

FILED
SUPREME COURT
STATE OF WASHINGTON
4/30/2020 4:28 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 98487-5

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

THE SUPREME COURT OF THE STATE OF
WASHINGTON

In re the Dependency of:

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

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

MOTION FOR DISCRETIONARY REVIEW

MAREK E. FALK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
marek@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED..... 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT 7

 1. The Court of Appeals opinion that Lisa invited the State’s failure to provide her required services is contrary to this Court’s decisions. 7

 a. Invited error requires affirmative, knowing action..... 8

 b. Lisa did not invite the trial court’s error regarding active efforts. 10

 2. The Court of Appeals decision affirming the trial court’s finding the Department made sufficient active efforts is contrary to established law, in conflict with this Court’s decision, and of substantial public interest. 12

 a. Active efforts must be “timely;” services either one year or five to six years previously do not qualify. 12

 b. The minimal efforts provided following the removal of Lisa’s children do not constitute “active efforts.” 15

F. CONCLUSION..... 17

TABLE OF AUTHORITIES

Washington Supreme Court

City of Seattle v. Patu, 147 Wn.2d 717, 58 P.3d 273 (2002).... 9

In re Call, 144 Wn.2d 315, 28 P.3d 709 (2001)..... 8

In re Coggin, 182 Wn.2d 115, 340 P.3d 810 (2014)..... 8, 11

In re Det. of W.C.C., 185 Wn.2d 260, 370 P.3d 1289 (2016).....
..... 8, 11

In re Thompson, 141 Wn. 2d 712, 10 P.3d 380 (2000) 8, 11

In re Tortorelli, 149 Wn.2d 82, 66 P.3d 606 (2003)..... 9

Matter of Adoption of T.A.W., 186 Wn.2d 828, 383 P.3d 492
(2016) 15, 17

State v. Elmore, 139 Wn. 2d 250, 985 P.2d 289 (1999)..... 9

State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990)... 8, 9

State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) .. 8, 9, 11

State v. Parra, 122 Wn.2d 590, 859 P.2d 1231 (1993) 10, 11

State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009)..... 8, 12

State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999)..... 9

Washington Court of Appeals

In re Dependency of T.L.G., 126 Wn. App. 181, 108 P.3d 156
(2005) 16

Matter of Welfare of A.L.C., 8 Wn. App. 2d 864, 439 P.3d 694
(2019) 15

Federal Statutes

25 U.S.C. § 1912.....	10, 13, 14, 17
25 U.S.C. § 1921.....	14
Federal Regulations	
25 C.F.R. § 23.2.....	10, 13, 14, 15, 17
Washington Statutes	
RCW 13.38.040	10, 13, 14, 15, 17
RCW 13.38.130	10, 13, 17
Court Rules	
RAP 13.5A.....	1, 12, 17
RAP 2.5.....	7, 13
Other Authorities	
73 Am.Jur.2d <i>Stipulations</i> § 2 (1974)	10

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.5A, Lisa¹ moves this Court to review the Court of Appeals decision affirming the dependency in *In re Dependency of A.L.K.*, No. 36621-9-III (consolidated with No. 36622-7-III and No. 36623-5-III).

B. COURT OF APPEALS DECISION

On March 31, 2020, the Court of Appeals affirmed the trial court's finding of dependency despite insufficient evidence the Department of Children, Youth and Families ("Department") provided Lisa with sufficient active efforts to reunite her with her children, as required by the federal Indian Child Welfare Act and the Washington Indian Child Welfare Act. App. at 1.² The Court of Appeals held the invited error doctrine precluded Lisa from arguing the active efforts requirement was not met. *Id.* at 9.

¹ The children are referred to by initials and other parties by pseudonyms to protect their privacy and to promote readability.

² The citations to the Court of Appeals decision refer to the appendix attached to the motion for discretionary review.

