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No. 50904-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In Re the Welfare of:

**A.L.C**

A Minor Child,

**J.C. (father),**  
Appellant/Petitioner

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

The Honorable Judge William C. Houser

**Appellant's Reply Brief**

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## ARGUMENT

### **I. RESPONDENT’S BRIEF CONFIRMS THAT THE DEPARTMENT FAILED TO MAKE “ACTIVE EFFORTS.”**

Under the Indian Child Welfare Act, the department must make “active efforts” to prevent the breakup of an Indian family. 25 U.S.C. §1912(d); RCW 13.38.130(1). Such efforts must be “affirmative, active, thorough, and timely.” 25 C.F.R. §23.2.

The court must document the department’s active efforts “in detail in the record.” 25 C.F.R. §23.120(b). The court failed to do so in this case, and Respondent does not claim otherwise. CP 82; *see* Brief of Respondent, pp. 9-13. This failure may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009).

To meet its obligations, the department must help 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. It must do more than “simply providing referrals” for services. RCW 13.38.040(1).

Here, the trial court made no findings showing that the department did more than simply provide referrals. CP 82. This must be held against the department: “[t]he absence of a finding of fact on an issue is ‘presumptively a negative finding against the [party] with the burden of proof.’” *Morgan v. Briney*, 200 Wn. App. 380, 390–91, 403 P.3d 86, 93

(2017), *review denied*, 190 Wn.2d 1023, 418 P.3d 787 (2018) (quoting *Taplett v. Khela*, 60 Wn.App. 751, 759, 807 P.2d 885 (1991)).

Under the Indian Child Welfare Act, the department's efforts must be consistent with tribal culture and must be undertaken in partnership with extended family members and the tribe. 25 C.F.R. §23.2. There is no indication that the department made any effort to contact or partner with extended family members, and the court made no finding on the subject. CP 82.

As for partnering with the tribe, contrary to the department's assertion, the department should not be credited with "involve[ing] the Samish Indian Nation in A.L.C.'s dependency from the outset... as evidenced by its representative's presence at shelter care and each subsequent hearing." Brief of Respondent, p. 10.

It appears that the department did no more than provide the obligatory notice mandated by 25 U.S.C. §1912. There is no indication that the social worker or other department representatives had any meaningful contact with members of the tribe outside of the courtroom. The trial court did not make any finding on the subject, and Respondent does not point to any facts in the record showing that it partnered with the tribe. Brief of Respondent, p. 11.

When housing is an issue, the department must<sup>1</sup> identify community housing resources and actively assist the parent “in utilizing and accessing those resources.” 25 C.F.R. §23.2. Here, housing was unquestionably an issue.

From the outset, the father identified housing as a significant barrier to reunification. CP 28-29. In his stipulation to dependency status, he indicated that he “has become homeless and he no longer has a safe home to provide for his daughter.” CP 28. He indicated that he needed “help in re-building an appropriate home for [his daughter] including: housing services.” CP 28. He based his dependency stipulation on a likelihood that the trial judge would find his daughter dependent due in part to “lack of suitable housing.” CP 29.

At oral argument on the father’s Motion for Discretionary Review, the department conceded that 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. Ruling Granting Review, p. 10.

In her Ruling Granting Review, the commissioner noted that “there is no evidence in the record to demonstrate that the Department identified

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<sup>1</sup> Even if they are not comprehensive, applicable examples outlined in the regulation should be viewed as the minimum steps necessary to qualify as active efforts.

housing resources for J.C. and actively assisted him in utilizing and accessing housing services.” Ruling Granting Review, p. 10.

Respondent concedes that J.C. told the social worker prior to the review hearing that “he’s still looking for housing.” Brief of Respondent, p. 5. According to Respondent, housing was not the department’s priority at that time. Brief of Respondent, p. 5.

