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No. 98487-5

NO. 36621-9-III

(Consolidated with 36622-7 and 36623-5)

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

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In re: the Dependency of

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

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

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OPENING BRIEF OF APPELLANT

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## A. INTRODUCTION

The United States Congress enacted the Indian Child Welfare Act (“ICWA”) to redress statewide practices that ultimately resulted in an alarmingly high percentage of Indian children being removed from their homes. ICWA, along with the Washington Indian Child Welfare Act (“WICWA”), require heightened efforts, considerations, and procedural protections in Indian child custody proceedings.

Lisa K.’s youngest two children are eligible for membership in the Northern Arapaho Tribe, and consequently are “Indian children” under ICWA and WICWA. Lisa’s older daughter appears to have Native heritage, but the Department did not fulfill its legal obligation to determine whether Lisa’s older daughter is also an “Indian child.”

The Department also failed to meet the standards required by ICWA and WICWA to work actively to reunite Lisa and her children. These failures require reversal.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred by finding the Department had made a good faith, diligent effort to determine whether A.L.K. is an “Indian child,” denying Lisa K. her right to the protections of ICWA and WICWA.

2. The trial court erred by finding the Department had made active efforts to reunite Lisa’s family, as required by ICWA and WICWA.

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal Indian child welfare acts require that the Department establish on the record sufficient good faith, diligent efforts to determine whether a child is an Indian child; notify the tribe of its rights; and update the court with any new information on this issue. The Department only disclosed A.L.K.’s Native heritage in the fact-finding trial, nearly 170 days after learning of it, and never established it had made good faith, diligent steps efforts to determine A.L.K.’s Indian child status or had notified the tribe. Is remand compelled when the Department fails in these obligations?

2. The federal Indian Child Welfare Act requires that the Department make “active efforts” that are “affirmative, active, thorough, and timely” to reunite the family of an Indian child. The Washington Indian Child Welfare Act requires such efforts be “timely and diligent.” Lisa K’s two youngest children are acknowledged Indian children, but the Department’s only effort during the children’s removal was to give Lisa a phone number to a community agency and sit with her once while she called the agency. Is reversal compelled when the Department fails to provide active efforts to reunite this family?

D. STATEMENT OF THE CASE

Lisa K. loves her children immensely. RP 402, 111. They have a close relationship, her visits go well, and she is good with her children. RP 402, 111.

Her two youngest children, L.R.C.K-S. and D.B.C.K-S., are eligible for membership in the Northern Arapaho Tribe through their father, who is a member. RP 217, 287. They are known to be Indian children under the Indian Child Welfare Act (“ICWA”) and the Washington Indian Child Welfare Act (“WICWA”). A.L.K., the oldest child, has a different father from

the younger two. RP 217. It is unknown whether A.L.K. is eligible for membership in a federally-recognized tribe.

The court entered an order finding A.L.K in need of shelter care on August 17, 2018. CP 12. The court found A.L.K. was not an Indian child; both parents had denied having Native heritage. *Id.* The investigator from the Department of Children, Youth, and Families (“Department”) then learned from A.L.K.’s grandmother that A.L.K had Native heritage on her father’s side, from a tribe not named in the record. RP 217. The investigator testified at the dependency fact-finding trial that she had sent an inquiry to the tribe, but did not know what resulted from it, as she was only on the case for its first ten days. *Id.*; RP 206, 224, 284.

After the investigator testified, the State indicated it would question the social worker who took over the case about A.L.K.’s heritage and the inquiry’s results. RP 218. That social worker testified later in the trial, but she did not discuss any response from the tribe or any further inquiry into whether A.L.K. is an Indian Child. *See* RP 282-337.

No other witness from the Department testified further about this issue. *See* RP 1-429. Nothing in the record establishes whether or how the tribe responded, whether the tribe was given proper notice, or what good faith, diligent efforts the Department made to determine whether A.L.K. is an Indian child under ICWA and WICWA. *Id.*; CP 1-170.

Despite the lack of information on the record, the court entered a dependency order and found the Department had “made a good faith effort to determine whether the child is an Indian child.” CP 87. The court proceeded to treat A.L.K. as a non-Indian child. CP 86-96.

The Department presented testimony throughout the trial to establish Lisa’s lack of housing stability as a parental deficiency. The investigator testified that Lisa “maintains homelessness,” RP 210, and the social worker testified Lisa did not have her own place to live when they first met; she was staying with friends, RP 289. The investigator and the social worker both testified that a child’s uncertainty about housing locations or a child not having a fixed home can have a psychological effect. RP 219; 308.

The Department also presented testimony to suggest Lisa might have mental health struggles and a drug problem. RP 211 (diagnosis of post-traumatic stress disorder and possibly depression and anxiety), 29 (historical drug usage); RP 48 (counsel's suggestion Lisa would have submitted to testing if she were in fact not using drugs); RP 221 (historical and current refusal of testing); RP 335 (lived in motel "known to be a well-known drug area").

The Department additionally knew of Lisa's related needs for assistance with transportation and financial stability. RP 75 (lack of a ride caused her to miss a visit with her children); RP 310 (frequently late to visits, despite consistent efforts to attend them); RP 69, 216 (permanently banned from receiving TANF).

The Department was also aware of its duties under ICWA and WICWA to assist Lisa to obtain services. The Department argued in closing it had made "active efforts to avoid [the] breakup of family, which is what ICWA requires as to the two younger children." RP 404.