C. ISSUES PRESENTED

1. The invited error doctrine may preclude a party from raising an error on appeal only when the party took knowing, intentional, affirmative steps to create the error in the trial court. Lisa never asserted or stipulated that she did not need help or that the Department had provided active efforts to reunite her family. Nor did she explicitly waive the active efforts requirement. Indeed, Lisa acknowledged she needed support in multiple ways to correct one or more deficiencies alleged by the Department. However, the Court of Appeals held Lisa was barred from arguing on appeal that the requirement had not been met because she was “was adamant the Department had provided all necessary services and her children should be returned to her care without further intervention.” This Court should grant review of this misapplication of the invited error doctrine.

2. The Indian Child Welfare Act (ICWA) 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 (WICWA) requires such efforts be “timely and diligent.” Lisa’s two youngest children are Indian children, but the Department’s only effort to help Lisa during this case was to give her a phone number to a community agency and sit with her once while she called the agency. Instead, the Department relied on prior voluntary services that were one to five years in the past; these efforts were not timely. This Court should grant review of the misapplication of federal and state law.

D. STATEMENT OF THE CASE

Lisa’s two youngest children, L.R.C.K-S. and D.B.C.K-S., are Indian children under ICWA and WICWA. RP 217.

The Department presented testimony throughout the trial to establish Lisa’s lack of housing stability as a parental deficiency. An investigator testified that Lisa “maintains homelessness,” RP 210, and a social worker testified Lisa did not have her own place to live when they first met; she was staying with friends, RP 289.

The Department additionally presented testimony to suggest Lisa might have a drug problem. RP 29, 48, 221, 335. The Department also knew of Lisa's needs for assistance with transportation and financial stability. RP 75, 69, 216, 310.

During the 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. In their first meeting together, the Department's social worker "offered" Lisa "housing" through "to the community resource network," and "sat there while [Lisa] called" the housing program. *Id.* That call did not result in housing for Lisa or her children. RP 22, 33.

Despite these meager efforts, the Department argued in trial and on appeal it had provided active efforts to Lisa. RP 404; Resp. Brief at 25. It relied entirely on services from two earlier periods when Lisa had participated voluntarily in Department programming. RP 215; Resp. Brief at 27-29. The first period occurred over five years before the dependency

trial. RP 252. The second voluntary participation ended 11 months before the trial. RP 258, 278.

Lisa testified at trial that she had “volunteered willingly with the Department, obviously, several times and have completed successfully.” RP 20. She did not “have a problem doing that again if [she got] a fair report” about her. *Id.* She stated the dependency petition was “a complete lie,” explaining it asserted she had abandoned her children even though she was present when they were removed, having “buckled [them] in the car seats of the CPS SUV that day.” *Id.* at 19-20. She had “asked the Department to please fix” the report and she consequently had declined the diagnostic services the Department had requested: “it’s the hair follicle, it’s the UA, it’s every service that the Department has asked of me to do except for my visits this time.” RP 20.

According to the Department’s testimony, Lisa accepted the one effort at housing assistance the Department had offered – the phone number for a housing service. RP 288-89.

Lisa acknowledged she had financial and housing difficulties. RP 22. She was not receiving the child support payments ordered by the court. RP 392-93, 395. As a single mother, she could not work full-time unless her children were in day care or school. RP 42-43, 394. She was appealing the decision that banned her from receiving financial assistance through TANF. RP 69, 216.

When asked if she needed any chemical dependency treatment or support, Lisa readily admitted she “need[ed] a lot of support for a lot of different things.” RP 41-42.

On her own, Lisa acquired a 33-foot recreational vehicle for her family to live in; identified a safe, permanent place to park it; and began the work to repair and retrofit it to make it comfortable for the children. RP 11, 67-68. Additionally, she updated her information every 90 days with the two publicly available community-housing resources, to no avail. RP 22.

