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No. 50904-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Welfare of:

A.L.C

A Minor Child,

J.C. (father),
Appellant/Petitioner

Kitsap County Superior Court Cause No. 17-7-00074-4

The Honorable Judge William C. Houser

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by finding that the department “has made active efforts to provide services to the family.”
2. The trial court erred by adopting Finding of Fact No. 2.13, CP 82.
3. The trial court’s findings are inadequate under state and federal law to support its review hearing order.

ISSUE 1: Did the department fail to make “active efforts” to prevent the breakup of this Indian family, as required by the state and federal Indian Child Welfare Acts?

ISSUE 2: Did the trial court fail to make adequate findings to support its review hearing order continuing the child’s out-of-home placement?

ISSUE 3: Should the Court of Appeals reverse the trial court, direct the department to make “active efforts,” and retain jurisdiction over the case to monitor compliance with the state and federal Indian Child Welfare Acts?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. The department took custody of A.L.C. and her sister while they were visiting their mother and placed them in foster care.

J.C. and his daughter A.L.C. are enrolled members of the Samish Indian Nation. CP 11, 28, 29, 33, 41; RP 12. J.C. has been clean and sober since April 10th, 2010, before either child was born. CP 28, 41. He has confirmed his sobriety over the course of several years by providing clean urinalysis tests.¹ CP 41.

The mother of both girls is addicted to heroin and has had many failed attempts at sobriety. CP 3-6. She used drugs during her pregnancy in 2012, and A.L.C.'s sister tested positive for opiates at birth. CP 3. A.L.C. was born the following year. CP 4.

With the approval of the Department of Social and Health Services, J.C. has served as both girls' primary caretaker. CP40. He applied for TANF, enrolled the children in daycare, took them to doctor's appointments, and served as their full-time parent. CP 40.

In early 2017, the father suffered a debilitating bout of pneumonia. CP 40. He relied on their mother to help with the children; they were

¹ Although he does not expect to relapse, the father has a relapse prevention plan, which includes arrangements for the children should he become incapacitated. A copy of the relapse prevention plan may be found in N.F.W.'s file (cause number 50902-4-II). It was submitted as an attachment to the Motion for Discretionary Review. See Appendix, p. 104.

picked up during a visit with her and placed into foster care. CP 2, 6, 28, 40-41.

The father became homeless after the children's removal. CP 17, 28. The department filed a dependency petition, alleging that the children had no capable parent. CP 2, 6.²

The children were placed in separate foster homes in another county. CP 9-18, 33, 41-42. The father agreed to a dependency order, stipulating that he should not have allowed the children to visit their mother, and that he had become homeless after the children were removed. CP 28. He noted his need for help with housing services, a victim's support group (to help him establish appropriate boundaries with the mother), and parenting education. CP 28-29. The court established a "c" dependency³ and scheduled a separate disposition hearing. CP 29, 53.

2. At the first review hearing, J.C. asked the court to find that the department had failed to make "active efforts" toward reunification.

² The department apparently believed the parents were in a relationship at the time. CP 39. They were not, and had not been for years, except for a brief period when the mother was living in sober housing. CP 39. However, the two had attempted to parent cooperatively, even though they were not in a relationship. CP 39.

³ RCW 13.34.030(6)(c).

The court held its disposition hearing on May 1, 2017. CP 53-61. At the department's request, the court ordered the father to obtain a mental health assessment and a parenting assessment, and to participate in parenting classes and a codependency group for non-abusing spouses.⁴ CP 57-58, 66. Although no one alleged that J.C. had committed acts of domestic violence, the court also ordered a domestic violence assessment at the department's request.⁵ CP 57, 66.

The court's first review hearing was scheduled for mid-July; however, the department failed to file a timely court report. CP 53, 62, 74. As a result, the court's first review hearing was delayed.⁶ CP 62, 74, 68.

