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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Welfare of

A.L.C.,

A Minor Child.

RESPONSE TO APPELLANT'S OPENING BRIEF,
DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUE.....1

III. STATEMENT OF THE CASE1

 A. The Department and Law Enforcement Intervened Repeatedly to Keep A.L.C. and Her Sister N.F.W. Safe.1

 B. The Department Made Active Efforts to Reunify J.C. and A.L.C.....3

IV. ARGUMENT7

 A. This Court Reviews a Finding of Active Efforts for Substantial Evidence.7

 B. Substantial Evidence Supports the Juvenile Court’s Finding that the Department Made Active Efforts During the Initial Review Period.9

 C. Were this Court to Rule that the Juvenile Court Erred, the Proper Remedy is to Reverse the Finding of Active Efforts and Remand to the Juvenile Court.....14

V. CONCLUSION16

TABLE OF AUTHORITIES

Cases

<i>In re Mahaney</i> , 146 Wn.2d 878, 51 P.3d 776 (2002).....	8, 12
<i>In re Welfare of A.G.</i> , 160 Wn. App. 841, 248 P.3d 611 (2011).....	14
<i>In re Dependency of Lee</i> , 200 Wn. App. 414, 404 P.3d 575 (2017).....	15
<i>Ir re Dependency of M.P.</i> , 76 Wn. App. 87, 882 P.2d 1180 (1994).....	7-8, 13
<i>In re Dependency of Roberts</i> , 46 Wn. App. 748, 732 P.2d 528 (1987).....	7-8
<i>In re Welfare of R.S.G.</i> , 172 Wn. App. 230, 289 P.3d 708 (2012).....	15

Federal

25 U.S.C. § 1903.....	3
25 U.S.C. § 1912.....	6, 9-10, 14
25 U.S.C. § 1920.....	14
25 C.F.R. § 23.2.....	9-13

State

RCW 13.34.136.....	5, 12
RCW 13.34.138.....	6, 12-13
RCW 13.34.145.....	5, 12
RCW 13.38.040.....	3, 9-10
RCW 13.38.130.....	9
RCW 13.38.160.....	14
RCW 13.38.190.....	9

I. INTRODUCTION

J.C. is father of A.L.C. He and A.L.C. are enrolled members in the Samish Indian Nation. The state and federal Indian Child Welfare Acts (ICWA) thus apply to the dependency of A.L.C.—requiring the Department¹ make active efforts for this Indian family. At the first dependency review hearing, 90 days into the dependency, the juvenile court found that the Department had made active efforts to reunify J.C. with A.L.C. Sufficient evidence supports that finding.

II. ISSUE

1. Whether substantial evidence supports the juvenile court's finding that the Department made active efforts to reunite J.C. with his daughter A.L.C. during the review period?

III. STATEMENT OF THE CASE

A. The Department and Law Enforcement Intervened Repeatedly To Keep A.L.C. and Her Sister N.F.W. Safe

S.K. is the mother and G.H. is the father to N.F.W., born in May 2012. CP 2. The mother used heroin daily for years, including while pregnant with N.F.W. CP 3. She disclosed that N.F.W.'s father, G.H., was abusive to her. *Id.* The Department filed a petition alleging N.F.W. to be dependent soon after her birth. CP 4. S.K. struggled to maintain sobriety

¹ On July 1, 2018, the Department of Children, Youth, and Families (DCYF) assumed all powers, duties, and functions of the Department of Social and Health Services pertaining to child welfare services. RCW 43.216.906; *see also* LAWS OF 2017, ch. 6.

during the ensuing dependency, while N.F.W.'s father failed to participate in the case. *Id.*

As of June 2013, the mother had relapsed three times while pregnant with A.L.C. CP 4. S.K. birthed A.L.C. in July 2013. *Id.* J.C. is the father of A.L.C. *Id.* The Department filed a dependency petition on A.L.C. *Id.* Both the mother and J.C. engaged in treatment for substance abuse. *Id.* Within a year, N.F.W. and A.L.C. had returned home, and their respective dependencies were dismissed in May 2014. CP 5.

