

FILED
Court of Appeals
Division III
State of Washington
11/5/2019 3:51 PM

NO. 366219

No. 98487-5

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

In Re the Dependency of: A.L.K., L.R.C.K-S., and D.B.C.K-S.,

Minors

STATE OF WASHINGTON, DEPARTMENT OF
CHILDREN YOUTH AND FAMILIES (DCYF)

Respondent.

v

L.K. (mother)

Appellant.

**RESPONSE TO APPELLANT'S MOTION FOR ACCELERATED
REVIEW**

ROBERT W. FERGUSON
Attorney General

Mary V. White
Assistant Attorney General
WSBA No. 23900
139 South Worthen Street, Suite 100
Wenatchee, WA 98801
(509) 664-6385

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESTATEMENT OF ISSUES.....4

III. STATEMENT OF THE CASE4

IV. ARGUMENT13

A. It would be appropriate and Equitable for this Court to retain jurisdiction and remand A.L.K.’s dependency to the trial Court for a limited evidentiary hearing to supplement the record with testimony and evidence regarding whether she is an Indian Child.13

1. Although the trial court failed to fully inquire at the outset of the proceedings whether A.L.K. is an Indian Child, none of the “reason to know” factors in the federal regulations were present at the contested shelter care or the contested fact finding, and the presumption of ICWA applicability was never triggered.....13

2. RAP 9.11 Allows for Supplementation of the Record Under the Facts in A.L.K.’s case.....22

B. Substantial Evidence Supports the Trial Court Findings That the Department Made Active and Reasonable efforts to Prevent the Breakup of the Indian Family24

V. CONCLUSION30

TABLE OF AUTHORITIES

Cases

Geouge v. Traylor,
68 Va. App. 343, 808 S.E.2d 541 (2017)..... 17

In re A.W.,
741 N.W.2d 793 (Iowa 2007) 20

In re Dependency of P.D.,
58 Wn. App. 18, 792 P.2d 159 (1990)..... 29

In re Dependency of T.L.G.,
126 Wn. App. 181, 108 P.3d 156 (2005)..... 18, 19, 21

In re L.R.D.,
2019 Ohio 178, WL 296876 17

In re Welfare of Angelo H.,
124 Wn. App 578, 102 P.3d 822 (2004)..... 29

State v. Sanchez,
177 Wn.2d 835, 306 P.3d 935 (2013)..... 20

Washington Federation of State Employees v. State of Washington,
99 Wn.2d 878, 665 P.2d 1337 (1983)..... 22, 24

Statutes

25 U.S.C. § 1903(4)..... 14

25 U.S.C. § 1912(d)..... 24

RCW 13.34.030(c)..... 9

RCW 13.34.120 3

RCW 13.38 5

RCW 13.38.040(1)(a) 26

RCW 13.38.040(1)(a)(i)-(iii)	26
RCW 13.38.040(7).....	14
RCW 13.38.050	18
RCW 13.38.070	19, 22
RCW 13.38.130(1).....	24
The Indian Child Welfare Act (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901.....	5
<i>Washington State Indian Child Welfare Act (WICWA)</i>	5

Rules

RAP 9.11.....	2, 4, 22, 23, 31
RAP 9.11(a)	23

Regulations

25 C.F.R. § 23	18, 26, 30
25 C.F.R. § 23.107.....	17
25 C.F.R. § 23.107(b)(1)-(2).....	20
25 C.F.R. § 23.107(b)(2).....	14
25 C.F.R. § 23.107(c).....	15, 16, 20
25 C.F.R. § 23.2.....	16, 25, 27
25 C.F.R. § 23.2(1)	28
25 C.F.R. § 23.2(2)	27, 29
25 C.F.R. § 23.2(3)	28, 30

25 C.F.R. § 23.2(4)	28
25 C.F.R. § 23.2(5)	30
25 C.F.R. § 23.2(7)	30
25 C.F.R. § 23.2(8)	28
WAC 110.110.030	21

I. INTRODUCTION

On August 14, 2018, A.L.K., L.R.C.K.-S. and D.B.C.K.-S. were placed into protective custody after the Department and law enforcement responded to reports from Appellant's landlord that three young children were being repeatedly left with her for hours at a time and overnight, without diapers, adequate food, or information regarding the mother's location, activities, or plans to return. The dependency petitions narrate a lengthy Departmental history, alleging chronic drug abuse and frequent involvement in the criminal justice system by the mother and both fathers. The petitions describe constant residential instability and a chaotic, unsafe lifestyle, despite multiple offers of assistance with housing, chemical dependency services, counseling, free daycare, transportation, assistance with the search for employment, and other supports spanning five years. The mother and A.L.K.'s father contested dependency, and the trial court's findings of Dependency for all three siblings are on appeal here by the mother, L.K.

L.R.C.K.-S. and D.B.C.K.-S. are members of the Northern Arapaho Tribe, which intervened early in their cases and participated throughout the fact-finding trial. As to these two children Appellant's sole assignment of error is her contention that there is not substantial evidence in the trial record to support the trial court's finding that Department provided active and

reasonable efforts to the family, as ICWA and WICWA require. The Department responds that substantial evidence was offered of ongoing active efforts to support the Indian family, corroborated and supported by the tribal representative and the court-appointed GAL, although the mother refused almost all of these services in the current dependency.