At the first dependency review hearing (held August 21, 2017), the court rejected the department's arguments regarding the father's progress and compliance. RP 5, 16. Instead, the judge found the father in full compliance with the service plan and held that he was making progress toward reunification. CP 82; RP 16.

The father asked the court to find that the department had not made "active efforts" toward reunification, as required under the Indian Child

⁴ J.C. was also required to submit to random UAs, all of which were negative. CP 66.

⁵ The department made no referral for the assessment for six weeks. CP 73, 68, 75-76; RP 10. When it finally made the referral, J.C. was found to have no need of domestic violence treatment. CP 68.

⁶ It was delayed a second time due to the tribe's unavailability.

Welfare Act. CP 69; RP 13. He pointed out that the children were removed on February 23, 2017, that the disposition order was entered on May 1st, and that the department had done little to provide services by the time of the August review hearing. CP 68-73.

The father had repeatedly contacted the social worker to request referrals.⁷ CP 68. The department did not always return his phone calls. CP 68. It did not set up a parenting assessment or refer the father for parenting classes, despite his expressed interest. CP 68-69. At the time of the review hearing, the department was still working on setting up the parenting assessment. RP 4.

It took the department more than six weeks after disposition to set up the domestic violence assessment;⁸ the father immediately completed the assessment and was found to have no need for domestic violence treatment. CP 68, 73, 75-76; RP 10, 12. Following the evaluation, the department referred the father for parenting education relating to domestic violence; however, the referral was so late that the father could not sign up for the next available class. Instead, he was forced to wait for the next session. RP 3-4.

⁷ Before the first review hearing, J.C. completed a mental health evaluation and entered counseling, which he found to be useful. CP 72. It is not clear that the department provided a referral or any assistance with this service.

⁸ Normally, the department seeks pre-approval before it asks the court to order an assessment. CP 69.

The department opposed the request for a negative finding on “active efforts.” RP 17. The department’s primary concern was that a finding of no active efforts could result in problems with federal funding. RP 17. According to the State, the department met its “active efforts” obligation simply by sending out referrals.⁹ RP 18.

The court found that the department had made “active efforts” toward reunification. CP 82; RP 21. J.C. sought discretionary review, which the Court of Appeals granted. CP 101-102; AP 1-11.

ARGUMENT

THE DEPARTMENT FAILED TO COMPLY WITH THE STATE AND FEDERAL INDIAN CHILD WELFARE ACTS.

J.C., the father, was the primary caretaker of A.L.C., an Indian child. He became homeless when A.L.C. and her sister were taken into state care during a visit with their mother. Since dependency was established, the department repeatedly delayed referring the father for his court-ordered services. The department has not helped the father search for appropriate housing, even though homelessness poses the primary barrier to reunification. Because the department has failed to provide

⁹ The department erroneously claimed to have provided a ferry pass and a drug and alcohol evaluation; these were apparently services it had previously provided the mother. CP 74. The State’s attorney also claimed that the social worker’s unsuccessful efforts to set up a class for the father amounted to active efforts. RP 17.

active efforts, the child must be returned to the father’s care. The Court of Appeals should reverse the finding of active efforts and retain the case and require the department to comply with the Indian Child Welfare Act.

A. The Court of Appeals should review this case *de novo*.

Whether a party has complied with a statute is a mixed question of law and fact. *Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 170 Wn.2d 495, 501, 242 P.3d 846 (2010) (addressing party’s substantial compliance with RCW 25.15.460). Such issues are reviewed *de novo*. *Id.*; *see also State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015) (addressing ineffective assistance claim).

Review is also *de novo* when a trial court decision relies exclusively on affidavits, declarations, and other documents. *Ameriquist Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 488, 300 P.3d 799 (2013).¹⁰ In such cases, the reviewing court stands “in the same position as the trial court.” *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

¹⁰ *See also, e.g., Smith v. Skagit Cy.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *Carlson v. City of Bellevue*, 73 Wn.2d 40, 435 P.2d 957 (1968); *Bishop v. Town of Houghton*, 69 Wn.2d 786, 420 P.2d 368 (1966).