In late 2015, however, the Department again intervened to protect N.F.W. and A.L.C. CP 5. The children's daycare reported that the girls arrived without underwear, were often dirty, and smelled of urine. *Id.* A substance abuse treatment provider reported a bag of dirty needles in the mother's home, and dangerous transients coming and going. *Id.* J.C. was not protecting his daughter A.L.C., nor N.F.W., from the mother's renewed addiction.

Nonetheless, working to prevent a second removal of these children from the mom, the Department looked to J.C. as a resource. CP 40. J.C. completed a urinalysis test at the Department's request, which was negative of all substances. CP 41. By November 2015, J.C. was caring for his daughter A.L.C., as well as N.F.W., tasked with keeping them safe from their heroin-abusing mother. CP 40-41. To solidify this safety plan, the

Department recommended J.C. pursue a parenting plan for A.L.C. and file for third party custody of N.F.W. CP 40. J.C. did neither; the safety plan did not work.

In February 2017, law enforcement took both N.F.W. and A.L.C. into protective custody. CP 6. In a garage, where J.C., S.K., N.F.W., and A.L.C. predominantly lived, law enforcement found excessive trash, spoiled bottles of milk, molded food, a urine and feces bucket near the kitchen area, and hypodermic needles throughout. *Id.* The mother admitted to heroin use that day; J.C. likewise admitted to using heroin, but would not say when. *Id.*

The Department therefore filed petitions alleging N.F.W. and A.L.C. as once again dependent. CP 1. Because J.C. and A.L.C. are enrolled members of Samish Indian Nation, the state and federal Indian Child Welfare Acts (ICWA) apply to A.L.C.'s dependency.²

B. The Department Made Active Efforts To Reunify J.C. and A.L.C.

J.C. subsequently agreed to dependency for his child A.L.C. CP 28. At the dispositional hearing, the juvenile court ordered J.C. to participate in: a mental health intake; urinalysis testing; a parenting assessment; and a

² RCW 13.38.040(7); 25 U.S.C. § 1903(4).

domestic violence assessment.³ CP 57-58. The Department referred and worked diligently to provide J.C. with his court ordered services. J.C. accessed mental health counseling, and established his sobriety through random urinalysis testing. RP 7, 21. The Department referred J.C. to a domestic violence assessment, which recommended that J.C. participate in a 12-week course. RP 4, 7. The Department communicated with J.C.'s attorney in an effort to determine an appropriate provider for J.C.'s parenting assessment. RP 4. In addition to services, the Department set up regular and consistent visitation for J.C. with his daughter A.L.C. RP 4; CP 82. The Department held staffings to discuss the family's needs and recommend services. CP 1, 135. The Department also involved the Samish Indian Nation in both staffings and court hearings on A.L.C.'s dependency. CP 10, 53, 77.

The Department successfully worked this case in spite of J.C.'s self-imposed barriers. J.C. could have begun his domestic violence course during the review period, "but he did not attend," opting for a later session. RP at 4. In her oral update to the juvenile court, social worker Kelly Linscott

³ While JC asserts no one alleged acts of domestic violence, Br. of Appellant at 4, both NFW and ALC disclosed witnessing JC be violent to the mother SK. Because this Court rejected JC's notice for discretionary review of the dispositional hearing and order as untimely, the adjudication of these facts and this issue are not before the Court.

described how J.C.'s lack of communication likewise impeded progress in the case:

[J.C.] states he's still looking for housing and that he's currently living, quote, at the shop again. He states that he's having difficulty maintaining a steady means of communication with the department because [the mother] still has access to his belongings, and she frequently takes his phone and his car keys, so I have expressed to [J.C.] that it's critically important that he maintain his lines of communication so that we can move forward with his services.

RP at 4-5. At the time of this update, it was more important that J.C. complete his domestic violence course and learn to be protective against the mother's substance abuse than him moving out of the shop.

In August 2017, at the initial review hearing, the juvenile court found that the Department had made active efforts to reunify J.C. with A.L.C. CP 82; RP 12-13, 21. Although J.C. was in compliance with services and making progress in addressing his own parental deficits, the court *did not find* that the conditions that had led to A.L.C.'s initial removal no longer existed such that A.L.C. could return to J.C.'s care (CP 80; *see* RCW 13.34.136(2)(a), RCW 13.34.145(8)(b)(i)); the court *did not find* that "the father's homelessness or lack of suitable housing is a significant factor delaying permanency for the child by preventing the return of the child to the home of the child's parent" (CP at 82; *see especially* RCW

13.34.138(4)); and the court *did not find* that “DSHS/Supervising Agency should provide housing assistance” (CP at 82).

