THE SUPREME COURT OF THE STATE OF ALASKA

JANELLE A.,	)	
	)	Supreme Court No. S-14128
Appellant,	)	
	)	Superior Court Nos. 3DI-08-00017 CN
v.	)	and 3DI-09-00001 CN
	)	
STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, OFFICE OF CHILDREN'S SERVICES,	)	MEMORANDUM OPINION AND JUDGMENT*
	)	
	)	No. 1396 – October 25, 2011
Appellee.	)	
	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Dillingham, Fred Torrisi, Judge.

Appearances: Joseph R. Faith, Dillingham, for Appellant. Megan R. Webb, Assistant Attorney General, Anchorage, and John J. Burns, Attorney General, Juneau, for Appellee. Lisa M. Wilson, Assistant Public Advocate, and Richard Allen, Public Advocate, Anchorage, for Guardian Ad Litem.

Before: Carpeneti, Chief Justice, Fabe, Winfree, Christen, and Stowers, Justices.

I. INTRODUCTION

A mother with a history of mental illness and alcohol abuse, in a relationship that consistently resulted in domestic violence, lost parental rights to her two

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* Entered pursuant to Appellate Rule 214.

young children. The mother appeals the superior court's ruling that the Office of Children's Services (OCS) made active efforts to provide remedial and rehabilitative services and the court's admission of a report of a psychological evaluation. Because the evidence supports the superior court's finding that OCS made active efforts, and because the mother waived her objection to the admission of the psychological evaluation report, we affirm the superior court's order terminating her parental rights.

II. FACTS AND PROCEEDINGS

A. Facts

Janelle and Alfred are the parents of two children: Rosie and Alfie.[1] They all live in Dillingham.

Janelle faced numerous difficulties growing up. She began receiving outpatient counseling at Bristol Bay Counseling Center (Counseling Center) in 2003, but the Counseling Center later reported that Janelle "has had difficulty attending consistently and usually does not complete a course of treatment." In May 2003, while she was a teenager, Janelle refused to eat and was taken to Providence Hospital. The staff there encouraged her to enter long-term residential care, but her family declined.

Janelle dropped out of school at age 16. She was arrested for assault in December 2005. By January 2006 she was living with her boyfriend Alfred, reported cutting herself because of stress, and was taking medication for depression. Janelle continued to report suicidal inclinations through at least 2007.

Janelle and Alfred had a daughter, Rosie, on February 12, 2007. That month, Janelle's therapist at Bristol Bay Area Health Clinic (Health Clinic), Lauren Graham, wrote that Janelle "has a history of inconsistent attendance and participation in

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[1] We use pseudonyms for all family members.

counseling sessions, and will often drop out for months at a time with no continuity of care." She recommended Janelle undergo a psychiatric examination, but Janelle declined.

Janelle and Alfred then had a son, Alfie, who was born two months premature in June 2008. Alfie was born with a partially developed lung, which resulted in numerous respiratory ailments. On October 31, 2008, Janelle brought Alfie to the hospital because he had a progressive cough over the last five days and had six or seven episodes of apnea over the prior four hours. The hospital admitted Alfie for monitoring. On November 2 the hospital called the police to escort Janelle out of the building. According to hospital notes, Alfred and Janelle began shouting about their personal possessions. The staff also noticed that the parents did not properly care for Alfie.

OCS received a protective services report from the hospital on November 5. Case worker Antonio Martinez met with the parents and recommended formulating a safety plan. The plan was created on November 10 by the parents, tribal representatives, and the parents' extended families; it placed Alfie with his maternal aunt until OCS's safety concerns could be resolved. As part of the safety plan, Martinez referred Alfred and Janelle for substance abuse and mental health assessments.