This case presents a mixed question of law and fact. The trial court's decision was based on documentary evidence. Review is *de novo*. *Id.*; *Humphrey*; 170 Wn.2d at 501.

- B. The department failed to make “active efforts” to prevent the breakup of this Indian family.

The United States Congress has found “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies . . . [and] that the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” 25 U.S.C. §1901(4) and (5).

To respond to this crisis, Congress passed the Indian Child Welfare Act (ICWA), 25 U.S.C. §1901 *et seq.*, in part “to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families...” 25 U.S.C. §1902. Washington has enacted similar legislation. RCW 13.38.010 *et seq.*

Both the state and federal Indian Child Welfare Acts impose stringent requirements upon the department. 25 U.S.C. §1912(d); RCW 13.38.130. Among other things, the department must establish that it

provided “active efforts” to prevent the breakup of the family. 25 U.S.C. §1912(d); RCW 13.38.130(1).

Federal regulations give additional meaning to the requirement: the phrase ‘active efforts’ is defined to mean “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.” 25 C.F.R. §23.2. The supervising agency must assist the parents “through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.” 25 C.F.R. §23.2. Under Washington law, active efforts require more than “simply providing referrals” for services. RCW 13.38.040(1).

Active efforts must also be “tailored to the facts and circumstances of the case.” 25 C.F.R. §23.2.¹¹ The regulation gives numerous examples, many of which are applicable to this case. Among other things, it lists “Identifying community resources including housing... and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources.” 25 C.F.R. §23.2. Federal regulations also require that the department’s active efforts “be documented in detail in the record.” 25 C.F.R. §23.120(b).

¹¹ Furthermore, the department is directed to provide active efforts in a manner consistent with tribal culture, in partnership with the child, parent, extended family members, and tribe. 25 C.F.R. §23.2.

Here, the department failed to provide “active efforts,” and the court failed to document such efforts “in detail in the record.” 25 C.F.R. §23.120. As the State conceded, the department did little more than send out a late referral for the father’s domestic violence assessment. RP 17-18. In fact, at argument in the Court of Appeals, the department acknowledged it had taken no action to assist the father obtain housing. AP 10.

This is wholly inadequate under 25 U.S.C. §1912(d). The department also failed to meet the minimum requirements of Washington law. RCW 13.38.040(1); RCW 13.38.130(1).

Furthermore, active efforts must be “timely.” 25 C.F.R. §23.2. The department’s untimely efforts do not qualify as “active efforts.”

Because homelessness poses the primary barrier to reunification, the department should have identified housing resources and “actively assist[ed]” the father in accessing those resources. 25 CFR §23.2. It failed to do so. RP 17-18. Nor is there any evidence that the department considered “alternative ways to address [the father’s homelessness] if the optimum services do not exist or are not available.” 25 C.F.R. §23.2. As Commissioner Bears put it, “[T]here is no evidence in the record to demonstrate that the Department identified housing resources for J.C. and actively assisted him in utilizing and accessing housing services.” AP 10.

The department has failed to meet its obligation in other ways as well. There is no indication that it undertook any of the actions outlined in the federal regulations. 25 C.F.R. §23.2.

Nothing suggests it conducted a comprehensive assessment of the family's needs or made any effort to help the father overcome barriers or obtain services. 25 C.F.R. §23.2. It did not seek to identify or invite tribal representatives to participate in providing support and services. Nor did the department conduct a diligent search for extended family members, or offer all available culturally appropriate family preservation strategies, including services available through the tribe. 25 C.F.R. §23.2.

Nothing suggests that the department took steps to keep the children together in foster care, or that it supported regular visits with J.C. in a natural setting. 25 C.F.R. §23.2. In fact, the record shows the opposite. CP 9-18, 41; Court Report (ISSP) p. 2, filed 4/26/17, Supp. CP; RP 15.