As to the third child, A.L.K., Appellant argues that the trial record does not support the conclusion that she is not an Indian child. Appellant contends that reversal is the appropriate remedy in light of the trial court's failure to make the mandatory inquiry on record at the outset of trial, combined with the limited evidence in the record regarding the investigation that Department was obligated to conduct upon receiving new information regarding Indian heritage.

The Department agrees that the trial court did not properly and fully conduct the mandatory on- record inquiry at the outset of the fact finding trial regarding whether there is *reason to know* that A.L.K. is an Indian child. However, reversal is not an appropriate or necessary remedy. Instead, the Department contends that this court should retain jurisdiction and remand A.L.K.'s dependency for supplementation of the record pursuant to RAP 9.11, with instructions for the court to conduct an evidentiary hearing and make findings as to whether the child is an Indian child.

The appropriateness of this remedy is supported by two pieces of evidence in the record illustrating the Department's investigation into A.L.K.'s heritage -- the social worker's trial testimony (which alerted Appellant to the issue), and the court report or "social study" prepared and filed with the Court, and disseminated to parties in advance of fact finding as required by RCW 13.34.120. The statute indicates that the court "shall" consider the court report in connection with the fact finding process, but it is not mentioned in the trial transcript. Nevertheless, it is a part of the record, submitted by the Department for the Court's consideration prior to fact finding, and it is contained within the Clerk's Papers designated by Appellant. The December 3, 2018 court report contains a quick-study summary of correspondence with twenty potentially affiliated tribes all denying membership, enrollment or ICWA status for A.L.K. The report is a small indication -- the "tip of the iceberg" regarding the existence of an entire investigation into A.L.K.'s heritage, which should be considered by the trial court in light of the current appeal and the Department's continued assertion of "no reason to know."

Remand for a limited evidentiary hearing will allow the trial court to make inquiries, take evidence, and enter findings and conclusions regarding A.L.K. After the evidentiary hearing, this Court should resolve any issues remaining on appeal.

II. RESTATEMENT OF ISSUES

1. Where the court record reflects that the Department received new information regarding Indian heritage and initiated an investigation of whether A.L.K. is an Indian child, and where the trial court did not make the required inquiry as to whether there is reason to know that she is an Indian child, should this court retain jurisdiction over the appeal as to A.L.K., remanding her case to the trial court for supplementation of the record in a limited evidentiary hearing pursuant to RAP 9.11, instructing the trial court to inquire whether there is reason to know that A.L.K. is an Indian child, take evidence and testimony limited to that question, and enter findings as to whether A.L.K. is an Indian child?
2. Where testimony and evidence presented at trial demonstrate that ample active and reasonable efforts to support and avoid breakup of the Indian family were offered to the mother over the course of more than five years through the eve of trial, and where the mother informed the Department she refused to do most of the services offered and where she did not dispute the adequacy of active efforts at trial, was the trial court correct in concluding tht Department satisfied ICWA's Active Efforts requirement, in regard to the dependency proceedings for the two Indian children?

III. STATEMENT OF THE CASE

Dependency petitions were filed in Douglas County Juvenile Court on August 17, 2018, seeking to establish dependency as to appellant's three children, A.L.K., L.R.C.K.-S., and D.B.C.K.-S., then ages 5, 2, and 1. The petition identifies L.R.C.K.-S. as an Indian child and asserts reason to know D.B.C.K.-S. is an Indian child, subject dependency to the provisions of the

state and federal Indian Child Welfare Acts (ICWA and WICWA)¹ through their father's membership in the Northern Arapaho Tribe of the Wind River Reservation. CP 2². The petition describes D.S. as an aggressive man with a history of drug abuse and extensive criminal activity, who has not been involved in parenting the two children. CP 4. A.L.K.'s father, H.R., is described in the petition as a long-term drug user with a significant criminal history, currently on DOC supervision, with limited recent involvement in his daughter's life. CP 4-5. The petition alleges no reason to know of Indian heritage or tribal affiliation for A.L.K. CP 4. The petition outlines the mother's extensive Departmental history and alleges her parental deficits to include untreated mental health problems, suspected long-term drug/methamphetamine abuse, and a troubling history of chronic residential instability and homelessness traceable in part to her unwillingness or inability to comply with the rules and conditions associated with various structured or subsidized housing programs and other clean and sober housing options. CP 3-5. The petition details a variety of mostly voluntary services offered to L.K., beginning in 2012, aimed at preventing out-of-home placement of her children, including repeated, proactive assistance

¹ The Indian Child Welfare Act (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.*; Washington State Indian Child Welfare Act (WICWA), RCW 13.38 *et. seq.*

² Unless otherwise noted, references to Clerks Papers refer to Bates stamped pages in Volume I, In Re: A.L.K., COA #366219, Douglas County Cause No. 18-7-00098-09. For example, CP 74-75.

with securing and maintaining safe and stable housing, parenting education, family preservation services, free daycare, chemical dependency assessment and treatment services, UA's, assistance with transportation and job applications, and other supports tailored to assist the family, offered through the Department's Family Voluntary Services (FVS) program. CP 5, 57. The petition alleged that the children were experiencing frequent moves, neglect, and residential instability with periods of abandonment, lack of supervision, and exposure to unsafe persons and circumstances, placing them at risk of substantial physical or psychological harm. CP 2.