Between September 23, 2008 and November 12, 2008, Janelle did not contact the Health Clinic. Lauren Graham reported that Janelle "has not been attending appointments regularly," and "[i]n the time that [she] has not been coming for appointments, she lost [Denali Kidcare]/Medicaid, is no longer involved with [the Women, Infants, and Children Program], has been denied for benefits, and lost all the identification documentation that [the Health Clinic] had been able to renew." Graham

once again recommended a psychiatric evaluation, but Janelle again declined. Janelle then stopped attending appointments.[2]

On November 16, Janelle was arrested for assaulting Alfred and interfering with arrest. She was released the same day on the condition that she not have contact with Alfred. On November 25, 2008, Janelle breached the safety plan by leaving her sister's house with both children and temporarily relocating to a shelter. At the shelter Janelle was disruptive toward staff and other guests, played loud music, and neglected to care for her children. She left the shelter less than 11 hours after arriving and went to Alfred's home in violation of her conditions of release. The shelter staff notified Martinez, who found Janelle at Alfred's home with the two children. Martinez observed that the parents had not been administering prescribed medication to Alfie, had not been properly hydrating him, and had not changed his soiled diapers. OCS took emergency custody of Alfie but left Rosie with her parents. Martinez testified that only Alfie was removed because OCS could only verify that Alfie was facing an imminent threat to his safety.

Martinez arranged semi-weekly visits between Janelle and Alfie in December 2008. These supervised visits lasted approximately an hour and a half. Martinez observed that Janelle "constantly fidgets with her cell phone and cries uncontrollably in front of the infant. Other things preoccupy her when she comes to see her son and she does not pick up on any of the baby's cues." Martinez also noticed that Janelle did not properly supervise or monitor Rosie, who ran throughout the OCS office. Martinez repeatedly reviewed the case plan with Janelle during these visits.

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[2] When Graham went on maternity leave, Janelle was reassigned to therapist Janet Cline. The parents' social worker, Debra Hallmark, testified that Janelle did not understand or connect with Cline and thus had a difficult time working with her.

On January 12, 2009, Janelle's therapist called OCS to report that she had not seen Janelle since November. Janelle told Martinez she missed the appointments because she could not remember to get to them. Martinez offered transportation, but Janelle declined. Martinez reminded Janelle to attend the sessions, but Janelle did not meet with her mental health therapist again until March 2009.[3]

Martinez created another case plan for Alfred and Janelle on January 21, 2009. Janelle, Alfred, the tribe, Martinez, Martinez's supervisor, and the parents' extended families were involved in developing the case plan. It listed concurrent goals of reunification and adoption. The plan required Janelle to participate in a mental health assessment, to be assessed for substance abuse, and to get involved with the services provided to Alfie. Martinez recruited Chris Itumulria, the local Indian Child Welfare Act worker, to explain the plan to Janelle and Alfred. Martinez testified that Itumulria asked him to leave the room, and that it was his understanding that Itumulria privately explained to the parents what was in the plan, what they needed to do, and how he was willing to assist them in accomplishing those tasks.

In April 2009 Lauren Graham updated Janelle's mental health assessment and performed a substance abuse assessment. The assessments explained that Janelle was "[s]elf-referred initially, but the Office of Children's Services is now mandating treatment." Janelle reported that she had been sober for between two and three years, but that she started using alcohol again in a binge fashion when she lost custody of her son. Janelle denied any current alcohol use. Graham diagnosed Janelle with depression,

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[3] According to OCS, Janelle's history of attending mental health appointments was as follows: missed a session on 10/7/08; attended on 11/12/08; missed 1/14/09; cancelled on 2/10/09 and 2/17/09; arrived 45 minutes late on 3/2/09; missed 3/24/09 and 3/26/09; attended on 4/6/09, 4/14/09, 4/21/09, and 4/28/09.

anxiety, and possible post-traumatic stress disorder resulting from the experience of multiple traumas as a youth. She recommended that Janelle undergo numerous services, including individual outpatient therapy focusing on her depression and sobriety support, family therapy, group therapy, crisis services, and a psychiatric evaluation. Given Janelle's "week and a half period of time when she was drinking and partying excessively" after OCS took custody of Alfie, Graham also recommended six outpatient sessions for co-occurring issues, combined with regular outpatient sessions.

