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NO. 36621-9-III
(Consolidated with 36622-7 and 36623-5)

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION THREE

In re the Dependency of

A.L.K., L.R.C.K-S., and D.B.C.K-S.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR DOUGLAS COUNTY

AMENDED REPLY BRIEF OF APPELLANT

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A. SUMMARY OF REPLY

Ms. L.K. has three children who were removed from her care in August 2018. The oldest child, A.L.K., has a different father from the younger two children. The Department did not sufficiently inform the trial court of its investigation into whether A.L.K. was an Indian child and the trial court did not make an adequate inquiry on this topic. Brief of Respondent at 13, 31. Further proceedings are necessary. *Id.* The parties disagree as to the correct remedy.

The younger two children are members of the Northern Arapaho Tribe. Brief of Respondent at 1. The trial court erred in finding sufficient active efforts had been made to reunite the children with their mother, where the Department relied on earlier voluntary services performed up to five years previously. RP 402-04; CP 141, 152;¹ *see* RP 252 (November 2013 – May 2014); RP 258, 278 (July 2017 – March 2018).

¹ Ms. L.K. will cite to documents from clerk's papers for A.L.K.'s case (COA #36621-9) as "CP." Documents from the court files for L.R.C.K.-S. (COA #36623-5) and D.B.C.K.-S. (COA #36622-7) will be distinguished by the child's initials.

B. ARGUMENT IN REPLY

1. **As the Department failed to show sufficient effort to know if A.L.K. is an “Indian child,” this Court should reverse and remand for further proceedings.**

The Department’s concessions regarding A.L.K.’s Indian child status are well taken. *See* Brief of Respondent at 13, 31. The Department failed to submit sufficient evidence regarding its investigation, the trial court did not make the proper inquiry, and further proceedings are necessary. *See* 25 C.F.R. § 23.107(a) (2016); Brief of Respondent at 13, 31.

The parties differ on the right remedy. This Court should reverse and remand A.L.K.’s case. On remand, the trial court should make the proper inquiry regarding A.L.K.’s Indian child status and develop the record as needed. *See* 25 C.F.R. § 23.107(a). Then, the parties may proceed as is appropriate.

No procedural rule allows this Court to retain jurisdiction while also remanding A.L.K.’s case back to the trial court, as the Department requests. While RAP 9.11 permits the taking of more evidence when each of its factors

are met, the Department appears to acknowledge not all the factors are met here. *See* Brief of Respondent at 22-25.

While the Department argues that not all six factors of RAP 9.11 are required, it relies on an opinion that held all six factors were met. Brief of Respondent at 23-24 (citing *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 885–87, 665 P.2d 1337 (1983)). When *Wash. Fed'n* was decided, “a literal reading” of RAP 9.11 suggested a party could not bring a motion for an appellate court to direct additional evidence be taken. *Wash. Fed'n*, 99 Wn.2d at 884–85. The Court employed its authority under RAP 1.2 to alter the rule so it could consider a party’s motion “in light of the other six requirements of RAP 9.11(a).” *Id.* at 885; *see* RAP 1.2. It then found the six factors were met. *Wash. Fed'n*, 99 Wn.2d at 885-87.

Here, there is no reason equity or “the ends of justice” justify excusing the trial court’s error or are grounds for waiving any other requirements of RAP 9.11. *Wash. Fed'n*, 99 Wn.2d at 884–85; *see* RAP 1.2, 9.11.

The Department incorrectly argues reversal “would leave the child in unsafe and unstable circumstances.” Brief of Respondent 23. This Court’s reversal of the dependency order would not undo all previous orders of the court. Jurisdiction attaches with the filing of the dependency petition. *In re Welfare of Brown*, 29 Wn. App. 744, 747, 631 P.2d 1 (1981). The juvenile court retains jurisdiction “until the dependency action is terminated or a determination is made that the child is no longer dependent.” *In re Marriage of Rich*, 80 Wn. App. 252, 256, 907 P.2d 1234 (1996) (citing *In re Boatman*, 73 Wn.2d 364, 367, 438 P.2d 600 (1968)).

The trial court removed A.L.K. from her mother’s home before the dependency trial. CP 14. Jurisdiction attached when the department filed a dependency petition. *See Brown*, 29 Wn. App. at 747. The trial court’s shelter care order would not be undone by this Court reversing the dependency order and remanding for the proper inquiry and further proceedings as appropriate. The trial court will retain jurisdiction until

the dependency petition is dismissed or the dependency action is otherwise terminated. *See Rich*, 80 Wn. App. at 256.