The Department argued it made active efforts by listing only services it had provided to Lisa in the previous voluntary cases. RP 402. The Department asked the trial court to rely

on these previous services to find active efforts were made, and the trial court found the Department had made “active efforts in its written orders. RP 402-04; CP 141, 152.”³

The Court of Appeals held the invited error doctrine precluded Lisa from arguing the State did not make active efforts as required by ICWA and WICWA. App. at 9. Based upon this misapplication of the invited error doctrine, the court affirmed the trial court’s decision. *Id.*

E. ARGUMENT

- 1. The Court of Appeals opinion that Lisa invited the State’s failure to provide her required services is contrary to this Court’s decisions.**

The invited error doctrine only precludes review of errors created through deliberate, knowing, intentional actions. Affirmative and knowing steps did not occur here. The court’s misapplication of the doctrine warrants review under RAP 2.5(a)(2).

³ All cites to the “CP” are to the file in A.L.K.’s case (COA #36621-9).

a. Invited error requires affirmative, knowing action.

The invited error doctrine prevents “a party who sets up an error at trial [from] claim[ing] that very action as error on appeal and receiv[ing] a new trial.” *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014) (plurality opinion) (quoting *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009)). The doctrine exists “in part to prevent parties from misleading trial courts and receiving a windfall by doing so.” *Momah*, 167 Wn.2d at 153 (citing *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990)).

Application of the doctrine requires evidence the party “intentionally or knowingly set up the error.” *In re Det. of W.C.C.*, 185 Wn.2d 260, 265 n.3, 370 P.3d 1289 (2016); *In re Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001); *In re Thompson*, 141 Wn. 2d 712, 715, 724, 10 P.3d 380 (2000).

The party must make “knowing and voluntary actions” to have “invited” the error. *Thompson*, 141 Wn.2d at 724. A failure to object does not invite an error. *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009).

In assessing whether a party invited an error, this Court additionally examines whether the party “affirmatively assented to the error, materially contributed to it, or benefited from it.” *Momah*, 167 Wn.2d at 154.

The doctrine may apply when a defendant formally and affirmatively contributes to the error. Several “classic” ways are well established. *Id.* at 153-54. One common example is proposing an erroneous instruction. *See City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002); *State v. Studd*, 137 Wn.2d 533, 546-48, 973 P.2d 1049 (1999); *Henderson*, 114 Wn.2d at 868.

Others include moving for the admission of an exhibit or testimony, or submitting or agreeing to a document in writing. *See In re Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003) (proposed exhibit); *State v. Elmore*, 139 Wn. 2d 250, 280, 985 P.2d 289 (1999) (assisted in drafting statement, agreed to its content, and proposed its presentation).

Stipulation to a required statutory element requires an affirmative, intentional waiver, typically in writing. *See, e.g.*,

State v. Parra, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993). The parties must mutually assent to the stipulation and “the terms of a stipulation must be definite and certain.” *Id.* (citing 73 Am.Jur.2d *Stipulations* § 2 (1974)).

b. Lisa did not invite the trial court’s error regarding active efforts.

The State had a statutory duty to prove it made active in order to establish Lisa’s children are dependent. 25 U.S.C. § 1912(d, e); RCW 13.38.130. Active efforts must be “timely” and “diligent,” and such efforts were not made here. 25 C.F.R. § 23.2; RCW 13.38.040(1)(a).

Lisa did not refuse all services or claim none would benefit her. Lisa accepted the limited housing assistance the Department offered. RP 288-89. She made her own efforts to correct her alleged housing deficiency. RP 11, 22, 67-68. She participated actively in her visits, another area in which the Department did not provide active efforts. 25 C.F.R. § 23.2(7); RP 289. Lisa stated she needed support in various ways. RP 22, 42-43, 69, 216, 392-95.

Lisa did not affirmatively propose or assent to the trial court's error. *See Momah*, 167 Wn.2d at 153-54. She never made a "knowing and voluntary" written or verbal statement that the State need not make active efforts. *Thompson*, 141 Wn.2d at 724. Nor did she propose or agree to a stipulation with "definite and certain" terms. *Parra*, 122 Wn.2d at 601. Lisa did not "intentionally or knowingly set up the error." *W.C.C.*, 185 Wn.2d at 265 n.3.