On August 17, 2018, shelter care was unsuccessfully contested by the mother and by A.L.K.'s father, H.R. Citing L.K.'s long history of denying chemical dependency problems and refusing UAs, hair follicle testing and chemical dependency treatment, the court found shelter care necessary and took the unorthodox step of ordering the mother to submit to UAs and hair follicle testing. CP 1-10. The children's Shelter Care Orders reflect the Court's adoption of the Department's ICWA determinations at the time of filing -- namely that L.R.C.K.-S. is an Indian child, there is reason to know D.B.C.K.-S. is an Indian child, and no reason to know that A.L.K. is an Indian child. CP 2. On August 22, 2018, the Court entered a continued shelter care order for A.L.K., moving her from foster care to placement with her paternal grandmother, L.S. CP 26.

The Northern Arapaho Tribe filed a Notice of Intervention for L.R.C.K.-S. and did the same for D.B.C.K.-S., once paternity was adjudicated. Designated CP for D.B.C.K.-S., Vol I, CP 78-79, COA #366227, Douglas County Cause No. 18-7-00099-09 (consolidated under #366219). The Department social worker who received the case from the CPS investigator prepared and filed initial court reports for the children in preparation for dependency fact finding and circulated them to all parties on December 3, 2018. CP 54. These statutorily-mandated reports address the child's cultural information and they reflect the basis for the Department's conclusions of *reason to know* that L.R.C.K.-S and D.B.C.K.-S. are Indian children, and *no reason to know* A.L.K. is an Indian child. CP 54-67. Specifically, A.L.K.'s court report reflects and informs the reader regarding an investigation that resulted after the paternal grandmother informed social worker Stephens-Adamek of her Indian heritage. CP 54-67. The court report does not contain detail but it summarizes and overviews the notices and inquiries which the Department sent to 22 Federally-recognized tribes with corresponding responses indicating "non-ICWA" for all but 3 tribes, which had yet to respond. CP 54-55.

Appellant states that "nothing in the record" establishes whether the Department made efforts to contact "the tribe," or how the Department investigated whether A.L.K. might be an Indian child, in light of newly

supplied information concerning Indian heritage. App. Br. at 5. However, the December 3, 2018 court report does summarize the preliminary results of the ICWA investigation initiated by social worker Stephens-Adamek.

No testimony or evidence was offered during the fact finding trial regarding the results of the investigation, because no party was contending that A.L.K. is an Indian child, and all results received had been in the negative. Similarly, the entire trial transcript is devoid of any assertions by either parent that A.L.K. is an Indian child, despite that fact the Indian heritage asserted by A.L.K.'s paternal grandmother would necessarily be passed to the child through her father, H.R. An Indian Child is by definition the biological child of an enrolled member of a federally recognized tribe. Here, A.L.K.'s father was involved with the proceedings, contesting both shelter care and dependency; A.L.K. was placed with his mother, who disclosed the Indian heritage, and he never asserted membership or affiliation with any tribe. The December 3, 2018 court report summarizes an entire investigation effort which only began after the August 17, 2018 shelter care hearing, at the point when A.L.K.'s paternal grandmother mentioned --for the first time -- her Indian heritage to social worker Stevens-Adamek. The trial transcript and court record suggest that once information to investigate was received, some investigation occurred which included communications with multiple potentially affiliated tribes by December 3,

2018 when the court report was filed.

On January 23, 2019, father D.S. entered agreed Orders of Dependency and Disposition for his two Indian children, L.R.C.K.-S. and D.B.C.K.-S., with the support and agreement of the tribe, the GAL, and the Department. CP 81. The fully contested Dependency Fact-Finding trial for the children's mother, and for A.L.K.'s father H.R., occurred on January 31, 2019 and February 1, 2019, with the mother contesting Dependency as to all the children, and A.L.K.'s father H.R. contesting dependency for A.L.K. CP 82-104. A representative from the Northern Arapaho Tribe was present via telephone and participated throughout the trial, submitting a Qualified Indian Expert Statement which urged the Court to find Dependency as to L.R.C.K.-S., and D.B.C.K.-S. CP (for D.B.C.K.-S.) 151-155. Orders of Dependency and Disposition were entered for all three children on February 1, 2019, reflecting the court's findings of dependency pursuant to RCW 13.34.030(c), no parent presently capable of adequately parenting the child, such that the child is in circumstances that constitute a danger of substantial damage to the child's psychological or physical development. CP 130, 142, 153. The mother's Dependency and Disposition Orders for L.R.C.K.-S. and D.B.C.K.-S. reflect that the Northern Arapaho Tribe intervened in the proceedings, participated fully in the trial proceedings, and as to the two Indian children, the Court expressly finds that DCYF

...made active efforts by actively working with the parents...to engage in remedial services and rehabilitative programs to prevent the breakup of the Indian family beyond simply providing referrals to such services, but those efforts have been unsuccessful. CP 141, 152.