The department's minimal efforts toward reunification are completely inadequate. Because of this, the court's "active efforts" finding must be vacated.

In addition, the court's findings are inadequate to sustain a foster care placement.¹² As noted above, the court must document the department's efforts "in detail in the record." 25 C.F.R. §23.120.

The court's "active efforts" finding is also deficient because it does not address the statutory elements. Language in both the federal and state statutes require the court to find that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. §1912(d); RCW 13.38.130(1).

The court's finding is a boilerplate finding in which the word "reasonable" has been interlineated and replaced with the word "active." CP 82. It does not mention "remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. §1912(d); RCW 13.38.130(1). Nor did the court find "that these efforts have proved unsuccessful." 25 U.S.C. §1912(d); RCW 13.38.130(1).

The department has failed to comply with the requirements of the state and federal Indian Child Welfare Acts. The Court of Appeals should vacate the trial court's "active efforts" finding and order the department to

¹² In addition to its other failures, it appears the department has never presented the testimony of an expert witness as required under RCW 13.38.130(2) and 25 U.S.C. §1912(e).

engage in active efforts to reunify this Indian family. *See Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 383 P.3d 492 (2016).

- C. The Court of Appeals should retain jurisdiction and monitor the department's compliance.

The Court of Appeals may take "any... action as the merits of the case and the interest of justice may require." RAP 12.2. In this case, the department's ongoing failure to provide active efforts and the trial court's failure to recognize this failure require more than a simple remand order.

Rather than issuing a decision terminating review, the court should retain the case to ensure that the department complies with its obligation to provide active efforts. *See, e.g. In re Welfare of R.S.G.*, 172 Wn. App. 230, 255, 289 P.3d 708 (2012). It should set a deadline for full compliance and direct the trial court to hold additional hearings on the issue of active efforts. In Commissioner Bearse's ruling, she noted that "Further proceedings in this dependency are useless if the Department is not fulfilling its duties under ICWA and WICWA." AP 10.

The Court of Appeals should also order the parties to supplement the record as necessary to enable review of the department's efforts. *Id.*; 25 U.S.C. §1912(d); RCW 13.38.040(1); RCW 13.38.130(1).

CONCLUSION

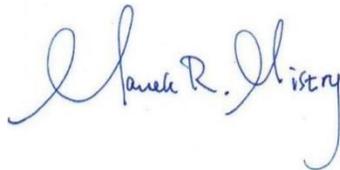
For the foregoing reasons, the Court of Appeals should reverse the trial court's active efforts finding. The court should direct the department to provide active efforts and retain the case to monitor the department's compliance with the law.

Respectfully submitted on July 9, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jerald Christiansen (address confidential)

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 9, 2018.



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Attorney for the Appellant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN THE MATTER OF THE
WELFARE OF:

A.L.C.,

A minor child.

No. 50904-1-II

RULING GRANTING MOTION
FOR DISCRETIONARY
REVIEW

J.C. is the father of A.L.C., a girl born in July 2013.¹ The juvenile court found that A.L.C. is a dependent child and concluded that under the federal and state Indian Child Welfare Acts, the Department of Children, Youth and Families (Department) made active efforts to provide remedial services to prevent the breakup of an Indian family. J.C. moves for discretionary review, arguing that the juvenile court erred in concluding that the Department made active efforts. RAP 2.3(b)(1) and (2). This court grants review.

¹ S.K. and J.C. are the parents of A.L.C. J.C. and A.L.C. are members of the Samish Indian Nation. The tribe is participating in A.L.C.'s dependency.

FACTS

Background

S.K., the mother, has used methamphetamine intermittently since 2008. She also used heroin daily for at least two years before the birth of N.F.W.,² in May 2012. After N.F.W.'s birth, the Department filed a dependency petition. S.K. relapsed and continued to use heroin, although in October 2012, the court found her to be partial compliance and making minimal progress.

