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NO. 98487-5

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF A.L.K, L.R.K.S., D.B.K.S.;

L.K.

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH
AND FAMILIES

Respondent.

**SUPPLEMENTAL BRIEF OF INTERVENOR
NORTHERN ARAPAHO TRIBE**

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PARTY INFORMATION

The Northern Arapaho Tribe is located on the Wind River Reservation in Wyoming. Two of the children in this case are eligible for membership in the Northern Arapaho Tribe. The Tribe intervened in the case below on November 28, 2018 and participated in the contested fact-finding hearing. The Tribe filed a qualified expert witness affidavit on January 16, 2019 where it agreed that the Department provided active efforts to L.K.

STATEMENT OF THE CASE

L.K.'s involvement in Family Voluntary Services with the Department of Children, Youth, and Families spanned over several months during the years of 2013, 2014, 2017 and 2018. During that time, the Department offered L.K. an array of services, including voluntary services to avoid removing the children. L.K. took advantage of some services, but refused others, such as urinalysis testing. In March 2018, the Family Voluntary Services ended because L.K. had completed or rejected all available services.

Subsequently, after a call to the Department indicating the children were being abandoned for periods of time in the house where they were living, the Department took L.K.'s three children into protective custody. In August 2018, dependency petitions were filed alleging L.K.'s failure to "provide appropriate housing," failure to provide "consistent care for the children," and regarding L.K.'s use of methamphetamine. At the shelter care hearing, the juvenile court determined that L.K.'s two youngest children were known to be affiliated with the Northern Arapaho Tribe. The Department had communicated with the Tribe during the voluntary services and subsequently sent notice regarding the removal of the children.

L.K. contested the dependency fact-finding hearing and in her own testimony stated she was refusing all Department provided services aside from visitation during the period between the shelter care and fact-finding hearings. At the contested dependency fact-finding hearing, the juvenile court found L.K.'s three children dependent under RCW 13.34.030(6)(c). The Tribe filed a qualified expert witness affidavit on January 16, 2019 where it agreed that the Department provided active efforts to L.K. The juvenile court determined that the Department made active efforts pursuant to ICWA and WICWA. L.K. appealed the decision of the juvenile court.

On appeal, the Third Division of the Court of Appeals affirmed the orders of dependency but failed to make a determination on whether the Department provided the active efforts required by both WICWA and ICWA, claiming that the doctrine of invited error precluded it from making a finding on the merits of L.K.'s claim.

ARGUMENT

I. THE DOCTRINE OF INVITED ERROR IS A CRIMINAL LAW DOCTRINE THAT SHOULD NOT BE USED AS A STANDARD IN CHILD WELFARE MATTERS, INCLUDING DETERMINATIONS REQUIRED UNDER ICWA AND WICWA.

The doctrine of invited error should not be used by courts as a mechanism to avoid making necessary determinations in child welfare cases. In the present case, the Third Division of the Court of Appeals refused to reach the merits of L.K.’s argument due to its finding that her claim was precluded under the doctrine of invited error. *In re Dependency of A.L.K.*, No. 36621-9-III, 12 Wash.App.2d 1074, WL 1649834, at *3 (March 31, 2020). Due to its reliance on the doctrine, the Third Division failed to make a determination of whether the state had provided “active efforts” as required by the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 et. seq. (1978), and the Washington state Indian child welfare act (WICWA), RCW §§ 13.38.040 (2011).

ICWA and WICWA require the court to “determine that active efforts have been made to prevent the breakup of an Indian family.” *In re A.L.C.*, 8 Wn.App.2d 864, 872 (2019). WICWA states,

A party seeking to effect an involuntary foster care placement of or the involuntary termination of parental rights to an Indian child *shall satisfy the court* that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent

the breakup of the Indian family and that these efforts have proved unsuccessful.

RCW 13.38.130(1) (emphasis added); *see also* 25 U.S.C. § 1912

(d). Therefore, the court must determine whether the requirements of active efforts were met under ICWA, 25 U.S.C. § 1912(d), and WICWA, RCW 13.38.040(1)(a)(i). There is no way around making this finding. *See Bill S. v. Dep't of Health & Social Services*, 436 P.3d 976 (Alaska 2019). While a court may find that active efforts eventually become “futile”, *In re D.J.S.*, 12 Wn.App.2d 1 (2020), this does not relieve the court of making the finding—nor does it relieve the appellate court from reviewing the an appeal of that issue from a parent. *See e.g. State ex rel. C.D.*, 200 P.3d 194, 207 (Utah Ct. App. 2008)(reviewing the evidence and concluding the lower court did not abuse its discretion in finding further active efforts would be futile).

However, the doctrine of invited error “prohibits a party from setting up an error at trial and then complaining of it on appeal.” *State v. Henderson*, 114 Wn.2d 867, 870 (1990) (*citing State v. Boyer*, 91 Wn.2d 342 (1979)). The doctrine of invited error “appears to require affirmative actions by the defendant ... [in which] the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine.” *In re Call*, 144

Wash.2d 315, 329 (2001) (*quoting In re Thompson*, 141 Wash.2d 712, 724 (2000)). No court in the country has used this doctrine against a parent in an active efforts appeal.

In Washington, rarely has the doctrine of invited error been used outside of criminal law. This Court referenced the doctrine of invited error just once, in a fairly unusual family law case that involved allegations of sexual abuse and the introduction of polygraph evidence into the record. *See In re Dependency of K.R.*, 128 Wn.2d 129, 147 (1995) (holding that under the doctrine of invited error, defense counsel was precluded from arguing on appeal that the trial court erred in allowing polygraph testimony when defense counsel originally moved for admission of the polygraph testimony).