During the 170-day shelter care phase prior to Lisa's dependency fact-finding trial, the Department provided minimal

services to her, on one date only at the beginning of the proceedings. RP 288-89. On September 12, 2018, in their first meeting together, the Department's social worker "offered" Lisa "housing" by connecting her "to the community resource network," and she "sat there while [Lisa] called ... the rapid rehousing [program]." RP 288-89. That phone call did not result in housing for Lisa or her children. RP 22, 33.

The Department similarly made no efforts in several more areas that would have supported the family's reunification. It made no efforts to have Lisa's visitation with her children in the most natural setting possible (they all occurred in the visit supervisor's office), RP 289; to involve extended family members for family support and visitation locations, RP 289; *see* 1-429; or to seek resources from the children's tribe when resources were not locally available, *see* RP 1-429.

Lisa had previously twice participated voluntarily in Department programming with Family Voluntary Services ("FVS"). RP 215. Those two cases closed out before the present case arose. RP 252, 278. The first FVS case was from November

2013 until approximately May 2014. RP 252. The second started in July 2017, RP 258, and was closed March 2018, RP 278.

The decision to remove Lisa's children and file a dependency petition was made August 14, 2018. RP 159-60. The children were removed the same day. CP 12. The fact-finding trial occurred 170 days later, on January 31 and February 1, 2019. RP 2.

The Department, in closing, listed previous services it had provided to Lisa in the previous FVS cases. RP 402. The Department listed nothing provided during the instant case. *Id.* The Department asked the court to rely on these previous services from the two prior FVS cases to find the Department had made "active efforts." RP 402-04. The trial court did so find in its written orders. CP 141, 152.

The Department argued in closing that Lisa "was not able to really keep the kids in a safe environment," RP 402-03, and that chemical dependency was the cause of Lisa's instability, RP 404. The judge orally found Lisa had a "stability problem" and a "drug problem," and he found both of those issues "put[ ] the kids in danger." RP 416.

E. ARGUMENT

1. **The Department failed to show a good faith, diligent effort to determine whether A.L.K. is an “Indian child.”**

Upon learning that A.L.K. had Native heritage, the Department of Children, Youth, and Families (“Department”) sent an inquiry to the relevant tribe. RP 217. However, the Department put no information on the record regarding any response from the tribe, any formal notice sent to the tribe of its right to intervene, any notice to the court prior to the fact-finding trial, or any other good faith, diligent efforts made by the Department to determine A.L.K.’s Indian child status, as required by ICWA and WICWA.

- a. ICWA and WICWA require specific steps to determine a child’s status, provide notice, and treat a possible Indian child as an Indian child.*

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 an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.” Indian Child Welfare Act,

25 U.S.C. § 1901(4). As a result, Congress passed the Indian Child Welfare Act (“ICWA”). *Id.* ICWA and Washington’s related statutory scheme (“WICWA”) govern involuntary child custody proceedings involving children who may be eligible for membership in a federally recognized tribe. *See* 25 U.S.C. §§ 1911-23 (1978); WICWA, RCW 13.38.10 *et seq.*

Where the state and federal acts differ, the court must apply the provision which gives greater protection for the parent. 25 U.S.C. § 1921. Further, WICWA establishes minimum standards for the Department’s efforts before a dependency is established, but the Department may provide a higher standard of protection to Indian children, their parents, and their tribes. RCW 13.38.030.

Federal regulations describe in detail the steps a court must take to determine Indian child status under ICWA. 25 C.F.R. § 23.107 (2016) (copy attached). First, at the outset of any dependency case, the court must inquire of each participant if he or she “knows or has reason to know that the child is an Indian child,” and participants must respond on the record. *Id.* at § 23.107(a). The court must direct the parties to notify the court

if information is later received supplying reason to believe the child may be an Indian child. *Id.*<sup>1</sup>

When there is “reason to know [a] child is an Indian child,” yet there is not “sufficient evidence to determine that the child is or is not an ‘Indian child,’” the trial court must determine, through information on the record, if the Department “used due diligence to identify and work with” any tribe in which the child may eligible for membership. *Id.* at § 23.107(b)(1). The court must then “[t]reat the child as an Indian child, unless and until it is determined on the record that the child [is not] an ‘Indian child.’” *Id.* at § 23.107(b)(2).

RCW 13.38.050 requires that the Department make a “good faith effort to determine whether” a child is an Indian child.<sup>2</sup> Washington regulations direct “[w]hen a family identifies

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<sup>1</sup> 25 C.F.R. § 23.107(a) states “courts must instruct the parties to inform the court if they subsequently receive information that provides *reason to know* the child is an Indian child. *Id.* (emphasis added). In this context, ‘know’ means ‘know for a fact’ and ‘reason to know’ means ‘think it is reasonably possible.’ *See* 25 U.S.C. § 1912(a) (referring to any “proceeding ... where the court [either] knows or has reason to know that an Indian child is involved”); 25 C.F.R. § 23.107(b).

<sup>2</sup> RCW 13.38.050 states, in part:  
Any party seeking the foster care placement of [or] termination of parental rights over[ ] must make a good faith effort to determine whether the child is an Indian child.