Lisa did not materially contribute to this error merely by rejecting one service and accepting another. *See Coggin*, 182 Wn.2d at 119 (plurality opinion); *Momah*, 167 Wn.2d at 154-55. Contribution requires affirmative, specific, formal actions directly related to the error; Lisa and her counsel made no such actions. *See Thompson*, 141 Wn.2d at 724.

Further, Lisa did not strategically benefit from the error. *See Momah*, 167 Wn.2d at 154-55. She certainly did not make an intentionally "misleading" argument that garnered her "a windfall." *Id.* at 153. Lisa received no benefit from having the court find her children dependent with the

accompanying invasion of her constitutionally protected relationship with her children.

The Court of Appeals noted Lisa’s trial attorney “never claimed the Department was failing its obligations under ICWA and WICWA.” App. at 5. However, failure to object is insufficient to preclude argument. *Strode*, 167 Wn.2d at 229.

Lisa did not invite the trial court’s error. The Court of Appeals improperly declined to review Lisa’s argument. The court’s misapplication of the invited error doctrine is contrary to this Court’s well-established caselaw and merits review.

See RAP 13.5A.

2. The Court of Appeals decision affirming the trial court’s finding the Department made sufficient active efforts is contrary to established law, in conflict with this Court’s decision, and of substantial public interest.

a. Active efforts must be “timely;” services either one year or five to six years previously do not qualify.

Under ICWA and WICWA, the Department must 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.

Failure to do so warrants review under RAP 2.5(a)(2).

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). They must be “*timely and diligent.*” RCW 13.38.040(1)(a) (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.

However, at trial, despite the “timely” requirement, the Department relied entirely on actions from previous interventions that occurred before it filed a dependency petition and had Lisa’s children removed. 25 C.F.R. § 23.2; RCW 13.38.040(1)(a); RP 402-04.

Much of these acts occurred five or six years before this case. RP 252, 272. The remainder preceded the children’s

removal by five to twelve months, and the dependency trial by nearly a year or more. RP 1, 158, 258-60, 272; CP 151.

Nonetheless, the trial court found these services sufficient to support a finding the Department made active efforts. CP 141, 152. Yet under ICWA and WICWA, prior services are insufficient; active efforts must be “timely.” 25 C.F.R. § 23.2; RCW 13.38.040(1)(a). “Timely” active efforts to reunite a family must occur during the present proceedings, not at a time before the children were removed and the possibility of reuniting the family arose. *See* 25 C.F.R. § 23.2.

On appeal, the Department argued past services may be considered in a present dependency, but provided no authority applicable to ICWA or WICWA, and no support establishing prior services can be “active efforts.” *See* Resp. Brief at 29. ICWA does not permit state-created exceptions to the active efforts requirement. 25 U.S.C. §§ 1912(d), 1921 (higher standard prevails). This Court has concurred, stating, “[a]bsent express legislative intent to the contrary, we refuse

to create any additional exceptions.” *Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 851, 383 P.3d 492 (2016).

b. The minimal efforts provided following the removal of Lisa’s children do not constitute “active efforts.”

Additionally, mere referrals to services are insufficient to qualify as remedial, active efforts. 25 C.F.R. § 23.2; RCW 13.38.040(1)(a)(ii); *see Matter of Welfare of A.L.C.*, 8 Wn. App. 2d 864, 875, 439 P.3d 694 (2019). The Department was obligated to provide “appropriate services” to Lisa and assistance for her “to overcome barriers.” 25 C.F.R. § 23.2(2). It was obligated to “actively assist[] [her] in obtaining such services” throughout the case. *Id.*

The only services provided to Lisa during this case were referrals to services: a phone number for housing wait list and a request for drug testing and assessment. RP 288-89. These “mere referrals” were insufficient under ICWA and WICWA and did not provide actual rehabilitative support for Lisa’s alleged housing and stability deficiency. 25 C.F.R. § 23.2; RCW 13.38.040(1)(a)(ii); *A.L.C.*, 8 Wn. App. 2d at 875.