On April 19, 2009, the Counseling Center informed OCS that Janelle had missed a scheduled psychological assessment. Because Janelle missed multiple assessment appointments without a valid reason, the Counseling Center refused to schedule any more assessments for her.

Martinez left Dillingham in May 2009 and Debra Hallmark took over as the parents' social worker. Hallmark discussed the parents' case plan with them and identified what parts had yet to be performed. She also created a new case plan for Janelle on June 8. Hallmark discovered that Janelle had completed an alcohol assessment as part of Graham's April 2009 mental health assessment, but that Janelle did not receive any alcohol recommendations because Janelle had told Graham she did not have a drinking problem. Hallmark testified that Janelle later admitted that she did have a drinking problem and she agreed to another alcohol assessment so she could get a recommendation for residential treatment. Janelle's June 2009 case plan reflected that she needed a substance abuse assessment. Hallmark continued to review Janelle's case plan with her every time Janelle came for visitation with the children.

In June 2009 OCS took emergency custody of Rosie because it could "no longer be assured [of Rosie's] safety in spite of having a safety plan in place with on-going monitoring." OCS's emergency petition explained that Janelle and Alfred were

homeless, their whereabouts were unknown, and there were reports of on-going arguing, fighting, and physical assault between Alfred, Janelle, and Alfred's father in Rosie's presence.

Around August 2009 Graham recommended that Janelle undergo a psychological evaluation. Assistant attorney general David Noteboom called Janelle's counsel, Joe Faith, to ask permission to perform the evaluation. Faith and Noteboom contest whether or not Faith opposed the evaluation during their conversation, but Faith encouraged Noteboom to file a motion to which he would respond. Faith spoke with Hallmark to find out the purpose of the evaluation and to get the evaluator's contact information. Hallmark gave Faith the evaluator's name — Dr. Bock — and telephone number. Hallmark stated in an affidavit that she also told Faith the evaluation dates, but Faith disputed this. The record shows that Faith spoke with Dr. Bock's office about the evaluation on August 19, but the contents of that discussion were not memorialized. Noteboom subsequently filed a motion to order the psychological evaluation. Though the guardian ad litem filed a non-opposition, Faith did not respond. He later conceded this was due to his own "oversight."

Hallmark arranged for Dr. Bock to travel from Kenai, where she lives and works, to Dillingham to perform the evaluation. According to Hallmark, Bock said she needed two days to do the evaluation, that she had Mondays off, and that she would prefer to schedule the evaluation on a Sunday and Monday to minimize the time taken out of her work week and to minimize the disruption to her other clients. The evaluation was scheduled for Sunday, September 20 and Monday, September 21, though the court had not yet ruled on the State's unopposed motion.

On September 20, 2009, Hallmark went to pick up Janelle for the evaluation. Janelle was asleep when Hallmark arrived, so Hallmark woke her and told

her to be ready in 45 minutes. Janelle was still asleep when Hallmark returned 45 minutes later. Hallmark woke her again and took her to the evaluation. Janelle's counsel was not present.

The next day, Hallmark went to pick up Janelle for the second day of the evaluation. Hallmark found Janelle in tears; Janelle later said she was upset because Alfred had been belittling her and calling her "worthless." Janelle went to the evaluation, but she appeared to be distracted. During the evaluation Janelle and Alfred had several telephone conversations that caused Janelle to become upset and leave the evaluation early. She received a telephone call from Alfred partway through the evaluation informing her that he was entering residential treatment that day. Dr. Bock testified that Janelle left, in part, because she wanted to see Alfred before he entered treatment. But Janelle later testified that she left because she did not want to continue the evaluation. Both Dr. Bock and Hallmark tried to get Janelle to come back to finish the evaluation, but they were not successful.