Dependency Orders for the two Indian children also clarify that the trial applied the *clear, cogent and convincing* standard and specifically affirmed that the active efforts ICWA mandates were made to avoid removal of the children, as set out in testimony and emphasized in the Declaration of the Tribal Representative and Qualified Indian Expert. CP 144, 155. The children's Court-appointed GAL participated in the dependency fact finding trial and submitted an Addendum to Fact Finding, observing,

...[L.K.] has failed to comply with Court orders for UAs and a hair follicle test, nor has she cooperated with the social worker to access other voluntary services. It appears that [L.K.] has issues with drug abuse and mental instability, anxiety and PTSD, but has refused to voluntarily participate in services offered by the Department. [L.K.] has not demonstrated that she can provide safe and stable housing for her children. Therefore it is recommended that A, L, and D, become dependent and under the supervision of the Department and that the court order services recommended in the Guardian ad litem Fact Finding report. CP 76.

During cross examination, L.K. admitted to relapses on methamphetamine during at least two pregnancies, and admitted criminal drug-related criminal convictions in 2006, 2008, and 2012. RP 17, 29, 40-42. She also acknowledged her diagnosis for PTSD and anxiety disorder.

RP 25-26. Although she maintained contact with the Department, participated in meetings, and attended visitation after the children were removed, L.K. refused all other voluntary and court-ordered services between the time of removal of the children in mid-August of 2018 and the fact finding trial which concluded on February 1, 2019, expressly rejecting the Department's active efforts, on grounds that the Department had lied about her in the dependency petition:

I have asked the Department to clarify or amend their report because I have- I have nineteen according to the CPS report, I have nineteen closed, completed intakes with the Department and have never had a fund – a finding of found. The report is a complete lie. It completely says that I abandoned my children or left my children and I was right there. I buckled my children in the car seats of the SUV that day and 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 about me. And everything in this report is a complete lie. And I've asked the Department to please fix that and I am not – it's the hair follicle, it's the UA, it's every service that the Department has asked me to do except for my visits at this time. I've done my visits and that's all I have done... RP 20.

L.K. testified under oath that when the Department and law enforcement arrived to remove the children, she was home in the residence with the children. However, the CPS investigator testified seeing her arrive and walk through the front door of the residence just as she was pulling up, and the East Wenatchee Police Department Officer accompanying the investigator testified that he saw L.K. arrive in a van belonging to a known

felon, D.K., park across the street, and enter the residence. RP 147. L.K.'s testimony that she would submit to UAs or hair follicle testing but for the Department's "complete lie," was also contradicted by social worker testimony that she had "refused urinalysis throughout her time with Family Voluntary Services and beyond." RP 213. L.K.'s assertions that concerns about current drug abuse were baseless were also belied by A.L.K.'s drawing of her mother smoking from a glass pipe, and the testimony of L.K.'s landlord that she had left a baggie of what appeared to be methamphetamine in the house. RP 212. Despite her assertion to the contrary, evidence offered at trial established that L.K. had a long record of refusing UAs in her previous voluntary services cases. RP 221, 252.

The basis for the Department's assertion that L.K.'s residential instability poses a substantial safety risk to the children was established by testimony concerning her frequent moves and historical rejection of safe housing options offered by the Department. For example, in 2017, while enrolled in an intensive perinatal drug treatment program in Seattle, L.K. left L.R.C.K.-S. and A.L.K. in the care of two individuals known by local law enforcement to be associated with drug use, weapons, and the prostitution of minors. RP 261. The Department also presented testimony from the manager of the Moonlight Motel where L.K. had lived with the children in early to mid-2018, regarding L.K.'s apparent involvement in

ongoing drug activities with other motel guests and visitors, and the physical evidence of drug use she observed in the room after L.K. was evicted. RP 354-358. Officer Eugene Gregory testified that the home of J. C., where L.K. testified she lived with the children after being evicted from the Moonlight Motel, is known to law enforcement for police contacts and arrests, and J.C. is known to Wenatchee law enforcement as a felon with schizophrenia who is often in possession of weapons, and who allows homeless persons to live in his garage for days or months at a time. RP 138-139.

IV. ARGUMENT

A. It would be appropriate and Equitable for this Court to retain jurisdiction and remand A.L.K.'s dependency to the trial Court for a limited evidentiary hearing to supplement the record with testimony and evidence regarding whether she is an Indian Child.

1. Although the trial court failed to fully inquire at the outset of the proceedings whether A.L.K. is an Indian Child, none of the "reason to know" factors in the federal regulations were present at the contested shelter care or the contested fact finding, and the presumption of ICWA applicability was never triggered.

The Department recommends that the court remand A.L.K.'s dependency case to the trial court for a supplemental evidentiary hearing to fully address whether she is an Indian child. However, the Department also recommends that this court retain jurisdiction, and firmly maintains that

none of the evidence in the court record and none of the trial testimony offered supports the conclusion that she is an Indian Child, or that her father is an enrolled member of an Indian tribe. The Department contends that there was never any basis for a presumption that ICWA and WICWA in A.L.K.'s case, because that presumption only arises once there is "reason to know," but not full confirmation that a child is Indian. ICWA and the WICWA define an Indian child in substantially the same manner:

An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4); *see also* RCW 13.38.040(7).