Lisa did not refuse this housing referral or fail to use it, despite likely already having contact with that resource. RP. 22, 33, 288-89. The Department alleged housing instability as a parental deficiency for Lisa, but did nothing more to address this deficiency during the case. RP 219, 288-89, 306-08.

The Department argued on appeal, and the Court of Appeals ruled, that Lisa refused all services other than visitation. App. at 4, 4-5 (citing RP 20), 9; Resp. Brief at 29 (citing RP 212). However, Lisa refused only drug testing, not housing or any other services. RP 20, 212. Her refusal in one area was insufficient justification for denying her all other services. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005). When the Department knows of a parent's additional needs to correct deficiencies, it may not rely on a "false premise that all other services should await" the outcome of a desired assessment. *Id.* By denying all other services, that is what the Department did here.

The trial court erred in finding the State satisfied the active efforts requirement, and the Court of Appeals erred in

affirming the dependency order. This decision conflicts with this Court's prior decision as well as federal and state law. *See T.A.W.*, 186 Wn.2d at 851; 25 U.S.C. § 1912(d); 25 C.F.R. § 23.2; RCW 13.38.130; RCW 13.38.040(1)(a).

Further, the trial court's disregard for the requirements of ICWA and WICWA is an issue of substantial public interest that this Court should review. These laws were enacted to prevent abuses of the system in disrupting Native American families. If the protections of ICWA and WICWA are permitted to be disregarded, violations will continue to occur.

This Court should grant review under RAP 13.5A.

F. CONCLUSION

Based on the foregoing and as presented to the Court of Appeals, this Court should grant review.

Submitted this 30th day of April 2020.



MAREK E. FALK (WSBA 45477)
Washington Appellate Project (WAP #91052)
Attorney for Appellant

APPENDIX

FILED
MARCH 31, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Dependency of:)	No. 36621-9-III
)	(consolidated w/
A.L.K.)	No. 36622-7-III,
_____)	No. 36623-5-III)
)	
In the Matter of the Dependency of:)	
)	
D.B.C.K.-S.)	
_____)	UNPUBLISHED OPINION
)	
In the Matter of the Dependency of:)	
)	
L.R.C.K.-S.)	
)	

PENNELL, C.J. — L.K. appeals orders of dependency regarding her three children, arguing that they were issued in violation of the federal Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963, and the Washington State Indian Child Welfare Act (WICWA), chapter 13.38 RCW. We affirm.

APPENDIX 1

FACTS

L.K. has a long history with the Department of Children, Youth, and Families,¹ largely stemming from methamphetamine abuse. For several months during 2013 and 2014, and then in 2017 and 2018, the Department engaged L.K. in Family Voluntary Services (FVS). L.K. was offered a variety of services including: urinalysis testing, mental health counseling, child care, bus passes, fuel vouchers, an alcohol evaluation and assistance with housing and basic necessities. L.K.'s response to FVS services was mixed. She took advantage of housing and other assistance, and participated in parenting classes and mental health counseling. But she largely refused to engage in urinalysis testing. The Department closed L.K.'s first FVS case after she declined further services.

L.K.'s final round of FVS services ended in March 2018 when all available services had either been completed or rejected by L.K. At around that point, L.K. and her three young children were living at the Moonlight Motor Lodge in Wenatchee. According to the lodge manager, L.K.'s circumstances were problematic. L.K. and her children were living in filth, there were questionable people coming in and out of L.K.'s unit, and L.K. often appeared incoherent. The manager did not report L.K. to

¹ Formerly the Department of Social & Health Services.

Nos. 36621-9-III; 36622-7-III; 36623-5-III
In re Dependency of A.L.K.

the Department. Instead, L.K. was evicted from the Moonlight Motor Lodge for nonpayment of rent.