On September 22, the court granted OCS's motion requiring Janelle to undergo a psychological assessment. The order did not specify the date, time, place, or name of the evaluator. Janelle's counsel filed a motion for reconsideration two days later seeking exclusion of evidence of the September 20 evaluation because it was performed while OCS's motion was pending and because Janelle's counsel was not present during the evaluation.

The superior court held a hearing on Janelle's motion on October 14. The court decided to admit the evaluation, explaining: "[I]f we go to a contested hearing and somebody needs to put on an expert to say . . . why it was invalid or biased in some way, that's fine. I'm just going to assume until I'm shown otherwise that it was professionally done and that it would be of some assistance."

Dr. Bock's report was issued in late October 2009. The report was based on Dr. Bock's meetings with Janelle, as well as court records, prior assessments, and treatment plans from the Counseling Center. Dr. Bock diagnosed Janelle with post-traumatic stress disorder, depression in the form of dysthymic disorder,[4] alcohol abuse with sustained remission, a learning disorder, and dependent personality disorder. Dr. Bock also testified that Janelle suffered from serious emotional disturbance.

Janelle completed a substance abuse assessment at Jake's Place on January 21, 2010. Jake's Place recommended Level III.5 residential treatment with a mental health component. Janelle's counsel sent a letter to OCS five days later stating that Janelle "wants to get into a long-term residential treatment program in Anchorage . . . as soon as possible." After receiving the substance abuse assessment from Jake's Place, Hallmark obtained the paperwork for Janelle to enter residential treatment at Clitheroe Center in Anchorage and gave the paperwork to Janelle to complete. A week or two later, Janelle said that she had lost the paperwork, so Hallmark got another copy, helped her complete it, and submitted it to Clitheroe. On March 11 Janelle told Hallmark she missed another appointment for a mental health assessment because she had overslept. Hallmark suggested Janelle reschedule, but Janelle did not do so.

The Department of Health and Social Services filed a petition for termination of parental rights on March 12, 2010. On March 15, Hallmark again asked Janelle to would reschedule the appointment for her mental health assessment. Janelle said she would, but she did not do so until August 2010.

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[4] *Dorland's Illustrated Medical Dictionary* defines "dysthymia" as "a mood disorder characterized by depressed feeling . . . and loss of interest or pleasure in one's usual activities and in which the associated symptoms have persisted for more than two years but are not severe enough to meet the criteria for major depression." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 519 (28th ed. 1994).

In May 2010 Clitheroe changed the recommended treatment for Janelle to Emotional/Behavioral or Cognitive Conditions and Complications Level III.1 because Janelle "does not seem to require Level III.5 services in this area. The client is reported to be medically stable and on medication for depression and anxiety." But Clitheroe's recommendation also stated that Janelle "must be medically cleared before entering treatment." Clitheroe required that Janelle obtain a medical release verifying she was physically fit for the facility, a mental health release saying she was not suicidal, and a tuberculosis screening test before entering the treatment facility. Hallmark made sure Janelle called Clitheroe every week to keep a bed available while Janelle obtained the necessary releases.

Hallmark created a new case plan for Janelle in June 2010 and OCS made an appointment for Janelle to see Dr. Ozer — a psychiatrist who visits Dillingham every three to four months — for possible medication management. Janelle missed the appointment with Dr. Ozer. On August 16 Janelle's counsel obtained a status report for Clitheroe from the Counseling Center; it verified that Janelle was sufficiently stable to enter long-term residential treatment. This report was given to OCS the morning of the termination trial. By the time of the termination trial, Janelle still had not obtained the medical release needed to enter Clitheroe.

B. Proceedings

The superior court offered the parties numerous dates for the termination trial, but none of the dates available on the superior court's calendar were convenient for the parties and their counsel. As a result, the superior court referred the matter to Master Brice, who presided over the termination trial on August 16 and 17, 2010.[5] Dr. Bock,

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[5] Although neither party raised the issue, we take this opportunity to reiterate (continued...)