Even according to the Respondent, the only effort made by the department was that it “discussed housing with J.C.” Brief of Respondent, p. 13. But a mere discussion of housing does not qualify as “active efforts” under any definition of that phrase.<sup>2</sup> *See* 25 C.F.R. §23.2.

The department also failed to timely provide the parenting assessment ordered by the court. CP 58. Four months after the father agreed to a dependency, the department had only “located a provider” for the parenting assessment and entered “discussions with [the father’s] attorney about whether or not we are moving forward with that local provider...” RP 4; CP 53. This hardly comports with the department’s obligation to provide “timely efforts;” instead, it unreasonably delayed a

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<sup>2</sup> Respondent suggests that the department was excused from providing active efforts on the issue of housing because the court failed to make findings pursuant to RCW 13.34.138(4), which authorizes the court to order the department to provide housing assistance. But the lack of findings and the statutory authority do not excuse the department from providing “active efforts” under the Indian Child Welfare Act. The department’s obligation is imposed by 25 U.S.C. §1912(d) and RCW 13.38.130(1). This obligation exists independent of the services ordered by the court.

“comprehensive assessment of the circumstances” and hampered the department’s ability to promptly “[i]dentify[ ] appropriate services and help[ ] the parents overcome barriers.” 25 C.F.R. §23.2(1) and (2).

Instead of outlining active efforts, Respondent faults the father for a “lack of communication.” Brief of Respondent, p. 15. But the obligation to communicate does not rest with an Indian child’s parent; instead, the department must maintain communication with the parent—even under difficult circumstances—as part of its duty to provide “affirmative, active, thorough, and timely efforts.” 25 C.F.R. §23.2.

Respondent also makes a misleading claim as part of its attempt to blame J.C. for the department’s failures. According to Respondent, the father ““did not attend”” a domestic violence course. Brief of Respondent, p. 12 (citing RP 4). This is deceptive for several reasons.

The department waited six weeks to refer J.C. for a domestic violence assessment. CP 68, 73, 75-76; RP 10. When it finally made the referral, J.C. immediately completed the assessment and was found to have no need of domestic violence treatment. CP 68, 73, 75-76; RP 10, 12.

Instead, the evaluation recommended parenting education. RP 3-4. The father had requested parenting education when he stipulated to dependency, months earlier. CP 28-29.

The department made the referral for parenting education so late that classes had already started. RP 3-4. Apparently, the program would have accepted him until the fourth week of the 12-week course. RP 4. However, the social worker did not claim to have told the father he could still be accepted into the course even after it had started.<sup>3</sup> RP 4.

Despite the department's intransigence, Respondent seeks to claim credit for the father's successful completion of the DV assessment and other services. Brief of Respondent, p. 10. This is unwarranted. As noted, the department delayed the father's participation in services. In addition, it is not clear that the department actually referred the father for counseling or helped him access that service through available community resources. *See* Brief of Respondent p. 10 (citing RP 7-8, 13).

Respondent's brief demonstrates that the department did not provide active efforts to prevent the breakup of this Indian family. Furthermore, the court did not document any such efforts "in detail in the record." 25 C.F.R. §23.120. Even further, the court's bare "active efforts" finding does not address the statutory elements required under state and federal law. The court made only a boilerplate finding in which the word "reasonable" has been interlineated and replaced with the word "active."

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<sup>3</sup> The State's argument in the trial court suggests that the father preferred not to enter the class four weeks after it started. RP 18.

CP 82. The finding 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 failed to comply with the Indian Child Welfare Act. The Court of Appeals should vacate the trial court’s “active efforts” finding and order the department to 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). The court should also retain jurisdiction to ensure future compliance with state and federal law. RAP 12.2; *see, e.g. In re Welfare of R.S.G.*, 172 Wn. App. 230, 255, 289 P.3d 708 (2012).