L.K. and her children subsequently moved into the home of an acquaintance. The acquaintance alleged L.K. was frequently gone all night and slept during the day, leaving her to care for L.K.'s children and provide them basic necessities. Eventually, the acquaintance reported L.K. to the Department.

The Department took L.K.'s three children into protective custody. Dependency petitions were filed on August 17, 2018, alleging L.K. had failed "to provide appropriate housing" and "consistent care for the children . . . leaving them either unattended or with other caregivers for several hours to days at a time." Sealed Clerk's Papers at 5. The Department also contended L.K. was using methamphetamine.

At the shelter care hearing, the juvenile court inquired as to potential American Indian or Alaska Native heritage in accordance with ICWA and WICWA. L.K.'s two younger children were known to be affiliated, through their father, with the Northern Arapaho Tribe of the Wind River Reservation, Wyoming. However, both L.K. and the father of L.K.'s oldest child (a different father than that of the younger children) reported no known Native heritage. The juvenile court found the Department had made a good faith effort to determine whether the oldest child was an Indian Child and that ICWA and WICWA did not apply to the proceeding.

Nos. 36621-9-III; 36622-7-III; 36623-5-III
In re Dependency of A.L.K.

Shortly after the shelter care hearing, the paternal grandmother of L.K.'s oldest child informed a Department social worker there was "some Native heritage." Sealed Report of Proceedings (Jan. 31, 2019) at 217. The Department purportedly sent an inquiry to the tribe in question. The record on review does not reveal the outcome of this investigation.

After her children were placed in protective custody, L.K. informed the Department she was drug free and not in need of services. L.K. claimed the allegations against her were lies and she refused to engage in any services other than visitation.

A dependency fact-finding hearing was held in early 2019. The Department presented testimony consistent with the foregoing summary. A representative of the Northern Arapaho Tribe also appeared in relation to L.K.'s two youngest children. The representative concurred in the Department's recommendation for out-of-home placement.

L.K. testified twice during the fact-finding hearing. She denied the statements made by the Moonlight Motor Lodge manager and her acquaintance/landlady. According to L.K., the allegations against her were all lies. L.K. claimed she had "completed successfully" all of her prior voluntary services. *Id.* at 20. Given her perceptions of past success and injustice regarding the current allegations, L.K. insisted she would not

Nos. 36621-9-III; 36622-7-III; 36623-5-III
In re Dependency of A.L.K.

participate in any further testing or services, other than visitation, until she received a “fair report” from the Department. *Id.*

L.K.’s attorney echoed L.K.’s testimony in legal argument. Counsel claimed there was no reason to remove L.K.’s children from her care. L.K.’s attorney asserted L.K. did not have a drug problem, she had a place she could live with her children, and L.K. had not committed abandonment or mistreatment. Counsel never claimed the Department was failing its obligations under ICWA and WICWA.

The juvenile court was not persuaded by L.K.’s position. The court found L.K.’s three children dependent under RCW 13.34.030(6)(c) (no parent capable of care). The court also determined the Department had made active efforts to prevent the breakup of L.K.’s family under ICWA and WICWA, largely based on interventions made during the pre-petition FVS interventions.

L.K. timely appeals.²

ANALYSIS

Indian child status of L.K.’s oldest child.

Application of ICWA and WICA turn on whether a child placed in foster care meets the definition of an “Indian child.” An Indian child is one who is either “(a) [a]

² The fathers of L.K.’s children were part of the dependency proceeding, but neither is a party on appeal.

member of an Indian tribe; or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” RCW 13.38.040(7). If there is “reason to know” a child may be an Indian child, the juvenile court must treat the child as such pending final determination. 25 C.F.R. § 23.107(b)(2).

Federal regulations outline six circumstances that provide a “reason to know” a child is an Indian child.³ The six circumstances all contemplate evidence beyond mere speculation. A family member’s assertion that a child has Indian heritage does not, by

³ The circumstances are:

- (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 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).