Martinez, Hallmark, Janelle, and Alfred testified at the termination trial. Master Brice issued his recommendation on October 29. It concluded that the evidence supported Dr. Bock's opinion that Janelle lacked the "emotional capability, judgment, and self-awareness necessary" to effectively parent her children. It also found that:

> Many of [Janelle's] problems are due to her dysfunctional relationship with [Alfred], and those can largely be placed at his feet. Many others, however, are of her own making, and rather than taking responsibility for them she blames them on others (primarily OCS, and her various counselors, but others as well, such as [the shelter staff] and relatives). Her apparent inability to function without [Alfred] or to acknowledge the importance of learning to do so is not helpful to her cause.

Master Brice concluded: "It would be helpful to know what further steps [Janelle] has taken with respect to Clithero[e] since trial. It would also be helpful to know the status on state efforts to find new adoptive parents." He recommended holding the petition in abeyance if Janelle had entered residential therapy or arranged to enter residential treatment in the near future, *and* if no progress had been made in finding suitable adoptive parents. But Master Brice also concluded that the State met its burden of proof for termination. Neither party filed an objection to the Master's recommendation or requested more time to do so.

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[5](...continued)
that our rules do not permit referral of a termination trial to a standing master, even where, as here, there are calendaring conflicts for the superior court or parties. Although Alaska Child in Need of Aid Rule 4 permits the presiding judge to appoint a standing master to conduct the CINA proceedings listed in subparagraph (b)(2) of the rule, termination trials are not among the proceedings listed in subparagraph (b)(2). To emphasize this point, we recently amended CINA Rule 4(b)(3) so that it now expressly provides that "[t]ermination trials may not be referred to a master."

The superior court independently reviewed the record and issued its findings and conclusions on November 9, 2010. The superior court found that "Deb Hallmark testified extensively about her efforts to encourage both parents to continue to attend mental health counseling," that "OCS located [a psychologist] who was able to travel to Dillingham for two days," that Hallmark tried to get Janelle to attend the psychological examination, that Hallmark made significant efforts to coordinate the application process for Clitheroe, that OCS offered Janelle regular visits with the children, and that OCS "took [the parents] through the steps of what needed to be done [on their case plans] and how it might best be accomplished," but both parents failed from the beginning to follow their plans. The superior court concluded that Rosie and Alfie are children in need of aid under AS 47.10.011(2) (incarceration), (8)(B)(ii) (domestic violence), (10) (substance abuse), and (11) (mental illness). The court made the other findings required to terminate parental rights.

Alfred did not appeal the superior court's decision. Janelle does appeal, claiming the superior court erred by: (1) finding that OCS made active efforts; and (2) admitting Dr. Bock's psychological evaluation report and testimony.

III. STANDARD OF REVIEW

"Whether OCS made active efforts . . . is a mixed question of law and fact."[6] We review a superior court's findings of fact for clear error.[7] Clear error exists if "a review of the entire record in the light most favorable to the prevailing party . . .

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[6] *Dale H. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 235 P.3d 203, 210 (Alaska 2010) (quoting *Sandy B. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 216 P.3d 1180, 1186 (Alaska 2009)) (internal quotations omitted).

[7] *Id.* at 209 (citing *Brynna B. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 88 P.3d 527, 529 (Alaska 2004)).

leaves . . . a definite and firm conviction that a mistake has been made."[8] Whether a superior court's findings satisfy the requirements of the Indian Child Welfare Act (ICWA) and Alaska's Child In Need of Aid (CINA) statutes and rules is a question of law that we review de novo.[9]

"A determination regarding the admissibility of evidence is a matter within the discretion of the trial court, and its rulings will not be disturbed absent an abuse of discretion. If the admissibility of evidence turns on whether the trial court applied the correct legal standard, we review the court's decision using our independent judgment."[10] Whether there was a violation of a litigant's due process rights is a question of law.[11]

IV. DISCUSSION

A. Active Efforts

1. General requirements for termination of parental rights

It is undisputed that Rosie and Alfie are Indian children within the meaning of the ICWA.[12] Under ICWA and CINA statutes and rules, OCS must prove five elements before a court may terminate parental rights in a case involving an Indian

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[8] *Id.* at 209-10 (quoting *Brynna B.*, 88 P.3d at 529) (internal quotations omitted).