S.K. gave birth to A.L.C. in July 2013. She relapsed three times during the pregnancy. A few days after birth, the Department filed a dependency petition as to A.L.C. However, S.K. and J.C. participated in drug treatment, and the Department dismissed the dependencies for both children in May 2014.

In August 2015, A.L.C. and N.F.W. arrived at daycare not wearing underwear. The daycare staff also reported to Child Protective Services (CPS) that the children appeared dirty and often smelled of urine. In November 2015, J.C. reported to the Department that S.K. relapsed on heroin and stopped going to her methadone treatment clinic.

In response, the Department placed both children with J.C. and encouraged him to gain third party custody of N.F.W. J.C., however, did not have the financial ability to

² A.L.C. and N.F.W. are half-sisters. S.K. is the mother of both children. J.C. is not the father of N.F.W. At the same review hearing of August 21, 2017, in which the juvenile court entered its here-challenged active efforts determination with respect to A.L.C.'s dependency, the court also denied J.C.'s motion to intervene in N.F.W.'s dependency to establish a de facto parent-child relationship. He moved for discretionary review of this decision, as well as the active efforts determination. The motions were linked and briefed together. This court unlinks the matters and will issue a separate ruling on the discretionary review motion involving N.F.W. See COA No. 50902-9-II.

pay an attorney to petition for custody of N.F.W. Instead, S.K. gave J.C. power of attorney to act as N.F.W.'s parent. As caregiver to the two children, J.C. applied for food stamps, enrolled the children in daycare, and took them to doctors' appointments.

J.C. provided the Department with multiple clean urinalysis tests over the course of the initial dependencies. He has been clean and sober since April 10, 2010. He has a relapse prevention plan in place, which contains arrangements for the care of the girls should he return to using drugs.

On February 23, 2017, law enforcement removed the children from their home and placed both children into protective custody. At that time, the family was homeless and sometimes lived in a garage full of bags of garbage, debris, moldy food, and hypodermic needles. A bucket used for urination sat next to the kitchen area. J.C. reported that in early 2017, he contracted pneumonia and this affected his ability to parent. He agreed that "[o]ver time [the garage] developed into an inappropriate place for kids." Mot. for Disc. Rev., Appendix at 286. J.C. told the court that the garage had running water, but no indoor bathroom. He also stated he had no knowledge that S.K.'s hypodermic needles were in plain view.

Dependency Fact Finding

On April 17, 2017, the juvenile court entered an agreed order of dependency as to J.C. and A.L.C. S.K. also agreed to the dependency of both A.L.C. and N.F.W. J.C. conceded that he should not have allowed visitation with S.K. and A.L.C. at the garage, but he denied that A.L.C. was living there full time. J.C. admitted that he did not have a

safe home for A.L.C.³ He acknowledged that he “needs help in re-building an appropriate home for [A.L.C.] including: housing services.” Mot. for Disc. Rev., Appendix at 262.

He also agreed to parenting education and counseling to “aid him in establishing appropriate boundaries with [S.K.,] which allow for a safe relationship for mother and daughter.” Mot. for Disc. Rev., Appendix at 262-63. The court ordered J.C. to do a mental health intake and follow all subsequent recommendations; participate in a co-dependency group; complete a domestic violence assessment and follow all subsequent recommendations; submit urinalysis tests when requested by the Department; and participate in a parenting assessment and parenting classes. J.C. also had to “provide a safe and stable home environment.” Mot. for Disc. Rev., Appendix at 199.

J.C. completed an intake at Kitsap Mental Health and met with a counselor “several times” before August 2017. Mot. for Disc. Rev., Appendix at 317. The Department referred J.C. for a domestic violence assessment six weeks after the court ordered it. As soon as J.C. received the referral, he scheduled an appointment and completed his assessment on July 21, 2017.

