



ICWA WASHINGTON STATE CASE LAW

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In re Dependency of Z.J.G.

- "Reason to Know" Under ICWA and WICWA

In re Dependency of A.L.K.

- What are "Active Efforts"?
- The Appropriate Remedy Where DCYF Does Not Make Active Efforts at Dependency Disposition

In re Dependency of G.J.A.

- What are "Active Efforts"?
- Whether the "Futility Doctrine" Applies in ICWA/WICWA Cases
- The Appropriate Remedy Where a Parent Does Not Seek Placement, but DCYF Does Not Make Active Efforts During a Dependency Review Hearing

In re Dependency of J.M.W.

- Whether Active Efforts Are Required at Shelter Care Hearings
- Are Shelter Care Hearings Child Custody Proceedings, Emergency Proceedings, or Both?
- The Appropriate Remedy Where DCYF Does Not Make Active Efforts at Shelter Care

IN RE DEPENDENCY Z.J.G.

196 WN.2D 152, 471 P.3D 853 (2020)

FACTS AND PROCEDURAL HISTORY

Background:

- Police removal into protective custody
- Dependency Petition:
 - *Knows or reason to known the child is an Indian child under ICWA and WICWA*
 - *Parents both identified tribal affiliation*
 - *Inquiry to tribes initiated by phone call and further inquiry and notification ongoing*

Shelter Care Hearing

- Social worker and parents testified
- Social worker testified that ICWA/WICWA did not apply “..at this time”
- Parents testified they were eligible for tribal membership, and their children were eligible – no one enrolled.
- Court found that ICWA did not apply “..at this point based on the evidence presented and the reasonable cause standard.”

WA SUPREME COURT'S ANALYSIS

De novo review

Protective
Provision

ICWA/WICWA

REASON TO KNOW THAT CHILD IS AN INDIAN CHILD

- Any participant in the proceeding
 - Indicates that the child has tribal heritage
 - Standard that respects a tribe's exclusive role in determining membership.
 - Tribal Membership/Citizenship varies widely
 - Requirements can change
- “A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” *Santa Clara Pueblo*, 436 U.S. at 55 (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832))

A TRIBE'S UNIQUE ROLE

- “We will not construe “reason to know” in a way that would require state agencies and parents to determine for themselves whether the child is a member or eligible for membership.”
- “To do so would undermine tribes’ exclusive authority to determine membership and would undermine the protections of the act.”
- The final determination of whether the child is an Indian child must be then made by the tribe itself, after it has been formally notified of the proceeding.”

BIA GUIDELINES TO STATE COURTS

1. Any participant informs the court that the child is an Indian child;
2. Any participant informs the court if has discovered information;
3. Child is subject to a proceeding that would give the court reason to know;
4. Domicile or residence of child, parents, or Indian custodian on reservation or AN village,
5. Is or has been a ward of a Tribal court,
6. Parent or child has an identification card indicating membership in an Indian Tribe.

GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 25 C.F.R. § 23.107(c).

WICWA – AN EQUAL AND ALTERNATIVE BASIS FOR REVERSAL

- “Thus, we hold that WICWA is an independent basis, regardless of ICWA, to find that a court has "reason to know" a child is or may be an Indian child when a participant in the proceeding indicates that the child has tribal heritage.”
- While testimony of eligibility is not necessary to establish a "reason to know," it *is sufficient* for a court to make such a finding.
- The court also had "reason to know" the children were Indian children due to the mother and father's testimony of their tribal heritage with the Cherokee tribes and the Confederated Tribes of the Umatilla Indian Reservation.

IN RE DEPENDENCY OF A.L.K.

196 Wn.2d 686, 478 P.3d 63 (2020)



BACKGROUND FACTS

- 2 of the mother's children were eligible for enrollment with the Northern Arapaho Tribe of Wyoming
- In 2017, DCYF had a Family Voluntary Services (FVS) case involving the family and offered the mother drug and alcohol treatment, UAs, childcare, housing assistance, concrete goods, and in-home family preservation services
 - DCYF later closed the FVS case
- Approximately 6 months after the FVS case's closure, DCYF filed dependency petitions as to the children and the children were placed in out-of-home care following a shelter care hearing
 - DCYF offered several random UAs and a hair follicle test, but the mother consistently refused to complete them
 - DCYF also recommended that the mother engage in several voluntary services during the shelter care phase, including: a chemical dependency evaluation, a domestic violence perpetrator's assessment, safe and stable housing, parenting education, and a psychological evaluation
 - The record on appeal did not reveal whether DCYF referred the mother to these services, helped the mother with scheduling appointments, or helped with filling out applications
- At the dependency fact-finding and disposition hearing, the juvenile court determined that the children were dependent and ordered that the children remain in out-of-home care after also finding DCYF made active efforts to prevent the breakup of the family

STATUTORY DEFINITIONS OF ACTIVE EFFORTS

ICWA

- “[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law 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.”
 - 25 U.S.C. § 1912(d)
- “active efforts” are “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