Reason to know is also a term of art, and Appellant blurs its meaning in service to her arguments urging this court to draw a conclusion that is not supported by the facts on record. Under federal law, when the court has "reason to know" that the child is an Indian child, but it does not yet have definitive information, the court must treat the child as an Indian child, unless and until it is determined on the record that the child is not an Indian child. 25 C.F.R. § 23.107(b)(2). However, A.L.K.'s grandmother did not create a "reason to know" just by claiming Indian heritage. Whether there is "reason to know" a child is an Indian child is determined using the following list of exhaustive factors issued by the Bureau of Indian Affairs (BIA) in binding regulations:

(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. 25 C.F.R. § 23.107(c).

This exclusive, exhaustive list is narrow and specific; it does not support "reason to know" -- and invocation of ICWA -- based upon general information that a child has Indian heritage, even with a specific, identified tribe. In this context, A.L.K.'s paternal grandmother is not one of the participants identified in paragraph 1 or 2, although the social worker is such a participant. However, the social worker who testified at fact finding about the information she received concerning Indian heritage *did not assert that she had learned that A.L.K. is a member of a tribe or that she is eligible*

for membership and is the child of an enrolled member of a tribe. “Indian child” does NOT mean a child with reported Native American ancestors. It means one who is either a member of a federally recognized tribe or eligible for membership in *and* the biological child of a member. 25 C.F.R. § 23.2.

Ignoring the short and exclusive list of “reason to know” factors in 25 C.F.R. § 23.107(c), Appellant argues that because the maternal grandmother claimed Indian ancestry, reason to know or presume ICWA status arose, pending investigation of the information. Appellant also implies that the Department failed to conduct the required investigation, or conducted an inadequate investigation, thereby compromising the rights of the tribe, the parents, or the child. This mischaracterizes the law and facts in the record, and certainly provides no independent legal basis to conclude that A.L.K. is an Indian child.

The “reason to know” threshold was never met for A.L.K. under the facts of this case as they emerged before and during the dependency fact finding trial. The Department learned after the contested shelter care was over that the paternal grandmother claimed Indian heritage through her own father, with an unspecified tribe. RP 217. Although the evidence reflects the paternal grandmother was in regular contact with A.L.K.’s father H.R., and was involved in the previous dependency proceeding, there is no previous or corroborating mention of Indian heritage for H.R. in the record, nor any

evidence that he intended to hide or reject his own heritage. There is however, limited information in the court record reflecting that Department inquired of at least 20 federally recognized tribes to determine whether any of these considered the child's father or the child to be members or eligible for membership, and every received responses indicated that A.L.K. was not an Indian Child. CP 54.

Thus, neither the Department nor the trial court had information that A.L.K. or her parents were members or eligible for membership in a federally recognized tribe, and reason to know A.L.K. is an Indian child never arose before or during the investigation. Again, pursuant to the BIA's regulations, the court only has a "reason to know" the child is Indian if one of the aforementioned circumstances exist. 25 C.F.R. § 23.107. The trial court likely erred by failing to conduct an express, on-record inquiry at the outset of the proceedings about A.L.K.'s ICWA status, but regardless of that, the disclosure of Indian heritage A.L.K.'s grandmother made to a social worker offers no basis for the Court to conclude that A.L.K. is an Indian child. *See Geouge v. Traylor*, 68 Va. App. 343, 808 S.E.2d 541 (2017) (holding "reason to know" threshold was not met by parent's report of Cherokee ancestry and allegation that the child might be an Indian child); *In re L.R.D.*, 2019 Ohio 178, WL 296876 (holding "reason to know" threshold was not met by mother report's that her father was "Iroquois").

In re Dependency of T.L.G., 126 Wn. App. 181, 108 P.3d 156 (2005), cannot be used to argue that reversal of the dependency order is required here. *T.L.G.* 126 Wn. App. 181, was decided prior to 2016, when the BIA issued federal regulations regarding ICWA. 81 Fed. Reg. 38777-38876, 25 CFR 23 (published June 14, 2016). *T.L.G.*, 126 Wn. App. 181 relied on the Guidelines for State Courts; Indian Child Custody Proceedings published in 1979 at 44 Fed. Reg. 67584 (Federal Register Vol. 44, No. 228, November 26, 1979). *T.L.G.*, 126 Wn. App. at 187-189. Since that time, the BIA has replaced the 1979 and the 2015 versions of the guidelines. The BIA's current guidelines for implementation of ICWA care found at 81 Fed. Reg. 96476-96477 (Federal Register, Vol. 81, No. 251, Dec. 30, 2016).