Only Ms. L.K.'s proposed remedy comports with RAP 9.11. This Court should reverse the trial court's order and remand for further proceedings.

2. The Department failed in its duty under ICWA and WICWA to exert timely and sufficient active efforts to reunite Lisa's family.

a. Efforts from prior Department involvement do not satisfy ICWA and WICWA's requirement for timely, active efforts in the instant dependency.

The Department acknowledges that federal regulations define ICWA's "active efforts" as "affirmative, active, thorough, and *timely* efforts intended primarily to ... reunite an Indian child with his or her family." 25 C.F.R. § 23.2 (emphasis added); Brief of Respondent at 24; *see* 25 U.S.C. § 1912(d). The Department concedes WICWA requires active efforts to be "*timely* and diligent." RCW 13.38.040 (1)(a) (emphasis added); Brief of Respondent at 26; *see* RCW 13.38.130.

However, at trial, the Department relied entirely on efforts made during previous interventions, before it filed a dependency petition and before Ms. L.K.'s children were removed. RP 402-04. The trial court found these prior services sufficient to support a finding that active efforts were made. CP 141, 152.

In its briefing, the Department argues nearly as it did at trial. *See* Brief of Respondent at 27-29. The Department cites the work of social worker Welsh during Ms. L.K.'s voluntary services, all of which occurred well before this case. *Id.*; RP 252, 272. Much of Ms. Welsh's work occurred five or six years before this case. RP 252, 272. The remainder preceded the children's removal by five to twelve months. RP 158, 258-60, 272; CP 151. These latter services pre-date the dependency trial by nearly a year or more. RP 1, 258-60, 272. Services provided during this case, apart from minimal referrals, did not address any deficiency alleged of Ms. L.K. *See* RP 288-89 (phone number for housing wait list; request for drug testing and assessment).

To support this failure to provide active efforts during the instant removal, the Department argues past services may be considered and relies on *In re Welfare of Angelo H.*, 124 Wn. App. 578, 587, 102 P.3d 822 (2004) and *In re Dependency of P. D.*, 58 Wn. App. 18, 22, 792 P.2d 159 (1990). Brief of Respondent at 29. These opinions did not relate to Indian children and did not interpret ICWA or WICWA. Instead, they interpreted statutes governing standard termination and dependencies, where ICWA and WICWA do not apply. *Angelo H.* discusses RCW 13.34.136's "all reasonable services" and RCW 13.34.180's "all necessary services, reasonably available." *Angelo H.*, 124 Wn. App. at 585-87. *P. D.* addresses RCW 13.34.180. *P. D.*, 58 Wn. App. at 24-25. These cases are not helpful to an analysis of ICWA or WICWA; Chapter 13.34 RCW does not govern or interpret the "active efforts" required by ICWA and WICWA. *See* 25 U.S.C. § 1912(d); 25 C.F.R. §§ 23.2, 101, 143; RCW 13.38.130.

The Department offers no support of its position that prior services satisfy the "active efforts" requirement of ICWA

and WICWA. The Department argues no support from the statutes, regulations, and case law which comprise ICWA and WICWA. Under the two bodies of law, prior services are insufficient; active efforts must be “timely.” 25 C.F.R. § 23.2; RCW 13.38.040(1)(a).

Chapter 13.34 RCW may not be employed to alter the timeliness requirement. ICWA does not permit state-created exceptions to the active efforts requirement. 25 U.S.C. §§ 1912(d), 1921 (higher standard prevails). The Washington Supreme Court has concurred, stating “[a]bsent express legislative intent to the contrary, we refuse to create any additional exceptions.” *Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 851, 383 P.3d 492 (2016).

“Timely” active efforts to reunite a family must occur during the present proceedings, not at a time before the children were removed and the possibility of reuniting the family arose. *See* 25 C.F.R. § 23.2. The Department was – and currently is – obligated to provide active efforts to Ms. L.K.

during the current removal in an attempt to prevent the breakup of her family. It has failed to do so.

b. The minimal efforts provided during the removal of Ms. L.K.'s children do not constitute "active efforts."

The Department agrees that active efforts "must involve assisting the parent ... with accessing or developing the resources necessary to satisfy the case plan." Brief of Respondent at 24 (citing C.F.R. § 23.2). The Department also agrees active efforts go beyond passive efforts, such as "simply providing referrals to ... services." RCW 13.38.040(1)(a)(ii); Brief of Respondent 26.