WICWA

- “active efforts” means “the department . . . shall make timely and diligent efforts to provide or procure such services, including engaging the parent . . . in reasonably available and culturally appropriate preventative, remedial or rehabilitative services. This shall include those services offered by tribes and Indian organizations whenever possible.”
 - RCW 13.38.040(1)(a)
- The Department must actively work with the parent to engage them in remedial services and rehabilitative programs to prevent the breakup of the family beyond simply providing referrals to such services
 - RCW 13.38.040(1)(a)(ii)

COURT'S DETERMINATION

- DCYF did not engage in active efforts as required under ICWA and WICWA
 - The social worker testified as to a case plan, and assistance with housing and chemical dependency services
 - **BUT**, there was no indication that the social worker made attempts to help the parent access services other than helping with one phone call and a case plan
 - "The record establishes that [the mother] did not want all of the services the Department offered, *but not that the Department made attempts to engage in active efforts to ensure she received services, even if they were unwanted.*"
- Providing active efforts in a past FVS case (6 months prior to the initiation of the present case) is not sufficient to show the *timely* provision of active efforts in a present case

“A parent’s declination to engage in voluntary services prior to a finding of dependency cannot be used as evidence that the Department has engaged in active efforts for the purposes of removing children from their parent’s care.”

ALK, 196 Wn.2d at 701.

EXAMPLES OF ACTIVE EFFORTS ADDRESSED IN A.L.K.

helping a parent
make appointments

calling providers on a
parent's behalf

driving a parent to
services

helping a parent with
filling out forms or
applications

attempting to engage
a parent in services,
even if the services
are unwanted

ICWA AND WICWA'S IMPROPER REMOVAL STATUTES

“Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.”

25 U.S.C. § 1920; see RCW 13.38.160

If a child is improperly maintained in out-of-home care at dependency disposition because DCYF did not make active efforts, the remedy is “to affirm the dependency order, but to vacate the dispositional order’s out-of-home placement and to remand for a determination of whether returning the children would subject the children to substantial and immediate danger or threat of danger.”

A.L.K., 196 Wn.2d at 703.



IN RE DEPENDENCY OF G.J.A.

197 WN.2D 868, 489 P.3D 631 (2021)



FACTS AND PROCEDURAL HISTORY

- 2017 Dependency established
- ICWA & WICWA applied (Blackfeet Nation)
- Services and Visitation Ordered
- Social worker assigned in October 2018 – communication issues
- Termination Petition Filed January 16, 2019
- Referrals not timely submitted
- Provider not culturally competent
- Court ordered visitations did not occur
- July 10, 2019 first therapeutic visit

TRIAL COURT'S FINDINGS

- Trial court found active efforts were provided under ICWA & WICWA
- Dept. acknowledged referrals should have been made and contact should have occurred but said:
- "[T]here's plenty of reason to believe that the phone was not going to be answered."
- The court was "not convinced anything would have come from the social work clicking 'submit' on family therapy referral..
- Court found "it is not the court's role" to critique how social workers could do better in every case."

SUPREME COURT'S REVIEW OF THE EFFORTS

- “During the two-week period when C.A. was in treatment in Spokane, [social worker] initiated contact with C.A. only once—... not to check on her health, safety, or needs....
- After C.A. requested help finding sober housing, [social worker] texted and e-mailed her a list of sober housing facilities. Instead of actively assisting C.A. in accessing necessary housing, [social worker] left her to contact the sober housing facilities on her own....
- [Social worker]'s failure to actively assist C.A. in getting admitted into a detox program or accessing safe, affordable, sober housing and her failure to monitor C.A.'s progress fell far below the minimum “active efforts” requirement.” (at 896-897)

ACTIVE EFFORTS

- “The Department **failed to meet its burden** to provide active efforts when it simply provided **untimely and inadequate referrals to services that were not culturally appropriate**. It also failed to engage with C.A. to overcome other barriers, including communication, housing, and treatment. Instead, the **Department used those barriers against her and relied on them as excuses** to not reach out to C.A. or submit referrals. The Department's actions fell far short of the **minimum standards** of ICWA and WICWA.” (at 901-902)

ACTIVE EFFORTS: THOROUGH, TIMELY, CONSISTENT, CULTURALLY APPROPRIATE

ICWA (BIA Guidelines)

- Comprehensive assessment – safe reunification
- Appropriate services
- Identify, notify, invite Tribal participation
- Diligent search and consultation
- Culturally appropriate services – consult Tribe
- Siblings together
- Visitation
- Identify Community Resources – actively assist
- Monitor progress
- Consider alternatives
- Post-reunification services

WICWA

- Department's duty to:
- “make 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) see (i) - (iii)*

COURT'S ANALYSIS – BACKGROUND OF ICWA & WICWA

- *The history of the United States and its relationship with Native tribes, communities, and families tell a story of promises made and broken.*
- *We rely on the commitment made by Congress and the Washington State Legislature to decline to remove Native children from their families and communities unless absolutely necessary and to **actively work toward reunification in those limited instances when the high standard for removal has been met.***
- *Today, we hold our state child welfare system and our courts to those promises. We reverse the dependency court's finding that the Department provided active efforts and remand to the trial court with instructions to order the Department to provide active efforts in accordance with this ruling.*
- *We also order the dependency court to not proceed to hear the termination petitions until the Department has provided active efforts.*



IN RE DEPENDENCY OF J.M.W.