**II. THE COURT OF APPEALS SHOULD REVIEW THE CASE *DE NOVO*, REVERSE THE TRIAL COURT’S DECISION, AND RETAIN JURISDICTION.**

A. Review is *de novo*.

The boilerplate language adopted by the court regarding the department’s efforts does not address the statutory factors required by the Indian Child Welfare Act. CP 82; *see* 25 U.S.C. §1912(d); RCW 13.38.130 (1). Because the court failed to undertake the required analysis, its “active efforts” finding is not entitled to deference. *T.A.W.*, 186 Wn.2d at 854 n. 16.

Furthermore, a party's compliance with a statute (such as ICWA) presents a mixed question of law and fact, subject to *de novo* review. *Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 170 Wn.2d 495, 501, 242 P.3d 846 (2010). This is especially true where the trial court's decision relies exclusively on documentary evidence. *Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 488, 300 P.3d 799 (2013); *see* Appellant's Opening Brief, pp. 7-8.

Finally, no one testified in this case. RP 2-41. Instead, the judge reviewed documentary evidence and allowed various parties to address the court. RP 2-41. These parties—including the attorneys-- were not under oath, and the father had no opportunity for cross-examination. RP 2-41. Given the absence of testimony under oath, subject to cross-examination, the trial court's assessments of "credibility" should not be accorded deference. *See* Brief of Respondent, pp. 8, 12, 16. The trial judge's decision is not "entitled to great deference on review" because the court did not "ha[ve] the witnesses before it." Brief of Respondent, p. 8 (quoting *In re Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002)).

The question on review is the legal sufficiency of the facts as found by the trial court to support its "active efforts" determination. Because the trial court failed to set forth the department's purportedly

active efforts “in detail in the record,”<sup>4</sup> there are no facts supporting the court’s determination. CP 82. Furthermore, even if the social worker’s assertions are taken at face value, they do not prove that the department made active efforts.

B. The Court of Appeals should retain jurisdiction to ensure compliance with ICWA.

The department failed to meet its obligations under the Indian Child Welfare Act, and the trial court failed to enforce the statute’s requirements. To ensure future compliance, the Court of Appeals should not simply remand the case with the understanding that the father may seek appellate review of subsequent violations.<sup>5</sup>

Instead, the Court of Appeals should exercise its authority under RAP 12.2. *See, e.g. R.S.G.*, 172 Wn. App. at 255. This does not mean that the appellate court “would supplant the juvenile court and turn this Court from one of error to fact-finder.” Brief of Respondent, p. 15.

Instead, as suggested in the father’s Opening Brief, the appellate Court should set a deadline for full compliance, direct the trial court to

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<sup>4</sup> 25 C.F.R. §23.120(b).

<sup>5</sup> In fact, the father has filed for discretionary review following the latest hearing. *See* Court of Appeals No. 52378-7.

hold periodic hearings, and order the parties to supplement the record as necessary.<sup>6</sup> *See* Appellant’s Opening Brief, p. 13. The trial court would retain responsibility for holding hearings, considering evidence, and finding facts.

If the Court of Appeals reverses but does not retain jurisdiction, the case will be delayed while the father overcomes the procedural hurdle posed by RAP 2.3(b). This will unnecessarily delay the case and deny the child permanency.

**CONCLUSION**

The Court of Appeals should reverse the trial court’s “active efforts” finding and retain the case to monitor compliance with the Indian Child Welfare Act.

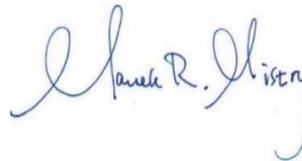
Respectfully submitted on September 28, 2018,

**BACKLUND AND MISTRY**



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<sup>6</sup> The father did not suggest that the Court of Appeals should be responsible for reviewing “court reports, declarations, and pleadings,” except as necessary to evaluate future orders entered by the trial court. *See* Brief of Respondent, p. 15.

## CERTIFICATE OF SERVICE

I certify that on today's date:

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

J.C. (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 Reply 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 September 28, 2018.



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## Transmittal Information

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