The resulting court order is less than perfect, as it unartfully captures the hearings for N.F.W. and A.L.C. in a single order. For example, finding 2.1 that “[t]he child is not an Indian child” is correct as to N.F.W., but incorrect as to A.L.C. CP 77 (with both cause numbers). For A.L.C., the second and third boxes in section 2.1 of the order should be checked to indicate that A.L.C. is an Indian child and that the Department made active efforts as required under ICWA. CP 78. Instead, the court’s finding of active efforts for A.L.C.’s dependency is noted in section 2.13. CP 82.

J.C. faults this finding as “boilerplate” but also for not parroting 25 U.S.C. § 1912(d), “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.” Br. of Appellant at 12 (also quoting 25 U.S.C. § 1912(d)). The context and intent of juvenile court is clear, however. J.C. challenged active efforts at the hearing, the juvenile court weighed the evidence before it, and the juvenile court found active efforts.

This Court’s Commissioner granted J.C. interlocutory review of the juvenile court’s finding of active efforts. Ruling Granting Discretionary Review (Mar. 9, 2018).

IV. ARGUMENT

Sufficient evidence supports the juvenile court's finding of active efforts. This Court reviews that finding for substantial evidence, deferring to the juvenile court on issues of credibility and weighing evidence. Viewing the evidence in a light most favorable to the Department, as the prevailing party, sufficient evidence supports the juvenile court's finding of active efforts for the relatively short review period. Finally, even if this Court rules that the juvenile court erred, the proper remedy is to reverse the finding of active efforts and remand—not supplant the juvenile court's role as fact-finder.

A. This Court Reviews a Finding of Active Efforts for Substantial Evidence

“[T]he findings of the trial court will not be disturbed on appeal if they are supported by substantial evidence.” *In re Dependency of Roberts*, 46 Wn. App. 748, 752, 732 P.2d 528 (1987); *see also in re Dependency of M.P.*, 76 Wn. App. 87, 90, 882 P.2d 1180 (1994). 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.

J.C. asks this court to review the juvenile court's finding de novo as a mixed question of law and fact. Br. of Appellant at 7. But this is not the

standard. When an appeal touches on how ICWA interrelates with other statutory schemes, courts review that interrelation de novo as an issue of law. *In re Mahaney*, 146 Wn.2d 878, 886, 51 P.3d 776 (2002); see *Roberts*, 46 Wn. App. 748. Then, “if the court applied the correct standard, whether there is sufficient evidence to meet the standard must be determined.” *Mahaney*, 146 Wn.2d at 886. J.C. does not argue that the juvenile court applied an incorrect standard; rather, he argues the juvenile court relied exclusively on affidavits, declarations, and other documents. Br. of Appellant at 7. This argument belies the nature of proceedings in juvenile courts, locally seated, who know the availability of services and resources in their area and are uniquely qualified to assess the credibility of social workers that appear before them frequently—such as social worker Kelly Linscott’s oral update at the beginning of the hearing. As our Supreme Court commented in *Mahaney*: “[I]n custody and foster care proceedings concerning child welfare, the trial court is accorded broad discretion and is entitled to great deference on review. Such deference to the trial court, which has the witnesses before it, is especially important in child welfare cases.” 146 Wn.2d at 895 (citations omitted).

B. Substantial Evidence Supports the Juvenile Court's Finding That the Department Made Active Efforts During the Initial Review Period

J.C. appeals the juvenile court's finding from the dependency's initial review hearing that the Department made active efforts. This appeal fails, as sufficient evidence supports the juvenile court's finding that the Department made active efforts to provide him rehabilitative services and to reunite him with his child A.L.C.