In any event, this case does not offend *T.L.G.*, because the evidence suggests that the Department's investigative unit contacted those tribes it determined the paternal grandmother might have ancestry with, in light of information she had supplied. Under WICWA, when a claim of ancestry is made, the Department is obligated to make a "good faith effort to determine whether the child is an Indian child."³ This obligation attaches regardless of

³ RCW 13.38.050 provides:

Any party seeking the foster care placement of, termination of parental rights over, or the adoption of a child must make a good faith effort to determine whether the child is an Indian child. This shall be done by consultation with the child's parent or parents, any person who has custody of the child or with whom the child resides, and any other person that reasonably can be expected to have information regarding the child's

whether the information is sufficient to provide a “reason to know” and does not generate a presumption that ICWA applies in the pendency of the investigation. Because the Department fulfilled that obligation with A.L.K., this case is distinguishable from *T.L.G.*

In *T.L.G.*, the Department was ordered to investigate whether the children were Indian based on the mother’s reported belief that her biological father was “full-blooded Cherokee.” *T.L.G.*, at 190. She did not cooperate with the Department’s efforts to access her sealed adoption record, and the Department never contacted the federally-recognized Cherokee tribes or provided them notice. *Id.* On appeal, the Court noted that contacting the tribe was important because “[t]ribes control the rules of their membership, and whether [the mother] is a member is a question only the tribe can definitively answer. One reason notice is a key component of ICWA is to ensure that tribes will have the opportunity to assert their rights independent of the parents or state agency.” *Id.*

T.L.G. is further distinguished from the instant case because it addressed whether there was “reason to know” the child was an Indian child

possible membership or eligibility for membership in an Indian tribe to determine if the child is an Indian child, and by contacting any Indian tribe in which the child may be a member or may be eligible for membership. Preliminary contacts for the purpose of making a good faith effort to determine a child’s possible Indian status, do not constitute legal notice as required by RCW 13.38.070.

such that formal notice was required under the law as it was at that time. The law at that time did not require that if there was a “reason to know” the child was Indian, the court must treat the child as an Indian child with all of the Act’s requirements—not just notice—until or unless it was determined that the child is not Indian. *Compare* Guideline B.1 44 Fed. Reg. 67,586 (requiring the court to seek verification of child’s status) *with* 25 C.F.R. § 23.107(b)(1)-(2) (requiring both verification of child’s tribal membership *and* treating the child as an Indian child).

Due to this significant legal change, this Court should only require the application of ICWA and WICWA if the “reason to know” factors set forth in 25 C.F.R. § 23.107(c) are met, and should decline to construe the “reason to know” determination more broadly. A broader interpretation risks applying ICWA to children’s cases based on their ancestry or race, rather than their or their parents’ political relationship with a tribe, which could create constitutional vulnerabilities in the Acts that otherwise do not exist. *See, e.g. In re A.W.*, 741 N.W.2d 793 (Iowa 2007) (holding that Iowa’s ICWA which expanded the definition of Indian child to include “ethnic Indians not eligible for membership in a federally recognized tribe” to “constitute a racial classification” in violation of equal protection); *State v. Sanchez*, 177 Wn.2d 835, 843, 306 P.3d 935 (2013) (holding courts are to construe a statute’s language to find it constitutional).

This case does not offend *T.L.G.* because the Department contacted many possibly-affiliated tribes about A.L.K.'s membership status upon learning of the claim; evidence of this effort was likely buried in discovery and is clearly summarized reflected in the December 3, 2018 court report, but it was not "broadcast," mostly because it reflected a non-event -- a continuation of the status quo for the non-Indian child. In other words, the detailed evidence of DCYF's investigation, notice and inquiries to tribes which followed disclosure of new information about heritage was not presented expressly to the court in the course of the fact finding trial, precisely because it never created "reason to know," or gave rise to any new ICWA-related obligations for the Department. At this juncture, the simplest and most direct remedy for the of lack of information in the Court record would be supplementation of the record with documents proving the Department's investigative efforts and sharing the results of those efforts.

In summary, the trial court did not have "reason to know" that A.L.K. was an Indian child at the time of the Dependency fact finding, and the social worker's passing testimony regarding the paternal grandmother's comment regarding Indian heritage certainly did not give rise to reason to know or a presumption of ICWA applicability. The information did generate a new, formal obligation for timely investigation by the Department in accordance with WAC 110.110.030.

2. RAP 9.11 Allows for Supplementation of the Record Under the Facts in A.L.K.'s case

RAP 9.11 authorizes this Court to accept additional evidence on appeal if:

- (1) additional proof of facts is needed to fairly resolve the issues on review,
- (2) the additional evidence would probably change the decision being reviewed,
- (3) it is equitable to excuse a party's failure to present the evidence to the trial court,
- (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive,
- (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and
- (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Washington Courts have accepted new evidence when the evidence is "necessary to fairly resolve the issue on review." *Washington Federation of State Employees v. State of Washington*, 99 Wn.2d 878, 884-86, 665 P.2d 1337 (1983). Such is the case here. The law clearly provides that a "written determination by an Indian tribe that a child is not a member of or eligible for membership in that tribe, or testimony by the tribe attesting to such status shall be conclusive that the child is not a member or eligible for membership in that tribe." RCW 13.38.070. The Department sent inquiries

and notice to possibly affiliated tribes inquiring about A.L.K.'s Indian status, but did not previously offer these into evidence, to allow the Court and all parties to examine the Department's investigation into whether this child is a member or eligible for membership in any federally-recognized tribe. Supplementation of the record with such evidence satisfies several of the grounds set out in RAP 9.11 – it would certainly better inform and provide a basis for the trial court's determination of whether there is to know that A.L.K. is an Indian child, and clearly it would be inequitable to decide the balance of the case without resolving the question raised, because only tribes, not courts, can definitively state whether a child is an enrolled member. The Court cannot make A.L.K. into an Indian Child if she is not one, and the Court would be remiss in carrying out the balance of her dependency proceedings on the assumption that she is not an Indian Child, when important information on that question has not been put to the court. It would make no sense to conduct the rest of A.L.K.'s dependency proceedings without the available information, and the full reversal called for by the Appellant would leave the child in unsafe and unstable circumstances.