This assessment recommended a domestic violence parenting class. After a delay of several weeks, the Department referred J.C. for the class, but the class had not started as of an August 21, 2017 review hearing. Also, as of August 21st, the Department had not referred J.C. for a parenting assessment or any parenting class. But it was in communication with J.C.’s attorney about the most appropriate provider for this

³ The dependency petition stated that J.C. was “homeless” and “would spend 3-4 days a week in a garage.” Mot. for Disc. Rev., Appendix at 223.

assessment. The Department invited the parents to staffing meetings to discuss the family's needs. The Department actively sought out information from local tribes to confirm N.F.W.'s tribal ancestry.

As of the August review hearing, a new social worker, K. Lynnscoff,⁴ mentioned that J.C. was "looking for housing and that he's currently living . . . at the shop again." Report of Proceedings (RP) Aug. 21, 2017 at 4 (by "shop," it appears the parties meant the garage). The Court Appointed Special Advocate (CASA), Stephenie Hooker, said that J.C. "is not able to kind of get out from underneath that [living] situation." RP Aug. 21, 2017 at 9. J.C.'s counsel stated that he was "homeless" and was trying to locate better housing, but was still living in his "shop." RP Aug. 21, 2017 at 13-14. She added, "[h]e is working as best he can to navigate a very broken system." RP Aug. 21, 2017 at 15.

At the hearing, J.C. raised the issue whether the Department was making active efforts under the state and federal Indian Child Welfare Acts to reunite him with A.L.C. 25 U.S.C. § 1912(d) (ICWA); RCW 13.38.130(1) (WICWA). The juvenile court found that the Department was making active efforts to reunite the family. The court also ruled that J.C. was in full compliance and making progress towards reunification.

ANALYSIS

Washington strongly disfavors interlocutory review, and it is available only "in those rare instances where the alleged error is reasonably certain and its impact on the trial

⁴ The August 21st hearing transcript does not contain the social worker's first name. This court located a first initial for Lynnscoff in the Clerk's Papers.

manifest.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, *review denied*, 169 Wn.2d 1029 (2010); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789, *remanded*, 146 Wn.2d 370 (2002), *cert. denied sub nom., Gain v. Washington*, 540 U.S. 1149 (2004). This court may grant discretionary review only when:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). J.C. seeks review of the active efforts determination under RAP 2.3(b)(1) and (2).

Parents have a fundamental liberty interest in the care and welfare of minor children. *In re Dependency of Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007). The State also has an interest in protecting the physical, mental, and emotional health of children. *Schermer*, 161 Wn.2d at 941. “It is well established that when a child’s physical or mental health is seriously jeopardized by parental deficiencies, ‘the State has a *parens patriae* right and responsibility to intervene to protect the child.’” *Schermer*, 161 Wn.2d at 941 (quoting *In re the Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)). “When the rights of basic nurture, physical and mental health, and safety of the child and

the legal rights of the parents are in conflict, the rights and safety of the child should prevail." RCW 13.34.020.

Because a dependency serves the important function of allowing state intervention in order to remedy family problems and provide needed services, it retains a relatively lenient preponderance standard. *Schermer*, 161 Wn.2d at 942; RCW 13.34.110. This court accordingly reviews an order of dependency to determine whether substantial evidence supports the juvenile court's findings of fact and the findings support the conclusions of law. *In re Dependency of M.P.*, 76 Wn. App. 87, 90, 882 P.2d 1180 (1994), *review denied*, 126 Wn.2d 1012 (1995). Substantial evidence exists if, when viewing the evidence in the light most favorable to the prevailing party, a rational trier of fact could find the fact more likely than not to be true. *M.P.*, 76 Wn. App. at 90-91; *In re Dependency of C.B.*, 61 Wn. App. 280, 285-86, 810 P.3d 418 (1991). This court does not weigh the evidence or assess witness credibility. *In re the Welfare of Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973).

Active Efforts

J.C. argues that the review hearing order must be reversed because the juvenile court failed to comply with ICWA and WICWA requirements that the Department make active efforts to provide remedial services designed to prevent the breakup of the family prior to removal of A.L.C.