Indian ancestry” per ICWA and WICWA, the Department has ten business days to make a “family ancestry chart” and start the inquiry process. WAC 110-110-0030(1). The ancestry chart must be preserved in the child’s file. *Id.*

Preliminary contacts to determine a child’s possible Indian child status do not satisfy the requirement of legal notice to the tribe mandated by RCW 13.38.070. RCW 13.38.050. The notice requirement mandates that the Department send, “as soon as practicable,” notice through “registered mail, return receipt requested” to any tribe in which a child may be eligible for membership, or otherwise to the Bureau of Indian Affairs. RCW 13.38.070(1-2); *see also* 25 U.S.C. § 1912(a) (the petitioner in an involuntary custody proceeding with a potential Indian child shall notify the tribe by registered mail of its right to intervene, and any foster care placement shall occur no fewer than ten days after the tribe received notice). The notice requirement is not met unless the formal ICWA process is followed, given a tribe’s right to intervene. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 131-92, 108 P.3d 156 (2005).

A trial court's finding that a statutory requirement was met is a conclusion of law to be reviewed de novo. *Matter of Welfare of A.L.C.*, 8 Wn. App. 2d 864, 871, 439 P.3d 694 (2019).

*b. The Department did not exercise due diligence in determining A.L.K.'s Indian child status.*

At the shelter care hearing, the court considered A.L.K. not to be an Indian Child. CP 12. A.L.K.'s grandmother told the initial investigator that A.L.K. had Native heritage from a specific tribe<sup>3</sup> during the first ten days of the case, but the Department failed to make this known to the court until the investigator testified at the fact-finding trial nearly 170 days later. RP 217. While the investigator had sent an inquiry to the tribe, she did not know what came of it, given she was only involved in the case for its first ten days. *Id.*

Nothing more about the further process and outcome of the investigation to determine whether A.L.K. is an Indian Child appears in the record. *See* RP 1-429; CP 1-170.

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<sup>3</sup> The tribe was named to the investigator, according to her testimony, but the Department did not make the tribe's name part of the record. RP 217, 1-429; CP 1-170.

ICWA requires that information about the inquiry and the result be put on the record. 25 C.F.R. § 23.107(a)-(b)(1). However, the record is silent as to any response received from the tribe, any good faith, diligent efforts to verify A.L.K.'s membership eligibility, or any efforts to notify the tribe of its right to intervene. *See* RP 1-429; CP 1-170; RCW 13.38.050 (good faith effort); WAC 110-110-0030(1) (ancestry chart and ten day window); 25 C.F.R. § 23.107(b)(1) (due diligence to verify status); 25 U.S.C. § 1912 (notice requirements); RCW 13.38.070 (same). Additionally, nothing in the record establishes the Department notified the trial court of A.L.K.'s Native heritage. *See* 25 C.F.R. § 23.107(a) (court must instruct parties of duty to update information on the record).

The court entered a dependency order indicating the Department had “made a good faith effort to determine whether the child is an Indian child,” but this finding is unsupported by the record. CP 87. The order shows A.L.K. was not treated as an Indian child, though no further indication of whether she was found to be an Indian child exists in the dependency order, as the appropriate boxes were left blank. *Id.*; CP 86-96; *but cf.*

CP 144, 149 (dependency order for L.R.C.K-S., showing how the court handled an acknowledged ICWA case), CP 155, 160 (same for D.B.C.K-S.). Similarly, nothing in the record establishes the court followed the requirement that A.L.K. be treated as an Indian child unless the tribe established she was not eligible for membership. *See* 25 C.F.R. § 23.107(b)(2); CP 86-96.

The Department failed in its duty to put information about its inquiry on the record. 25 C.F.R. § 23.107(a)-(b)(1). It failed in its duty establish good faith, diligent efforts in its inquiry, and it failed in its duty to show either notice to the tribe of its right to intervene, or the lack of need to do so. *See* RCW 13.38.050; WAC 110-110-0030(1); 25 C.F.R. § 23.107(b)(1); 25 U.S.C. § 1912; RCW 13.38.070.

The court erred in finding the Department had made a good faith effort following the late disclosure of A.L.K.'s Native heritage during the fact finding, with no more information provided to show a good faith, diligent effort was made to clarify A.L.K.'s status. *See* CP 87; RP 217. Moreover, A.L.K. should have been treated as an Indian child until the issue was determined on the record. *See* 25 C.F.R. § 23.107(b)(2).

*c. The remedy is remand for the Department to comply with ICWA and WICWA.*

Contrary to ICWA and WICWA, there is no record that the Department made a good faith, diligent effort to verify A.L.K.'s status, notify the tribe, or inform the court about the issue. Where lack of notice is the only issue on appeal, the proper remedy is remand so that the notice requirements may be met and the trial court may proceed as appropriate dependent on the tribe's response. *T.L.G.*, 126 Wn. App. at 193.

A.L.K.'s case should be remanded for the proper inquiry and notice, with all participants treating A.L.K. as an Indian child unless and until the tribe responds that she is not eligible for membership. *See T.L.G.*, 126 Wn. App. at 193; 25 C.F.R. § 23.107(b)(2).

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

During the 170 days between the emergency removal of Lisa's children and the dependency fact-finding trial on January 31, 2019, the Department provided very minimal services to her, on one date only at the beginning of the proceedings. RP 288-89. The Department had provided services to Lisa during her two

previous engagements with Family Voluntary Services (“FVS”), starting in 2013 and 2017. RP 252, 258. Those two cases closed out before the present case arose. RP 252, 278. At the fact finding, the Department relied only its provision of services to Lisa during her previous FVS participation to satisfy the requirement that “active efforts” had been made. RP 402-04. The court found the requirement had been met. CP 141, 152. Active efforts to reunite a family must be “timely” – during the present proceedings, not a prior time before the children were removed and the possibility of reuniting the family arose. 25 C.F.R. § 23.2. The Department failed to meet ICWA’s and WICWA’s requirement to work actively to reunite Lisa and her children before a dependency may be established.