In addition, even if all of the technical requirements set forth in RAP 9.11(a) have not been satisfied, supplementing the record should be

permitted as it “would serve the ends of justice.” *Washington Federation of State Employees*, 99 Wn.2d at 885-86.

Here, supplementing the record would clearly serve the ends of justice, bringing transparency to a murky issue that bears upon A.L.K.’s future. Furthermore, the supplemental documentation will be helpful to this court in reviewing the key issue raised by the appellant in her briefing.

B. Substantial Evidence Supports the Trial Court Findings That the Department Made Active and Reasonable efforts to Prevent the Breakup of the Indian Family.

Appellant contends that the Department failed to meet the active efforts requirements of RCW 13.38.130(1) and 25 U.S.C. § 1912(d) . ICWA provides that

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

- (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

- (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
- (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
- (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
- (6) Taking steps to keep siblings together whenever possible;
- (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
- (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- (9) Monitoring progress and participation in services;
- (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
- (11) Providing post-reunification services and monitoring.

25 C.F.R. § 23.2 etc.

In this case, substantial evidence in the record shows that the Department repeatedly provided extensive active efforts to Appellant and her family in a manner that often was tailored to her specific needs. Unfortunately, the mother's consistent evasion of all chemical-dependency related services and selective partaking only of services she prefers has

resulted in a continuation of the circumstances that have necessitated removal of the children.

The Washington State ICWA also requires that the Department must make timely and diligent efforts to provide reasonably available, culturally appropriate preventative, remedial, and rehabilitative services to the Indian family. RCW 13.38.040(1)(a). In the context of an established dependency, it defines “active efforts” as showing that the Department worked with the parent in accordance with any existing court orders and the individual service plan to engage them in remedial and rehabilitative services beyond simply providing referrals to such services. RCW 13.38.040(1)(a)(i)-(iii).

Although the federal ICWA does not define “active efforts”, the Bureau of Indian Affairs issued guidance interpreting the term with legislative rules that took effect on December 12, 2016. 25 C.F.R. § 23. These rules provide a federal definition of “active efforts” that is consistent with the state definition. They explain that “active efforts” means affirmative, active, thorough and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. 25 C.F.R. § 23.2. The efforts “must involve assisting the parent. . . through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.” 25 C.F.R. § 23.2. A.P. notes that the federal regulations also provide some examples of “active efforts”; the record before the trial court

shows that the Department's efforts in this case mirror the many examples set forth in the federal regulations as noted above. For example, social worker Welch engaged in active efforts when she traveled to the Moonlight motel on numerous occasions, during a FVS case, to check on L.K. and the children, discuss resources, and help her work on her "game plan." RP 35, 47. Social worker Reeves visited father D.S. in custody, once he was booked into the local jail, to discuss his children's circumstances and his thoughts regarding their placements. RP 317. Social worker Reeves also offered services to A.L.K.'s father, contacting his DOC officer to work out a mutually workable UA system, providing H.R. with resources for health insurance, and arranging and referring a chemical dependency for Mr. Rivera in his area, out of the neighborhood. RP 295.

The Department identified appropriate services, helped L.K. to overcome barriers, and actively assisted her in obtaining a variety of services over time. 25 C.F.R. § 23.2(2). L.K. testified that the Department provided her with a FPS Counselor who traveled to her location, spending entire days with her, driving her around town and assisting her in completing applications and locating and obtaining supports and resources. RP 33. She also received free daycare and childcare, even when unemployed, and at her request this valuable support was extended many months beyond the scheduled ending of a typical Family Voluntary Services

case. RP 34-35. The Department also identified community resources and assisted her in accessing the resources. 25 C.F.R. § 23.2(8). The Department actively worked with the Northern Arapaho Tribe not only in the current dependency but also during periods of Family Voluntary Service offerings. RP 268. 25 C.F.R. § 23.2(3). The Department also researched and contacted L.K.'s extended family for respite care or placement, and was in contact with D.S.'s sister, as potential Indian home or respite for the children. RP 28, 82, 269; 25 C.F.R. § 23.2(4). The Department conducted a comprehensive assessment of L.K.'s circumstances, with questions focused on services required to achieve safe and stable home for the family. Social worker Welch testified that she assisted the mother in locating and applying for 3 different safe and stable housing options - at the YWCA, Haven of Hope and Grace House, but L.K. rejected these, citing a preference to stay in the less restrictive environments with friends or at the Moonlight Motel. RP 265-66. 25 C.F.R. § 23.2(1).