In dependency cases, before ordering out-of-home placement of an Indian child, the juvenile court must find that the Department made active efforts to reunify the Indian family but these efforts were unsuccessful. RCW 13.38.130, .190. "Active efforts" requires the Department to "make timely and diligent efforts to provide or procure services, including engaging the parent . . . in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services." RCW 13.38.040(1)(a); 25 U.S.C. § 1912(d). The Department must do more than simply refer such services. RCW 13.38.040(1)(a)(ii). "Active efforts are to be tailored to the facts and circumstances of the case." 25 C.F.R. § 23.2. As long as the Department seeks to continue an out-of-home placement for the Indian child, its obligation for active efforts remains on-going. RCW 13.38.040(1)(a)(ii); 25 U.S.C. § 1912(d).

Here, substantial evidence supports the juvenile court's finding of active efforts. The Department referred to J.C. and he participated in a domestic violence assessment, which recommended a 12-week course. RP 7. The Department worked to connect J.C. with that course. RP 3-4. As for the parenting assessment, the Department communicated with J.C.'s attorney as to who would be the most appropriate provider. RP 4. This communication shows the Department's efforts to "provide or procure services, including engaging the parent . . . in reasonably available and culturally appropriate" services. RCW 13.38.040(1)(a). That J.C. was able to engage in counseling sessions (RP 7-8, 13), took sufficient urinalysis testing as to render continued testing unnecessary (RP 21), and completed his domestic violence assessment—all before the initial review hearing in the case—shows the Department's efforts were "affirmative, active, thorough, and timely." 25 C.F.R. § 23.2. A rational trier of fact could readily find the Department made active efforts.

J.C. faults the Department's efforts by relying on examples of "active efforts" in the federal regulations for ICWA. Br. of Appellant at 10-11 (citing 25 C.F.R. § 23.2). But contrary to J.C.'s assertion, the record shows the Department's efforts are consistent with the examples in 25 C.F.R. § 23.2. J.C. asserts the Department failed to conduct a comprehensive assessment of the family; this is the purpose of the

Department's 30 Day Staffing, however. CP 1, 135; *see* 25 C.F.R. § 23.2(1). J.C. asserts the Department did not identify or invite tribal representatives; but the Department involved 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. CP 10, 53, 77; *see* 25 C.F.R. § 23.2(3). J.C. asserts the Department has not offered culturally appropriate family preservation strategies, but the social worker coordinated with J.C. and his attorney in selecting providers. RP 3-4; *see* 25 C.F.R. § 23.2(5). J.C. asserts the Department has not arranged regular visitation, but the record shows J.C. consistently visiting his daughter A.L.C. RP 4; CP 59, 82; *see* 25 C.F.R. § 23.2(7). J.C.'s assertions only serve to highlight that the Department did not simply refer him to generic services but attempted to create a service plan to specifically serve the needs of this Indian child's family.

Active efforts do not guarantee success. As social worker Kelly Linscott described, J.C.'s lack of communication impeded progress in the case:

[J.C.] states he's still looking for housing and that he's currently living, quote, at the shop again. He states that he's having difficulty maintaining a steady means of communication with the department because [the mother] still has access to his belongings, and she frequently takes his phone and his car keys, so I have expressed to [J.C.] that it's critically important that he maintain his lines of

communication so that we can move forward with his services.

RP at 4-5. As an example, J.C. could have begun his domestic violence course during the review period, “but he did not attend.” RP at 4. The juvenile court’s credibility assessment of this update—of whether J.C.’s lack of communication or own choices hindered the Department’s efforts—is entitled to great deference, especially as it informs whether those efforts were sufficiently “timely” as to be found “active.” 25 C.F.R. § 23.2; *Mahaney*, 146 Wn.2d at 895.

J.C. points to housing and his homelessness as the critical issue at the initial review hearing, positing it as “the primary barrier to reunification.” Br. of Appellant at 10. This position defies the juvenile court’s review order: the juvenile court *did not find* that the conditions that had led to A.L.C.’s initial removal no longer existed such that A.L.C. could return to J.C.’s care (CP 80; *see* RCW 13.34.136(2)(a), RCW 13.34.145(8)(b)(i)); the juvenile court *did not find* that “the father’s homelessness or lack of suitable housing is a significant factor delaying permanency for the child by preventing the return of the child to the home of the child’s parent” (CP at 82; *see especially* RCW 13.34.138(4)); and the juvenile court *did not find* that “DSHS/Supervising Agency should provide housing assistance” (CP at 82). As such, this case did not meet the

preconditions for housing assistance as set forth in RCW 13.34.138(4). Instead, the critical issue at the initial review hearing remained J.C.'s domestic violence and inability to protect A.L.C. from her mother's substance abuse.