*a. ICWA’s “active efforts” mandate requires that the Department affirmatively assist Lisa to access and obtain services and resources.*

ICWA and WICWA require a higher standard of Department action in cases involving Indian children than Washington law requires in non-WICWA cases. *Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 841, 844, 383 P.3d 492 (2016). Both acts obligate the Department to make “active

efforts” “to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.” 25 U.S.C. § 1912(d); RCW 13.38.130. Binding federal regulations, effected in 2016, define “active efforts” and clarify ICWA’s standards; these rules apply to all ICWA cases. 25 C.F.R. § 23.2, § 23.101, § 23.143.

Active efforts are “*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) (copy attached). They must be “*timely and diligent*” (emphasis added). Active efforts go beyond passive efforts, such as “simply providing referrals to ... services.” RCW 13.38.040(1)(a)(ii). Instead, they “must involve assisting the parent ... with accessing or developing the resources necessary to satisfy the case plan.” 25 C.F.R. § 23.2. Tribal resources should be sought out as available. *Id.* at § 23.2(5); RCW 13.38.040(1)(a).

Moreover, the Department’s active efforts “must be documented in detail in the record.” 25 C.F.R. § 23.120(b); *accord* RCW 13.38.040 (1)(a)(ii) (“The department ... must show to the court that it has actively worked with the parent ... to

engage [her] in remedial services and rehabilitative programs to prevent the breakup of the family.”).

The federal regulation defining “active efforts” contains an instructive list of examples state agencies should rely on to determine what efforts to provide to the parents of Indian children. *See* 25 C.F.R. § 23.2. Active efforts include “actively assisting” a parent to obtain services and “helping [her] to overcome barriers” in accessing services. *Id.* at § 23.2(2). They include the Department’s duty to make “a diligent search for the Indian child’s extended family members,” and involve them in planning and efforts to support the parent and child. *Id.* at § 23.2(4). The Department should also assist in the provision of services from the child’s tribe, *id.* at § 23.2(5), and contemplate alternative options for services when the ideal services are not available, *id.* at § 23.2(10).

The Department’s own ICWA/WICWA policy manual defines “active efforts” with language taken directly from 25 C.F.R. § 23.2. *See Definitions*, Dept. of Children, Youth & Families Indian Child Welfare Policies and Procedures [“DCYF

ICW Policy Manual”].<sup>4</sup> The purpose of the Department’s policy on “Child Protective Services for Indian Children” is to “fulfill federal and state Indian Child Welfare laws which require active efforts to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family.” DCYF ICW Policy Manual (Sept. 12, 2016).<sup>5</sup> The policy links to federal regulations defining active efforts as “affirmative, active, thorough, and timely.” *Id.*

This Court has assessed the level of active efforts needed to meet ICWA’s and WICWA’s requirements. In *In re Welfare of L.N.B.-L.*, where a child was taken from the parents at birth, the standard was met when the Department helped the parents get an apartment and helped pay the first month’s rent; provided numerous, culturally appropriate rehabilitative services; performed “quite a bit of research” to identify a location for recommended services; provided monthly bus passes; and reimbursed taxi expenses to get to services. *L.N.B.-L.*, 157 Wn.

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<sup>4</sup> Available at [www.dcyf.wa.gov/node/967](http://www.dcyf.wa.gov/node/967).

<sup>5</sup> Available at [www.dcyf.wa.gov/node/903](http://www.dcyf.wa.gov/node/903).

App. 215, 227-28, 231, 242, 248, 252, 237 P.3d 944 (2010). The tribe provided additional services. *Id.* at 234.

In *In re Dependency of A.M.*, the active efforts standard was met when the Department funded a mother's methadone treatment, daily counseling, and vouchers for her infant's basic needs, and then made diligent and consistent efforts to locate the mother during her two-year disappearance. *A.M.*, 106 Wn. App. 123, 126-28, 22 P.3d 828 (2001).

Conversely, in *Matter of Welfare of A.L.C.*, the Court held the Department had not made active efforts. *A.L.C.*, 8 Wn. App. 2d 864, 875, 439 P.3d 694 (2019). The trial court had found a homeless father's child dependent and ordered in May that the father complete assessments for DV and parenting, and take a parenting class. *Id.* As of August, the father was still homeless, and the Department had only provided a referral for a DV assessment – six weeks after the court's order – and a parenting class referral after it was too late for the father to begin the class. *Id.* Though the father was homeless, the Department failed to make “any efforts ... to assist [him] in identifying housing resources much less assist [him] with ‘utilizing and

accessing' housing resources." *Id.* (quoting 25 C.F.R. § 23.2(8)).

The Department's efforts were not timely, and they were insufficient, invalidating the proceedings. *Id.* at 876.

A trial court's finding of active efforts is a conclusion of law to be reviewed de novo. *A.L.C.*, 8 Wn. App. 2d at 871.

*b. The Department failed to provide active efforts, despite knowledge of Lisa's needs and ICWA's requirements.*

*i. The Department provided nearly no services during the instant removal of Lisa's children.*

The Department testified to only one effort made on Lisa's behalf between August 14, 2018 – the date CPS received a call and decided to remove Lisa's children – and February 1, 2019, the concluding date of the fact-finding trial. When Ms. Reeves, the ongoing social worker, first met with Lisa on September 12, 2018, she "offered" Lisa "housing" by connecting her "to the community resource network," and she "sat there while [Lisa] called Catholic Family or Catholic Charities for the rapid rehousing [program]." RP 288-89. The record establishes no more remedial services rendered. RP 1-429; CP 1-170.