Nos. 36621-9-III; 36622-7-III; 36623-5-III
In re Dependency of A.L.K.

itself, supply a “reason to know” a child is an Indian child. *In re Dependency of Z.J.G.*, 10 Wn. App. 2d 446, 449, 448 P.3d 175 (2019). Rather, “[a]n assertion of Indian heritage” merely “triggers the Department’s duty to investigate” pursuant to RCW 13.38.050 and WAC 110-110-0030(1). *Dependency of Z.J.G.*, 10 Wn. App. 2d at 468.

The information here failed to provide the juvenile court a reason to know L.K.’s oldest child qualified as an Indian child. Both parents denied tribal heritage and none of the circumstances set forth at 25 C.F.R. § 23.107(c) were present. While the paternal grandmother claimed some Native American heritage, this merely triggered the Department’s duty to investigate; it did not oblige the juvenile court to treat L.K.’s oldest child as an Indian child.⁴ Because the record before the juvenile court did not provide a reason to know L.K.’s oldest child was an Indian child, ICWA and WICWA did not apply to the court’s dependency order. L.K.’s arguments for reversal are therefore unfounded.

Although the record does not indicate any legal reason to know L.K.’s oldest child is an Indian child, the State concedes that the details of the Department’s ICWA and WICWA investigation should be placed on the record. This concession is well taken.

⁴ Citing 25 C.F.R. § 23.107, L.K. claims the Department was required to make a record of its investigative efforts. We disagree. The federal regulation refers only to the “reason to know” standard. It does not address the Department’s separate duty to make a good faith investigative effort. RCW 13.38.050; WAC 110-110-0030(1).

Nos. 36621-9-III; 36622-7-III; 36623-5-III
In re Dependency of A.L.K.

Under RCW 13.38.070(4)(a), the juvenile court may reassess the issue of Indian child status at any time during the pendency of a dependency proceeding. Given the arguments raised on appeal, such reassessment would be prudent in the case of L.K.'s oldest child. However, remand on this point is unnecessary. Reassessment can take place during the normal course of the dependency proceedings.

Active efforts

Unlike the oldest child, each of L.K.'s two younger children meet the definition of an Indian child, thus triggering the procedural and substantive protections of ICWA and WICWA. Important here, ICWA and WICWA require the Department to engage L.K. in active efforts at family preservation. 25 U.S.C. § 1912(d); RCW 13.38.130(1). Such efforts must be timely. 25 C.F.R. § 23.2; RCW 13.38.040(1)(a). They must also amount to more than "simply providing referrals" to services. RCW 13.38.040(a)(i)-(ii).

L.K. contends the Department failed to meet its obligation to make timely active efforts at family preservation. L.K. does not challenge the adequacy of the Department's pre-petition FVS intervention efforts. Instead, L.K. argues the Department fell short when it failed to actively provide services during the time period between the placement of L.K.'s children in protective custody and the fact-finding hearing.

We decline to reach the merits of L.K.'s arguments as they are precluded by invited error. "Under the doctrine of invited error, a party may not materially contribute

Nos. 36621-9-III; 36622-7-III; 36623-5-III
In re Dependency of A.L.K.

to an erroneous application of law [in the trial court] and then complain of it on appeal.”
In re Det. of Rushton, 190 Wn. App. 358, 372, 359 P.3d 935 (2015). An invited error is distinct from one that is merely unpreserved. Under RAP 2.5(a), certain types of errors may be claimed for the first time on appeal, despite lack of preservation in the trial court. But RAP 2.5(a)’s generous stance toward unpreserved error does not apply to invited errors. *See State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). When a party does not simply fail to object, but instead actually induces the trial court to commit an error, appellate review is waived. *Id.*

L.K.’s posture in the juvenile court precluded her from arguing on appeal that the Department failed to make sufficient efforts at family preservation. From the time L.K.’s children were placed in protective custody, up until the fact-finding hearing, L.K. was adamant the Department had provided all necessary services and her children should be returned to her care without further intervention. According to L.K., the allegations against her were all lies. As such, she threw down the gauntlet and refused to participate in any services or testing, other than visitation. The stance L.K. chose to take in the juvenile court may have been reasonable, even if unsuccessful. But it had consequences. L.K.’s claim that the Department failed to provide active efforts at family reunification fails under the doctrine of invited error.