ICWA provides:

(d) Remedial services and rehabilitative programs; preventative measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court

that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d) (boldface theirs). Similarly, WICWA provides:

(1) A party seeking to effect an involuntary foster care placement of or the involuntary termination of parental rights to an Indian child shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

RCW 13.38.130(1). ICWA regulations define "active efforts" as follows:

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 and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

- (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
- (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- (9) Monitoring progress and participation in services;
- (10) Considering 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;
- (11) Providing post-reunification services and monitoring.

25 C.F.R. § 23.2 (italics and boldface added). WICWA defines "[a]ctive efforts" as:

- (1) "Active efforts" means the following:
 - (a) In any foster care placement or termination of parental rights proceeding of an Indian child under chapter 13.34 RCW and this chapter where the department or a supervising agency as defined in RCW 74.13.020 has a statutory or contractual duty to provide services to, or procure services for, the parent or parents or Indian custodian, or is providing services to a parent or parents or Indian custodian pursuant to a disposition order entered pursuant to RCW 13.34.130, the department or supervising agency shall make **timely** and **diligent** efforts to provide or procure such services, including **engaging the parent** or parents or Indian custodian in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services. This shall include those services offered by tribes and Indian organizations whenever possible. At a minimum "active efforts" shall include:
 - (i) In any dependency proceeding under chapter 13.34 RCW seeking out-of-home placement of an Indian child in which the department or supervising agency provided voluntary services to the parent, parents, or Indian custodian prior to filing the dependency petition, a showing to the court that the department or supervising agency social workers actively worked with the parent, parents, or Indian custodian to engage them in remedial services and rehabilitation programs to prevent the breakup of the family beyond simply providing referrals to such services.
 - (b) In any foster care placement or termination of parental rights proceeding in which the petitioner does not otherwise have a statutory or contractual duty to directly provide services to, or procure services for, the parent or Indian custodian, "active efforts" means a documented, concerted, and good faith effort to facilitate the parent's or Indian custodian's receipt of

and engagement in services capable of meeting the criteria set out in (a) of this subsection.

RCW 13.38.040 (*italics and boldface added*).

This court concludes that there is no evidence in the record to demonstrate that the Department identified housing resources for J.C. and actively assisted him in utilizing and accessing housing services. 25 C.F.R. § 23.2(8). A primary cause of A.L.C.'s removal from J.C.'s care and custody was the family's subpar living conditions. He stated he needed housing assistance in his agreed dependency order. The juvenile court required J.C. to acquire safe and stable housing. But at the August 21, 2017 review hearing, J.C. was still living in the "shop" and was essentially "homeless."

In its response to J.C.'s motion for discretionary review, the Department does not address J.C.'s argument that it made no active efforts with respect to housing services. Mot. for Disc. Rev. at 23-24 ("Perhaps most important, given the father's homelessness, there is no indication that the department made any effort" to assist him in accessing housing resources). At oral argument, the Department acknowledged it had not expended any efforts with respect to J.C.'s homelessness. Rather, it explained that it does not look into housing resources until reunification is imminent.

In light of this record, this court determines that review of the active efforts determination is appropriate. See generally *Matter of Dependency of K.S.*, No. 75169-7-I, 2017 WL 2634788, at *9, 199 Wn. App. 1034 (2017) (detailing Department's active efforts to provide housing resources); RAP 2.3(b)(1) and (2). Further proceedings in this dependency are useless if the Department is not fulfilling its duties under ICWA and WICWA. RAP 2.3(b)(1). Similarly, the father's freedom to act is limited if he is not being

provided with ICWA and WICWA-mandated supports in his dependency. RAP 2.3(b)(2).

Accordingly, it is hereby

ORDERED that J.C.'s motion for discretionary review of the juvenile court's active efforts determination in A.L.C.'s dependency is granted.

DATED this 9th day of March, 2018.



Aurora R. Bearse
Court Commissioner

cc: Jodi R. Backlund
Manek R. Mistry
Bryan W. Russell
Hon. William C. Houser

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