This single effort does not satisfy ICWA’s active efforts requirement. Ms. Reeves gave a referral, then “sat there while” the call was made, RP 288-89, but this only helped Lisa initiate a process, and did not in itself provide the follow through necessary to constitute “actively assist[ing]” Lisa to actually “obtain[ ] such services,” C.F.R. § 23.2(2). The Department’s act of providing a phone number and sitting by through the call did not result in housing that could accommodate Lisa’s children, and constituted far less regarding housing than the court found satisfactory in *L.N.B.-L.*, 157 Wn. App. at 227 (helping the parents to get an apartment and pay the first month’s rent, along with many other remedial services).

The Department’s single effort here is similar to its lack of effort in *A.L.C.* See *A.L.C.*, 8 Wn. App. 2d at 875 (in three and one-half months, the Department merely provided the father with a referral for a DV assessment and a referral for a parenting class after the class had started and the father could not join it).

Ms. Reeves did not assist Lisa to access more information than she already had, and provided no more than Lisa already

was doing on her own. *See* RP 22, 33. Lisa’s testimony described her ongoing personal efforts – all conducted without the Department’s help – to secure a place for her family to live together. These efforts included acquiring an RV for them all to live in, planning a retrofit to make it comfortable for the children, and arranging for safe place to park it. RP 11, 67-68. Additionally, she continually updates her information every ninety days with the two publicly available community housing resources, one with 179 families ahead of hers on the waitlist. RP 22.

These accomplishments had not yet resulted in stable housing as the fact finding. RP 67-68. The Department testified to no more efforts, much less any “affirmative, active, thorough, and timely efforts” made after the removal of Lisa’s children to assist in obtaining stable housing. *See* 25 C.F.R. § 23.2(2) (active efforts include “actively assisting the ... parent[ ] ... in utilizing and accessing [housing] resources”). Where a parent unsuccessfully tried to obtain housing, but the Department has done effectively nothing to assist in this area, the Department’s actions do not qualify as active efforts. *See A.L.C.*, 8 Wn. App. 2d

at 874-75. ICWA and WICWA required the Department to do more to remedy Lisa's lack of stability.

It appears that in every case where this Court has found the active efforts requirement satisfied, barring cases where parents were incarcerated or missing, the Department provided far more effort and expenditure during the children's removal than that provided to Lisa in this case. *See, e.g., L.N.B.-L.*, 157 Wn. App. at 227-28, 242, 248, 252 (obtaining apartment; paying rent; funding numerous services; providing monthly bus passes and taxi reimbursement; spending time to locate new providers for services); *A.M.*, 106 Wn. App. at 126-28 (funding methadone treatment, daily counseling, and infant's basic needs).

Here, the Department did nothing more than provide a phone number to a well-known public agency and sit passively while Lisa called it. RP 288-89. This single effort during the 170 days since Lisa's children were removed does not meet the standard of services "to preserve and mend family ties, and to alleviate the problems that prompted the State's initial intervention." *T.L.G.*, 126 Wn. App. at 203. Most importantly, it fails the active efforts requirements of ICWA and WICWA. 25

U.S.C. § 1912(d); RCW 13.38.130; 25 C.F.R. § 23.2 (“affirmative, active, thorough, and timely efforts”); RCW 13.38.040(1)(a) (“timely and diligent efforts”); RCW 13.38.040(1)(a)(ii) (“beyond simply providing referrals”).

*ii. The Department knew of Lisa’s needs, and should have made active steps towards reuniting her family.*

In deciding what assistance to give the parents of Indian children, the Department must consider the specific needs of the parents and refer to the federal code’s non-exhaustive list of examples of active efforts. *See* 25 C.F.R. § 23.2. In the fact-finding, the Department presented testimony from multiple witnesses to establish that Lisa struggled from housing instability, a potential parental deficiency. RP 210, 219, 289, 308. It also presented evidence of Lisa’s needs for assistance around transportation and financial stability. RP 69, 75, 216, 310. In closing argument, the Department argued Lisa’s instability to be considered a deficiency, claiming “she was not able to ... keep the kids in a safe environment.” RP 402-03.<sup>6</sup> The

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<sup>6</sup> Further, counsel for the Department tried to make this point by repeatedly attempting to introduce information that Lisa allegedly had 14 residences in an unclear number of years, despite no witness having

judge ultimately found orally that Lisa had a parental deficiency of “a stability problem that puts the[ ] kids in danger,” as well as a “drug issue.” RP 416.

The Department was obligated to address Lisa’s stability deficiency in an effort to reunite the family prior to the fact-finding trial. *See* 25 C.F.R. § 23.2; 25 U.S.C. § 1912(d); RCW 13.38.130. However, it failed to meet the required level of active effort to support Lisa. *See* 25 C.F.R. § 23.2(2, 4, 5, 7, 8, 10).