Nos. 36621-9-III; 36622-7-III; 36623-5-III
In re Dependency of A.L.K.

CONCLUSION

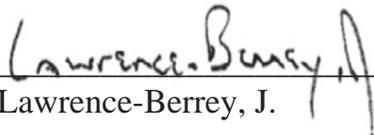
The orders of dependency are affirmed. At the next review hearing, the juvenile court shall elicit evidence regarding the Department's investigation of the Indian child status of L.K.'s oldest child. The court shall also make an explicit notation of whether that child meets the definition an Indian child.⁵

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

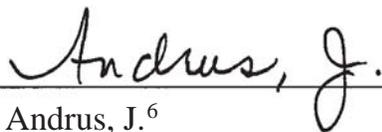


Pennell, C.J.

WE CONCUR:



Lawrence-Berrey, J.



Andrus, J.⁶

⁵ The juvenile court's dependency order does not specifically note the Indian child status of L.K.'s oldest child. This appears to be a clerical omission that should be corrected.

⁶ The Honorable Beth Andrus is a Court of Appeals, Division One, judge sitting in Division Three under CAR 21(a).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

)
)
)
)
)
)

SC NO. _____
COA NO. 36621-9-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2020, I CAUSED THE ORIGINAL **MOTION FOR DISCRETIONARY REVIEW** TO BE FILED IN THE WASHINGTON STATE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-------------------------------------|------------------------------------|-------------------------------------|----------------------|
| <input checked="" type="checkbox"/> | MARY WHITE, AAG | <input type="checkbox"/> | U.S. MAIL |
| | OFFICE OF THE ATTORNEY GENERAL | <input type="checkbox"/> | HAND DELIVERY |
| | 139 S WORTHEN ST STE 100 | <input checked="" type="checkbox"/> | E-SERVICE VIA PORTAL |
| | WENATCHEE, WA 98801 | | |
| | [maryw5@atg.wa.gov] | | |
| | [rsdwenappeals@atg.wa.gov] | | |
|
 | | | |
| <input checked="" type="checkbox"/> | CLAIRE NEWMAN | <input type="checkbox"/> | U.S. MAIL |
| | ATTORNEYFOR NORTHERN ARAPAHO TRIBE | <input type="checkbox"/> | HAND DELIVERY |
| | KILPATRICK TOWNSEND & STOCKTON LLP | <input checked="" type="checkbox"/> | E-SERVICE VIA PORTAL |
| | [jblack@kilpatricktownsend.com] | | |
| | [cnewman@kilpatricktownsend.com] | | |

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF APRIL, 2020.



X _____

WASHINGTON APPELLATE PROJECT

April 30, 2020 - 4:28 PM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: In re the Dependency of: A.L.K. (366219)

The following documents have been uploaded:

- DCA_Motion_Discretionary_Rvw_of_COA_20200430162816SC023698_6740.pdf
This File Contains:
Motion for Discretionary Review of Court of Appeals
The Original File Name was washapp.043020-09.pdf

A copy of the uploaded files will be sent to:

- cnewman@kilpatricktownsend.com
- jblack@kilpatricktownsend.com
- maryw5@atg.wa.gov
- rsdwenappeals@atg.wa.gov
- shelley.mbonu@northernarapaho.com
- Gregory Charles Link (Undisclosed Email Address)
- Marek Elias Falk (Undisclosed Email Address)

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Marek Elias Falk - Email: marek@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200430162816SC023698