This lack of the doctrine used outside of the criminal context makes sense. Child welfare matters, while very serious, are not criminal. The goal of the child welfare system is reunification, not criminal prosecution. *See* RCW 74.14C.005 (family preservation services). And parents have the right to contest the state's interference in their family. RCW 13.34.110. That right does not preclude the state from having to follow the requirements of state and federal law. *Id.*

Choosing not to engage in certain services is not “setting up an error,” and should not be used to excuse a finding on appeal. Indeed, in

this case, L.K. did not refuse all services, but took advantage of the ones she thought would be helpful. The disagreement between the state and the Tribe on one hand, and L.K. on the other, regarding what services L.K. needs is not setting up an error, but rather a legitimate disagreement the appellate court must address. The state cannot avoid providing active efforts simply because a parent does not want to participate in the services. *See e.g., A.A. v. Alaska Dep't of Family & Youth Services*, 982 P.2d 256, 262-3 (Alaska 1999)

Here, L.K. testified that “So, I am not doing classes. I’m not doing UAs. I’m not doing hair follicle. I’m strictly visiting my children and I am standing up for myself”. RP at 48-49. This position to refuse to engage does not excuse the state from providing the statutorily required active efforts. *See Sylvia L. v. State, Dept. of Health and Social Services*, 343 P.3d 425, 433 (Alaska 2015). Certainly, there will be parents who reject services for a myriad of reasons—this does not relieve the Department from its duties, or the court from making its required findings, or the appellate court ensuring the finding is reviewed on appeal.

When the Court of Appeals avoids a determination entirely with a parent who refuses to engage in services, this gives trial courts permission to do the same. As the Michigan Supreme Court in *In re J.L.* stated, when refusing to adopt an appellate futility test for active efforts, the Court

agreed with the lower court’s dissent that “under a such a test, ‘the circuit court may altogether avoid applying [25 U.S.C. 1912(d)] by simply deciding that additional services would be ‘futile.’” *In re J.L.*, 483 Mich. 300, 327, 770 N.W.2d 853, 867 (2009). In adopting the futility test for the Third Division of the Washington Court of Appeals, the Court rejected this reasoning because it “fail[ed] to credit the abilities of trial court judges, and as fail[ed] to recognize the role of appellate courts, in ensuring that trial courts apply the ICWA standard of active efforts.” *Matter of D.J.S.*, 12 Wn.App.2d 1 at ¶ 99 (2020). Yet within nine months, the same Court adopted a standard never used in child welfare cases in order to avoid analyzing an active efforts appeal, and failing to ensure the trial court applies the standard of active efforts.

II. ACTIVE EFFORTS INCLUDE EFFORTS TO CONNECT WITH THE TRIBE, AS THE AGENCY DID IN THIS CASE.

While ICWA does not provide a definition for active efforts, both the federal regulations, 25 C.F.R § 23.2, and WICWA, RCW 13.38.040(1), provide definitions of the phrase. The federal regulations define active efforts as,

...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.

25 C.F.R § 23.2. Furthermore, WICWA defines active efforts as

timely and diligent efforts to provide or procure such services, including engaging the parent or parents or Indian custodian in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services. This shall include those services offered by tribes and Indian organizations whenever possible.

RCW 13.38.040(1)(a).

In the present case, the Department offered L.K. a variety of services over many years including: “urinalysis testing, mental health counseling, child care, bus passes, fuel vouchers, an alcohol evaluation and assistance with housing and basic necessities,” and though L.K. took part in many of the services the Department offered, she refused anything that would address a chemical dependency. *In re Dependency of A.L.K.*, No. 36621-9-III, 12 Wash.App.2d 1074, WL 1649834, at *1 (March 31, 2020). At the contested fact-finding hearing, L.K.’s attorney stated that she had “partaken in extensive services over time, correct?” and received an affirmative answer from the Department’s on-going social worker. RP at 332.

Finally, active efforts include ensuring the state agency engages the Tribe. 25 C.F.R. 23.2 (definition of active efforts “(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.”) In this case, the Department contacted the Tribe and communicated throughout the time L.K. was been involved with the Department, both during her voluntary services period and after the children were removed. RP at 269, 290. After the children were removed, the Department conducted a Family Team Decision Meeting to ensure the Tribe’s children were placed together. RP at 320. The Agency also attempted to place the children with an Indian family, RP at 290, and continues to work with the Tribe on a placement the Tribe has since identified.

The Tribe believes that active efforts are a particularly important aspect of ICWA and WICWA, and trial level courts need to take evidence and make the finding the Department provided the efforts. In this case, while L.K. essentially refused services from the shelter care hearing to the fact-finding hearing, the Department provided services to L.K. for years prior to those few months. The Tribe prefers services to be offered *before* children are removed in an attempt to prevent a removal, as was done for

this family. When removal becomes necessary, the Department then knows what additional services a parent needs to in order to reunify with her children. L.K.'s issues with chemical dependency remain a major obstacle to that reunification. The Tribe will continue to hold the Department accountable to provide active efforts to L.K. However, the Court of Appeals should not be allowed to use L.K.'s actions to relieve itself from fully reviewing the active effort finding.

CONCLUSION

Because the doctrine of invited error is a criminal doctrine, it has no place in the child welfare arena. The Tribe respectfully asks this Court to review the Third Division of the Court of Appeals decision in the matter and remand the case to make a determination on whether the requirements of active efforts were met.

Respectfully submitted,

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