[9] *Id.* at 210 (citing *Carl N. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 102 P.3d 932, 935 (Alaska 2004)).

[10] *Alderman v. Iditarod Properties, Inc.*, 104 P.3d 136, 140 (Alaska 2004); *see also Barbara P. v. State, Dep't of Health & Soc. Servs.*, 234 P.3d 1245, 1253 (Alaska 2010) ("We review a decision to admit expert testimony for abuse of discretion.").

[11] *D.M. v. State, Div. of Family & Youth Servs.*, 995 P.2d 205, 207 (Alaska 2000).

[12] 25 U.S.C. § 1903(3) (2006) (" 'Indian' means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43."); *see also id.* at § 1903(4), (8).

child.[13] OCS must prove by clear and convincing evidence: (1) that the child has been subject to conduct or conditions such that the child is "in need of aid";[14] (2) that the parent has failed, within a reasonable time, to remedy the conduct or conditions in the home that placed the child at substantial risk of harm;[15] and (3) 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 proved unsuccessful.[16] OCS must also prove by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, (4) that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.[17] Finally, OCS must prove by a preponderance of the evidence (5) that termination of parental rights is in the best interests of the child.[18]

Regarding the superior court's termination findings, Janelle only appeals the finding that OCS made active efforts.

2. Established standards and principles for the active efforts requirement

We have announced a number of guiding principles in determining whether OCS has made active efforts. "[N]o pat formula exists for distinguishing between active

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[13] *Dale H. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 235 P.3d 203, 209 (Alaska 2010).

[14] AS 47.10.088(a)(1); CINA Rule 18(c)(1)(A).

[15] AS 47.10.088(a)(2)(B); CINA Rule 18(c)(1)(A)(ii).

[16] 25 U.S.C. § 1912(d) (2006); CINA Rule 18(c)(2)(B).

[17] 25 U.S.C. § 1912(f) (2006); CINA Rule 18(c)(4).

[18] AS 47.10.088(c); CINA Rule 18(c)(3).

and passive efforts"; rather, we have "adopted a case-by-case approach for the active efforts analysis."[19] We have explained:

> Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. In contrast, [a]ctive efforts [are] where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, [ICWA] would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child.[20]

Active efforts are evaluated over time, looking at the State's involvement in its entirety.[21] Courts may consider a parent's "demonstrated unwillingness to participate in treatment as a factor in determining whether OCS met its active efforts burden."[22] "[A] parent's lack of cooperation may excuse minor faults in OCS's efforts."[23] Finally, when more

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[19] *Pravat P. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 249 P.3d 264, 271 (Alaska 2011) (citing *Dale H. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 235 P.3d 203, 213 (Alaska 2010)).

[20] *Id.* (citing *Dale H.*, 235 P.3d at 213).

[21] *Roland L. v. State, Office of Children's Servs.*, 206 P.3d 453, 456 (Alaska 2009) (internal citations omitted).

[22] *Pravat P.*, 249 P.3d at 271 (citing *Dale H.*, 235 P.3d at 213).