Although the Department did not do more for Ms. L.K. than provide minimal referrals during this dependency case, it argues its efforts were sufficient. Brief of Respondent at 27-29. They were not. *See* RCW 13.38.040(1)(a)(ii); 25 C.F.R. § 23.2. The Department asserts it provided services to Ms. L.K. during this case, but lists nothing it did to help her, other than refer her to for drug testing and treatment. *See* Brief of Respondent at 27-29. All other services were not

directed towards Ms. L.K. *Id.*; *see* 25 C.F.R. § 23.2); RCW 13.38.040(1)(a)(ii).

The Department lists services provided before the removal, services for the children’s fathers, and investigations for child placement. *See* Brief of Respondent at 27-30.

However, the Department was also obligated to provide “appropriate services” to the children’s mother and assistance for her “to overcome barriers.” 25 C.F.R. § 23.2(2). It was obligated to “actively assist[] [her] in obtaining such services” throughout the case. *Id.*

The Department did not offer Ms. L.K. services during this case beyond drug testing, except for providing a phone number for a housing list. RP 288-89. Ms. L.K. did not refuse this housing referral or fail to use it, despite likely already having contact with that resource. RP. 22, 33, 288-89. The Department alleged housing instability was a parental deficiency of Ms. L.K., but did nothing more to address this deficiency during this case. *Id.*, RP 210, 219, 289, 308.

Further, drug testing is a diagnostic tool, not a remedial service. Such referrals are not active efforts. 25 C.F.R. § 23.2; RCW 13.38.040 (1)(a)(ii); *see Matter of Welfare of A.L.C.*, 8 Wn. App. 2d 864, 875, 439 P.3d 694 (2019).

The Department argues Ms. L.K. refused all services other than visitation. Brief of Respondent at 29 (citing RP 212). However, she refused only drug testing. RP 20; 212. This refusal was insufficient justification for denying her all other services. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005). When the Department knows of a parent's additional needs to correct deficiencies, it may not rely on a "false premise that all other services should await" the outcome of a desired assessment. *Id.* By denying all other services, that is what the Department did here.

The Department also asserts the children's tribe "has remained active throughout the case," and the Department worked with the tribe. Brief of Respondent at 28, 30. However, no evidence exists in the record showing any efforts by the tribe to assist Ms. L.K. with an aim to reunite the

family or any work by the Department to facilitate such efforts. The tribe did request that the Department place the children with family in a Native American home, but the Department was unable to do so. RP 290. Beyond that, the tribe only requested documentation. RP 290. No actual services were provided by the tribe. *Id.* While 25 C.F.R. § 23.2(5) provides that the Department should assist with services provided by the child’s tribe, the Department cites no evidence any services from the tribe were utilized to support Ms. L.K.

Further, while the Department states the tribe “intervened early” in both children’s cases and “remained active throughout the case,” this misrepresents the record. Brief of Respondent 1, 30. The tribe did not file notice of its intention to intervene in the case of the older child until December 13, 2018, one and one-half months before trial and four months after removal. RP 1; CP 1-5; CP for L.R.C.K-S. 71. The tribe filed its notice of intervention for the younger child eight days before trial. RP 1; CP for D.B.C.K.-S. 78.

The Department did not provide active efforts to support Ms. L.K. and correct any parenting deficiencies. It relies on inapplicable justifications. The requirements of ICWA and WICWA have not been met.

This Court should reverse and remand, upon which the trial court must decline jurisdiction and return the children to Ms. L.K.'s custody unless the trial court finds doing so "would subject the child[ren] to a substantial and immediate danger or threat of such danger." 25 U.S.C. § 1920; RCW 13.38.160; *A.L.C.*, 8 Wn. App. 2d at 876-77.

As the trial court has violated section 1912 of ICWA and section 130(1) of WICWA, reversal and remand for further proceedings is appropriate. *See* 25 U.S.C. §§ 1914, 1920; RCW 13.38.160; *A.L.C.*, 8 Wn. App. 2d at 876-77.

C. CONCLUSION

The trial court and the Department did not meet the requirements of ICWA and WICWA. In A.L.K.'s case, the court failed to make the necessary inquiry and the Department failed to present the necessary evidence. In the

cases of L.R.C.K-S. and D.B.C.K-S, the Department failed to provide timely and sufficient active efforts to the children's mother in order to reunite their family.

Ms. L.K. asks this Court to reverse the trial court's three orders of dependency and remand the cases for further proceedings appropriate to each child's case.

DATED this 17th day of December 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Falk', is written above the typed name.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

IN RE A.L.K. AND D.B.C.K-S.,
A MINOR CHILDREN.

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NO. 36621-9-III

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