L.K. was offered diapers, wipes, bus passes, transportation support, help filling out applications, and access to housing resources, parenting classes, counseling, and social worker Welch even accompanied her to the TANF office to see if she could assist her in resolving her sanction and regaining benefits. RP 273. All of these things are "work to overcome barriers" tailored to L.K.'s circumstances. 25 C.F.R. § 23.2(2).

Perhaps the best evidence of the Department's active efforts is that initially, L.K. previously participated in more of the offered services than she has in the current dependency proceeding. Chemical dependency evaluations, UAs, and treatment have been offered on a near constant basis due to persistent concerns about drug abuse arising from multiple intakes, but L.K. has always rejected those. She informed social worker Reeves, the current caseworker, that she would accept visits (with the children) and monetary support, but would refuse all other services, court ordered or not. RP 212. On appeal, the mother contends that the services offered to her were inadequate, when in fact they were abundant, but largely rejected, as L.K. actually admitted on cross-examination. RP 212. The services offered in the first dependency case and the two voluntary services cases are properly considered as evidence in a subsequent dependency. *In re Welfare of Angelo H.*, 124 Wn. App 578, 587, 102 P.3d 822 (2004) (citing *In re Dependency of P.D.*, 58 Wn. App. 18, 22, 792 P.2d 159 (1990)).

The Department also employed other "active efforts" as described in 25 C.F.R. § 23. The Department supported frequent visits when it could. 25 C.F.R. § 23.2(7). The Department also employed appropriate family preservation strategies. 25 C.F.R. § 23.2(5). When the case first started, all three children were placed in licensed foster care, but the Department worked to place A.L.K. with her paternal grandmother, and continued to

search for other potential relatives and to work in collaboration with the Northern Arapaho Tribe to identify other potential relatives, fictive kin or a suitable Indian home for D.B.C.K.-S. and L.R.C.K.-S.

The trial record reflects that the Northern Arapaho Tribe has remained active throughout the case, consulting with the Department and attending most court hearings by phone. The Tribe's expert, Shelly Mbonu, was aware of all the services offered to L.K. and affirmed through her expert witness statement that the Department made active efforts to stabilize the family. CP for D.B.C.K.-S., 151-155; 25 C.F.R. § 23.2(3).

V. CONCLUSION

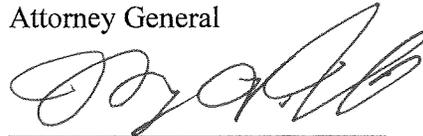
The trial court's orders establishing Dependency and Disposition for the two Indian children, D.B.C.K.-S. and L.R.C.K.-S., should be affirmed by this Court and the Appellant should be instructed to comply with the trial court's Orders of Dependency and Disposition for those children. The Department offered sufficient proof of the ongoing active efforts ICWA and WICWA require, many of which the mother rejected, and the elements of Dependency were established by clear, cogent and convincing evidence.⁴

⁴ To the Department's best knowledge, the children's tribe concurs with this Response to the Appellant's brief, although the tribe's undisputed, independent interest in the proceedings was not honored or acknowledged until Department petitioned this court to so instruct the Appellant. At the time of this writing the children's Tribe has belatedly intervened in this appeal, and the Department does not know what the tribe may argue in response to Appellant. However, at trial the Tribe urged the Court to find dependency and asserted that the Department's provision of active efforts satisfied ICWA.

This Court should retain jurisdiction of A.L.K.'s case and remand to the trial court with instructions regarding supplementation of the record with a limited evidentiary hearing pursuant to RAP 9.11. This is the most equitable option given the twin deficits in the record below – the lack of a full and complete on-record inquiry by the trial court as to whether there was reason to know A.L.K. is an Indian child, and the incomplete evidence in the record which reflects that an investigation of A.L.K.'s heritage in response to new information was conducted, but does not offer the detailed underlying evidence that will allow the trier of fact to independently consider the Department's assertion that the investigation did not change her "non-ICWA" status or give rise to any "reason to know" she is an Indian child.

RESPECTFULLY SUBMITTED this 5th day of November, 2019.

ROBERT W. FERGUSON
Attorney General



MARY WHITE, WSBA #23900
Assistant Attorney General
rsdwenappeals@atg.wa.gov

WASHINGTON STATE ATTORNEY'S OFFICE

November 05, 2019 - 3:51 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36621-9
Appellate Court Case Title: In re the Dependency of: A.L.K.
Superior Court Case Number: 18-7-00098-5

The following documents have been uploaded:

- 366219_Affidavit_Declaration_20191105154634D3016011_3709.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was 366219 ALK Service.pdf
- 366219_Briefs_20191105154634D3016011_5369.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 366219 ALK Response Brief.pdf

A copy of the uploaded files will be sent to:

- debi.truitt@atg.wa.gov
- shelley.Mbonu@wyo.gov
- wapofficemail@washapp.org

Comments:

Sender Name: Debi Truitt - Email: debi.truitt@atg.wa.gov

Filing on Behalf of: Mary V. White - Email: maryw5@atg.wa.gov (Alternate Email: rsdwenappeals@atg.wa.gov)

Address:
139 S Worthen, Suite 100
Wenatchee, WA, 98801
Phone: (509) 664-6385

Note: The Filing Id is 20191105154634D3016011