The Department’s duty is to reunite the family. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.2. ICWA requires that when applicable, the Department must help Lisa overcome barriers to accessing services and actively assist her to obtain the services, *see* 25 C.F.R. § 23.2(2), including actively supporting her in utilizing and accessing housing resources, *see id.* at § 23.2(8). The Department’s own WICWA policy manual cites to 25 U.S.C. § 1912(d) (requiring “active efforts”) and 25 C.F.R. § 23 (defining “active efforts”) and instructs employees that “[a]ctive efforts

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testified to or affirmed that. *See* RP 32 (counsel suggested 14 residences since 2012) [transcriber’s error ascribed counsel’s question to Lisa]; RP 33 (same); RP 219 (no time period mentioned); 404 (in closing, ‘some fourteen residences over the course of three or four years perhaps,’ while previously counsel had stated ‘since 2012’ – six or seven years prior).

include offering services that provide parents the help they need to keep their children safe.” *Child Protective Services for Indian Children*, DCYF ICW Policy Manual. Given its policy manual and its testimony and argument at trial, the Department knew and should have taken active steps to assist Lisa in obtaining safe, stable housing as well as meeting associated needs to support stability. That would have corrected one of two deficiencies found by the court. *See A.L.C.*, 8 Wn. App. 2d at 875 (citing 25 C.F.R. § 23.2(8)) (holding the Department should have taken steps to assist father in accessing housing resources). Further, stability and a safe, long-term place to live would have been a much better environment to allow Lisa to address the remaining deficiency.

The Department has an identical duty to identify sources of financial and transportation assistance and help Lisa obtain them, as related to her ability to have stable housing and care for her children. *See* 25 C.F.R. § 23.2(2, 8). Testimony established Lisa was banned from receiving TANF and was trying to appeal that decision. RP 69, 216. But as ICWA directs, the Department has a duty to make active efforts and look for

“alternative ways to address [her] needs [when] the optimum services ... are not available.” 25 C.F.R. § 23.2(10). ICWA requires that the Department look for “and facilitate the use of remedial and rehabilitative services provided by the child’s Tribe;” *id.* at § 23.2(5); such resources may be available to help Lisa, but the record does not show the Department sought outside assistance.

Lisa had transportation difficulties that caused her on one occasion her to miss a visit with her children, RP 75, and the social worker testified to her frequent lateness at visitations, despite her consistent efforts to attend them, RP 310. However, the social worker did not offer Lisa bus passes or gas vouchers to reduce her lateness and ensure her attendance at all her visits. *See L.N.B.-L.*, 157 Wn. App. at 231, 252 (providing monthly bus passes to parents and taxi reimbursement). Family visitation is a critical feature in maintaining Lisa’s connection with her children, thus the Department had a double duty to support her in obtaining adequate transportation. 25 C.F.R. § 23.2 (active efforts are “intended primarily to ... reunite an Indian child with his or her family” and include “[s]upporting regular visits” and

“actively assisting” parents in obtaining transportation resources).

Additionally, ICWA directs that the Department advocate for visitation “in the most natural setting possible,” and “trial home visits” in “any period of removal,” as appropriate. 25 C.F.R. § 23.2(7). Yet all Lisa’s visits occurred in the offices of the agency supervising them. RP 289. This was presumably for the visit supervisor’s convenience, but ICWA mandates the visits should occur in more natural settings. 25 C.F.R. § 23.2(7).

In accordance with its duties to provide visitation in the most natural setting possible, *see id.*, seek out alternative options as needed, *see id.* at § 23.2(10), and work with extended family to provide support and structure, *see id.* at § 23.2(4), the Department was required to consider visits in alternate settings when Lisa did not have a home. Appropriate locations existed with extended family members, *see* RP 222-23, and WICWA explicitly encourages “appropriate extended family visitation,” RCW 13.38.180(2)(f)(i).<sup>7</sup> The Department should have arranged

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<sup>7</sup> RCW 13.38.180 governs placement in WICWA cases. Preferred placement options include non-Indian families, if they are committed to,

visitation in available natural settings, rather than only in a sterile office building. *See id.*; 25 C.F.R. § 23.2(4, 7, 10).

Had the Department made active efforts towards correcting Lisa's instability, it is possible the resulting stability would have improved her ability to address or rebut the other issues raised by the Department, including alleged drug use and concerns for mental health instability. Obtaining safe, permanent housing prior to drug and mental health treatment interventions tends to increase the efficacy of subsequent treatment modalities as compared to providing treatment before housing is obtained. *See, e.g.*, U.S. Dep't. of Hous. & Urban Dev., *Housing First in Permanent Supportive Housing Brief*, (Jul. 2015) ("Many people experience improvements in quality of life, in the areas of health, mental health, substance use, and employment, as a result of [first] achieving housing.");<sup>8</sup> Seattle Univ. Sch. of Law Homeless Rights Advocacy Proj., *The Effectiveness of Housing First & Permanent Supportive Housing*

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inter alia, "[p]romoting and allowing appropriate extended family visitation." RCW 13.38.180(2)(f)(i).

<sup>8</sup> [www.hudexchange.info/resource/3892/housing-first-in-permanent-supportive-housing-brief](http://www.hudexchange.info/resource/3892/housing-first-in-permanent-supportive-housing-brief).

(Jul. 25, 2018) (summarizing studies and articles showing effectiveness of “housing first” model, compared to “treatment first”).<sup>9</sup> After removing the children from Lisa’s home, the Department had a duty to actively assist her with housing, financial, and transportation resources, as well as to support visitation in a natural setting, so the removal would end as soon as possible. *See* 25 C.F.R. § 23.2. Helping her become more stable would likely have improved the opportunity to introduce mental health and substance abuse services, as needed.

Despite Lisa’s obvious need and ICWA and WICWA’s clear directives, the Department abdicated its duty to work actively towards reuniting Lisa’s family during the 170 days between the Department’s removal of her children and the fact finding trial. *See* 25 C.F.R. § 23.2; 25 U.S.C. § 1912(d).