J.C.'s myopic focus on housing asks this Court to reweigh the juvenile court's finding of active efforts in violation of the standard of review. The relevant federal regulation lists 11 examples of how "active efforts" might play out in any given case. 25 C.F.R. § 23.2. The list is not exclusive, no factor is mandatory, and none is accorded greater weight than any other. Identifying housing resources is only *part* of factor (8), alongside identifying resources for "financial, transportation, mental health, substance abuse, and peer support." Social worker Linscott's update to the court shows that the Department discussed housing with J.C. RP 4-5. What weight to give that discussion in assessing the entire case plan and the Department's efforts as active falls squarely within the realm and responsibility of the juvenile court. Moreover, this Court views this evidence in the light that most favors upholding the trial court's finding. *M.P.*, 76 Wn. App. at 90-91.

Sufficient evidence supports the juvenile court's finding of active efforts.

C. Were This Court To Rule That the Juvenile Court Erred, the Proper Remedy Is To Reverse the Finding of Active Efforts and Remand To the Juvenile Court

J.C. notes that active efforts are a necessary condition to out-of-home placement of an Indian child. This is correct. 25 U.S.C. § 1912(d). However, if this Court reverses the finding of active efforts, the remedy is *not* to order A.L.C. immediately returned to J.C.’s care. Rather, the proper remedy is for this Court to remand to the juvenile court for a hearing under 25 U.S.C. § 1920 and RCW 13.38.160. In ICWA cases, where out-of-home placement is later ruled improper, a court shall immediately return the child to her parent unless doing so would subject the child to “substantial and immediate danger or threat of such danger.” 25 U.S.C. § 1920; RCW 13.38.160. The juvenile court is best equipped and situated to assess what danger or risk immediate return home might pose today.

As potential remedy, J.C. requests this Court to retain the case, presupposing “the department’s ongoing failure to provide active efforts and the trial court’s failure to recognize this failure.” Br. of Appellant at 13. But this supposition, against the Department and against the juvenile court, evades the scope of this appeal—which concerns only the sufficiency of evidence for an August 2017 finding of active efforts. When ruling that a finding lacks sufficient evidence, this Court reverses the finding and remands. *E.g., in re Welfare of A.G.*, 160 Wn. App. 841, 845, 248 P.3d 611

(2011); e.g., *in re Dependency of Lee*, 200 Wn. App. 414, 454, 404 P.3d 575 (2017).

J.C.'s proposed remedy for this Court to retain the case with regular supplementation of the record for ongoing interlocutory de novo review would supplant the juvenile court and turn this Court from one of error to fact-finder. Even in *R.S.G.*, which J.C. relies on, the parties were ordered to "supplement the record on appeal *with the trial court's order(s)*," not court reports, declarations, and pleadings. *In re Welfare of R.S.G.*, 172 Wn. App. 230, 234, 289 P.3d 708 (2012) (emphasis added). J.C. cannot cite any legal basis for this Court to supplant the juvenile court and become fact-finder in this case.

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V. CONCLUSION

This Court reviews the juvenile court's finding of active efforts for substantial evidence. Giving due deference to the juvenile court and viewing the evidence in a light most favorable to the Department, sufficient evidence supports the juvenile court's finding of active efforts for the initial review period. Even if this Court rules that the juvenile court erred, the proper remedy is to reverse the finding of active efforts and remand.

RESPECTFULLY SUBMITTED this 31 day of August, 2018.

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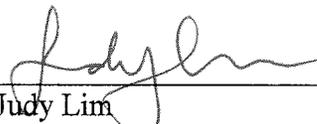
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I, Judy Lim, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On August 15, 2018, I caused a true and correct copy of the RESPONSE TO APPELLANT'S OPENING BRIEF to be filed electronically with the Court of Appeals, Division II, and to be served via email through the Court's electronic filing system to:

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SIGNED in Tacoma, Washington, this 7th day of September, 2018.



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