with the parents?
34. Have you monitored parental progress and participation in services?
35. Have you considered alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available?
36. Have you provided post-reunification services and monitoring?
37. Considering all of the services and supports offered by the social worker, would you conclude they were affirmative, active, thorough, and timely?

services for over five months. Yet the trial court adopted boilerplate language in its orders finding that active efforts had been provided. The Washington Supreme Court disagreed with that procedure, writing that “the dependency court must make a clear record of those efforts underlying such a finding.”<sup>32</sup>

These two cases provide important guidance for social workers dealing with Native American parents when the state files child welfare proceedings in dependency court. Active efforts is a critical part of the ICWA. Social workers must provide a heightened level of services and support to Native American families, and trial courts must hold social workers accountable for that level of services and support.

Parents' and children's attorneys should be prepared to ask the social worker questions about compliance with the ICWA and active efforts, in particular. Below are questions attorneys should consider asking social workers. Judges should also consider these questions to determine if the social worker has provided services consistent with the ICWA. Additionally, attorneys and judges should be aware of the detailed definition of active efforts written by Justice William Thorne (retired) and the lengthy description of the proper role of a social worker working with a Native American parent, both found in *Reasonable Efforts: A Judicial Perspective 2nd Edition*. ■

<sup>32</sup> *In re G.J.A.*, 197 Wash.2d 868 at 909 (citing 25 C.F.R. §23.120(b)).