*c. State law cannot waive the Department’s duty under ICWA to continuously expend active efforts.*

Washington law cannot waive the Department’s obligation under ICWA to continuously expend active efforts. ICWA permits only two exceptions to its application: status

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<sup>9</sup> [law.seattleu.edu/Documents/Korematsu/HRAP-Excerpts-of-Studies-on-Housing-First-Permanent-Supportive-Housing.pdf](http://law.seattleu.edu/Documents/Korematsu/HRAP-Excerpts-of-Studies-on-Housing-First-Permanent-Supportive-Housing.pdf).

offenses and custody awards to one parent in a divorce. 25 U.S.C. § 1903(1); *T.A.W.*, 186 Wn.2d at 858. In *T.A.W.*, the Court held no other exceptions to the protections of ICWA could be employed: “[a]bsent express legislative intent to the contrary, we refuse to create any additional exceptions.” *Id.* at 851.

Here, the Department relied on its provision of services during Lisa’s prior FVS participation to argue that it had expended active efforts. RP 403-04. It may also contend that Lisa’s refusal to submit to urinalysis relieved the Department of its duty to provide remedial services. *See* RP 288-89, 401. These positions are incorrect; ICWA requires active, continuing efforts to remedy parental deficiencies, and does not permit state-created exceptions to the active efforts requirement. 25 U.S.C. §§ 1912(d), 1921 (higher standard prevails); *T.A.W.*, 186 Wn.2d at 851.

*i. Efforts in past years, prior to removal, are not timely efforts intended to remedy the instant removal.*

Under ICWA and WICWA, the Department’s efforts must be “timely.” 25 C.F.R. § 23.2; RCW 13.38.040 (1)(a). The Department cited a litany of services that it had provided to Lisa

to argue active efforts had been made. RP 402-04. However, every service listed was provided only in the previous FVS cases, which ended about six months before the Department removed Lisa's children and filed the dependency petition, and about eleven months before the trial. RP 402, 278; *see* RP 252, 265, 270-71 (services provided during FVS).

The Department relied on nothing provided during the instant case. RP 402. The Department asked the court to use the previous FVS services to find the Department had made active efforts in the dependency matter, as required by ICWA, RP 403-04, and the trial court did so find in its written orders, CP 141, 152. No exception to the active efforts requirement exists in ICWA for cases where past services were provided, and the Department's services are not timely.

In a non-ICWA dependency proceeding, the court may consider the Department's past provision of services in order to establish it made the requisite "reasonable efforts" to prevent removal. RCW 13.34.110(2). This does not apply to this Court's analysis here; neither ICWA nor WICWA provide that the court may consider services in the past to establish the requisite

“active efforts.” *See* 25 U.S.C. §§ 1911 – 1923; RCW Chapter 13.38. ICWA directs that where state and federal provisions differ, the court must apply the provision which gives greater protection for the parent. 25 U.S.C. § 1921. As ICWA does not permit an exception where services were provided one, two, or six years previously, Washington law governing non-ICWA dependency proceedings cannot be employed to weaken the protections of ICWA. *See id.*

Additionally, RCW 13.34.110(2) allows past services to be used to establish “reasonable efforts,” as required in a non-ICWA dependency case, but under ICWA and WICWA, the Department’s obligation is to expend “active efforts,” not “reasonable” ones. 25 U.S.C. § 1912(d); RCW 13.38.130(1). Therefore, given the statutory language, the legislature did not intend for this provision to apply to ICWA and WICWA cases; if it were trying to create an exception to WICWA’s protections, it would have included the term “active efforts” in RCW 13.34.110(2). The Department may not rely on RCW 13.34.110(2) to show that active efforts have been made during the instant removal.

The Department must always make “affirmative, active, thorough, and timely efforts” every time an Indian child is removed and placed in foster care, despite what any state law may provide. 25 C.F.R. § 23.2; 25 U.S.C. §§ 1912(d), 1921; *see T.A.W.*, 186 Wn.2d at 851.

ICWA requires that active efforts be “timely.” 25 C.F.R. § 23.2. *A.L.C.* is instructive. In that case, the Department referred the father to an assessment six weeks after it had been ordered by the court and to a class four weeks after the class started, causing the father to have to wait eight or more weeks for the next session to start. *A.L.C.*, 8 Wn. App. 2d at 868, 875. The Court held the Department’s efforts were not timely; they came too late. *Id.* at 875.

Here, the services were significantly in the past. There was a gap of six or more months between the end of the second FVS case and the Department’s decision to remove Lisa’s children in this case. RP 258, 260, 278, CP 2-3. The bulk of the services provided in the second FVS case were in 2017; that case started in July 2017, over a year before the instant case began. RP 260.

Past services do not meet ICWA’s standard of “timely efforts ... to ... reunite [Lisa’s] family.” 25 C.F.R. § 23.2; *see* RCW 13.38.040(1)(a) (“Active efforts means ... the Department shall make timely and diligent efforts to provide ... remedial[ ] or rehabilitative services.”). Timely services would be “well-timed” and “opportune” for the present removal. *Timely*, *Webster’s New World College Dictionary* (4th ed. 2010).<sup>10</sup> One to two years in the past – or five to six years – is not the opportune time to deliver services to speedily correct the presently-occurring removal of Lisa’s children from her home and reunite her family. *See id.*; 25 C.F.R. § 23.2; RCW 13.38.040(1)(a).