199 Wn.2d 837, 514 P.3d 186 (2022)



BACKGROUND FACTS

- J.M.W. is a member of the Oglala Sioux Tribe and an "Indian child" under ICWA and WICWA
- In August 2019, DCYF received a report that the mother physically abused J.M.W.
 - The mother admitted she had hit J.M.W.; DCYF discussed appropriate forms of discipline, parenting services, and provided several concrete goods and vouchers
 - Two weeks later, the social worker attempted, unsuccessfully, to contact the father
- In October 2019, J.M.W.'s daycare reported that the child arrived with bruises and in pain
 - That same day, law enforcement placed J.M.W. into protective custody
 - The record does not reveal whether DCYF attempted to contact the father before J.M.W. was removed from his mother's care
 - The next day, the social worker spoke with the father. The father was on DOC supervision, had a history of substance abuse and domestic violence, and had unstable housing
 - The record does not reveal what efforts the social worker made as to the father
- DCYF filed a dependency petition, and the juvenile court held an initial shelter care hearing
 - The juvenile court maintained J.M.W. in out-of-home care, but its order was silent as to active efforts
- The juvenile court held an interim shelter care hearing approximately two weeks later
 - The court found DCYF made active efforts and that there had been "no change in circumstances" since the initial shelter care hearing

EMERGENCY PROCEEDINGS

- Under ICWA, an “emergency proceeding” is “any court action that involves an emergency removal or emergency placement of an Indian child.”
 - 25 C.F.R. § 23.2
- “[N]othing shall be construed to prevent the department or law enforcement from the emergency removal of an Indian child . . . from his or her parent or Indian custodian or the emergency removal of such child in a foster home, under applicable state law, to prevent imminent physical damage or harm to the child.”
 - RCW 13.38.140(1)

CHILD CUSTODY PROCEEDINGS

- A “child-custody proceeding” includes one of four types of proceedings:
 - a foster care placement
 - termination of parental rights
 - a preadoptive placement
 - an adoptive placement
 - RCW 13.38.040(3)
- A “foster care placement” is “any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home, institution, or with a relative, guardian, or suitable other person where the parent or Indian custodian cannot have the child returned up on demand, but where parental rights have not been terminated.”
 - RCW 13.38.040(3)(a)

COURT'S DETERMINATION

- Under WICWA, active efforts are required in involuntary "foster care placements"
- WICWA requires that juvenile courts evaluate whether active efforts have been taken at **EVERY** hearing where an Indian child is placed in out-of-home care
 - But, **SOME** initial shelter care hearings are not child custody proceedings in which DCYF must prove it made active efforts to prevent the breakup of the Indian family
- Regardless, the Department must begin making active efforts **AS SOON AS POSSIBLE**
- When an Indian child is placed or maintained in out-of-home care at shelter care, the juvenile court must find whether removal or placement is "necessary to prevent imminent physical damage or harm to the child."
- Where active efforts are required, but not proven, the juvenile court must immediately return the child to the parents' care unless doing so would subject the child to substantial and immediate danger or threat of such danger

“Where, as here, the department had prior contact with the family and reason to believe the child was at risk of physical damage or harm, it had an obligation to at least begin making active efforts to avoid breaking up the family. The trial court had an obligation to consider whether active efforts had been taken at these shelter care hearings.”

J.M.W., 199 Wn.2d at 848.

“Prior active efforts may not be required at least in some circumstances when, for example, a court orders law enforcement or Child Protective Services to take a child into custody in an emergency. . . . In such circumstances, the department’s active efforts obligation may not be triggered until after the first shelter care hearing.”

J.M.W., 199 Wn.2d at 848.

WHEN ARE ACTIVE EFFORTS REQUIRED?

Initial Shelter Care Hearings

- **IF** DCYF had prior contact with the family and reason to believe the child was at risk of physical damage or harm

Shelter Care Hearings After the Initial Hearing

- including interim and continued shelter care hearings
- where the child is placed or maintained in out-of-home care

Disposition

- where the child is placed or maintained in out-of-home care

Dependency Review & Permanency Planning Hearings

- where the child is placed or maintained in out-of-home care

Termination & Guardianship

ICWA AND WICWA'S PROTECTIONS DURING CHILD CUSTODY PROCEEDINGS:

- Active efforts
- Formal legal notice to the child's Tribe
- Qualified Expert Witness testimony
- Clear and convincing evidence that the continued custody of the child by the parent or Indian custodian is likely to result in "serious emotional or physical damage to the child"

RCW 13.38.130

"The department suggests that holding active efforts are required at shelter care hearings will necessarily require the department to comply with impossible requirements, such as 10 days' prior written notice to various stakeholders. Such a requirement would be inconsistent with RCW 13.38.140(1). Read as a whole, **WICWA does not require that notice when it could not be accomplished.**"

J.M.W., 199 Wn.2d at 848 n.4.