The services provided in the past were not active, affirmative, and thorough for the instant removal. *See* 25 C.F.R. § 23.2. Active efforts must occur during the present removal to show present action and to meet the logic of the definition; active efforts are those “intended primarily to ... *reunite*” Lisa with her children. *Id.* (emphasis added); *see T.L.G.*, 126 Wn. App. at 203; 25 U.S.C. § 1912(d). Actions taken before a removal

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<sup>10</sup> Available at <https://www.collinsdictionary.com/us/dictionary/english/timely>.

cannot be conducted with the intention to end the subsequent removal and thus reunite the family. *See* 25 C.F.R. § 23.2.

The Department was obligated not only to make active efforts to reunite Lisa’s family, *see* 25 U.S.C. § 1912(d); RCW 13.38.130, but also to document its efforts “in detail in the record,” 25 C.F.R. § 23.120(b). The record shows that the Department only documented efforts in the past, apart from referring Lisa to public housing waiting lists she likely already knew about. The Department failed to do, and failed to document, nearly anything that was intended to end the current separation of Lisa and her children; it failed to meet the ICWA and WICWA. *See* 25 U.S.C. § 1912(d); RCW 13.38.130; 25 C.F.R. § 23.120(a-b).

*ii. The Department may not condition remedial services on Lisa’s agreement to other services.*

The Department is obligated to make active efforts to correct perceived parental deficiencies whether or not a parent accepts certain remedial services while rejecting other rehabilitative services. ICWA provides no exception to the active efforts requirement when a parent fails to participate in certain

services desired by the petitioner. *See* 25 U.S.C. §§ 1911 – 1923; *T.A.W.*, 186 Wn.2d at 851 (“Absent express legislative intent to the contrary, we refuse to create any additional exceptions.”).

When the Department knows of a parent’s additional needs to correct a deficiency, it may not rely on a “false premise that all other services should await” the outcome of a court-ordered assessment. *T.L.G.*, 126 Wn. App. at 203 (holding Department could not delay provider-recommended mental health and parenting services, awaiting psychiatric evaluation). The Department must follow ICWA’s mandates even if a parent’s assistance would have eased the Department’s burden. *See id.* at 192 (holding burden of notice to tribe on petitioner, not parent, despite challenges for Department).

Here, the Department seemed to argue Lisa did not have a right to services through the Department if she declined to submit to urinalysis. In closing, the Department misstated testimony to argue that Lisa “wouldn’t even consider [an evaluation or urinalysis] unless she received enough, essentially, funding for housing and other things that – that she would be entitled to apparently.” RP 401.

While Lisa had not testified to that, *see* RP 11-82, 388-97,<sup>11</sup> ICWA makes clear that a parent of an Indian child is entitled to the Department’s active efforts and that the burden of the provision of services is always on the Department. *See* 25 U.S.C. § 1912(d), *T.L.G.*, 126 Wn. App. at 192-93, 203. Any suggestion otherwise is a misstatement of the Department’s duty under ICWA and WICWA. *See* 25 U.S.C. §§ 1911 – 1923; *T.A.W.*, 186 Wn.2d at 851.

The Department cannot demand that Lisa submit to certain services before providing the active efforts required by ICWA. *See T.L.G.*, 126 Wn. App. at 203. It did not have authority to wait for her to submit to urinalysis or participate in a treatment program before providing active efforts towards getting her into safe and stable housing. *See* 25 U.S.C. §§ 1911 – 1923; *T.A.W.*, 186 Wn.2d at 851; *T.L.G.*, 126 Wn. App. at 203.

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<sup>11</sup> Lisa explained she had decided not to undergo urinalysis or a hair follicle test because she was not using drugs and took exception to inaccuracies in the original dependency petition, stating “I have volunteered willingly with the department, obviously, several times and have completed successfully and I don’t have a problem doing that again if I get a fair report said about me.” RP 19-20; RP 390.

The Department cannot condition federally-mandated affirmative assistance on Lisa's provision of a urine sample.

*d. The remedy is reversal and remand for further proceedings.*

The Department failed to make active efforts to reunite Lisa with her children, as required by ICWA and WICWA. As such, the trial court erred in so finding.

Failure to make appropriate and sufficient active efforts designed to maintain or reunite the family of Indian children invalidates a dependency finding. 25 U.S.C. § 1912(d); § 1914 (parent may petition court to invalidate dependency finding when section 1912 of ICWA is violated). ICWA and WICWA each require that when a court has not followed the Act, the trial court must decline jurisdiction and return the child to the parent's custody unless doing so "would subject the child 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. Consequently, when section 1912 of ICWA and section 130(1) of WICWA are violated, reversal and remand for further proceedings is the appropriate remedy. *See* 25 U.S.C. §§ 1914, 1920; RCW 13.38.160; *A.L.C.*, 8 Wn. App. 2d at 876-77.

Accordingly, the orders of dependency for each of the children must be reversed and remanded for further proceedings. This should be ordered not only for the two younger children, already confirmed to be Indian children, but also for A.L.K., who must be treated as an Indian child unless and until such status is disproved. 25 C.F.R. § 23.107(b)(2).

F. CONCLUSION

ICWA and WICWA require heightened efforts, considerations, and procedural protections in child custody proceedings. Because the Department did not meet these requirements, Lisa K. asks this court to reverse the trial court's three orders of dependency and remand this case for further proceedings.

DATED this 30th day of August 2019.

Respectfully submitted,



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# APPENDIX A

How should a State court determine if there is reason to know the child is an Indian child? 25 CFR § 23.107 (2016)

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an “Indian child,” the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an “Indian child” in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

# **APPENDIX B**

Definitions, 25 C.F.R. § 23.2 (2016) - Definition of “Active efforts”

*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.



# WASHINGTON APPELLATE PROJECT

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