[23] *Id.* at 272 (citing *Ben M. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 204 P.3d 1013, 1021 (Alaska 2009)).

than one child is involved, courts should not look at OCS's efforts toward each child in isolation, but rather in the context of its efforts toward all of the children.[24]

3. OCS Proved Active Efforts By Clear And Convincing Evidence.

After reviewing the evidence, the superior court concluded that "[OCS] made [Alfred] and [Janelle] aware of the requirements of their case[] plans, and the possible consequences of noncompliance, and took them through the steps of what needed to be done and how it might best be accomplished. Nevertheless, both parents failed from the beginning to follow their case plans, and remain out of compliance." The court added: "While [Alfred and Janelle] often said that they were willing to participate in the recommended treatment and programs, their conduct showed that they were not, despite repeated and active efforts by the department." Janelle concedes that OCS made some efforts, but she argues their efforts did not rise to the level of "active." In particular, Janelle argues that OCS's efforts toward getting her into residential treatment were deficient.

The record shows that the superior court's findings are well supported. OCS made numerous efforts in this case, including referring Janelle to mental health appointments and substance abuse assessments (which she often missed); developing a safety plan and a number of case plans; reviewing the case plan with Janelle every week and including an ICWA worker to ensure the plan's requirements were understood; repeatedly offering transportation to appointments (which Janelle usually declined); scheduling two visitations with the children per week; showing the parents how to change diapers and helping Janelle handle Rosie; arranging for Janelle's therapist to give parenting advice during her counseling appointments to compensate for the lack of

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[24] *Sandy B. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 216 P.3d 1180, 1188-89 (Alaska 2009).

parenting classes in Dillingham; mailing weekly information from the Infant Learning Program to the parents and encouraging them to attend Cuddle Cure, a parent and family education program for new parents or at-risk parents of newborns; helping Janelle get into an alternative school (which Janelle stopped attending); scheduling an appointment for Janelle in Anchorage (which Janelle missed after flying there); scheduling an appointment with a psychiatrist for possible medication (which Janelle missed); scheduling and paying for a substance abuse assessment at Jake's Place; arranging a psychological evaluation for Janelle with Dr. Bock (who traveled from Kenai to Dillingham to do the evaluation); and going to Janelle's home twice to wake her and take her to Dr. Bock's evaluation.

OCS made additional efforts on Janelle's behalf. For example, Hallmark helped Janelle develop a strategy to tell her therapist that she wanted to switch to another therapist, and arranged a conference call so that Hallmark and Janelle could talk to the therapist together. Hallmark helped Janelle complete paperwork for Clitheroe, encouraged Janelle to call Clitheroe every week from the OCS office to ensure that Clitheroe kept a bed available while Janelle obtained the necessary clearances, wrote letters for Janelle to take to the hospital so she could get a medical clearance, and helped Janelle obtain an x-ray to use in place of a tuberculosis clearance. Indeed, Janelle testified that Hallmark did "most of" the work to get her accepted into Clitheroe. Hallmark also spoke with Janelle's landlord after she and Alfred were given an eviction notice and she helped them generate ideas about how they might keep the apartment. Finally, OCS filed a motion to release Janelle's psychological evaluation to Adult Protective Services when OCS thought she might need a guardian or additional services due to her situation as a victim of abuse. Although the superior court denied the motion, it was another active effort by OCS.

These efforts go beyond merely developing a case plan and leaving it to the parent to use her own resources to complete it. The guardian ad litem described OCS's efforts as "exemplary." Further, even if there were some deficiencies in OCS's overall efforts, Janelle testified that she did not follow her case plan, that she would often miss scheduled appointments, and that she would show up to visitations with a hangover and smelling "like booze."

A parent's "demonstrated unwillingness to participate in treatment [may be] a factor in determining whether OCS met its active efforts burden."[25] Looking at OCS's efforts in their entirety,[26] and Janelle's repeated failure to substantially participate in treatment, we affirm the superior court's conclusion that OCS made active efforts.

B. The Admission Of Dr. Bock's Evaluation And Testimony

Janelle argues the superior court erred by admitting Dr. Bock's psychological evaluation report and corresponding testimony because Janelle's counsel was not present during the evaluation and because Janelle was in a vulnerable state. The State responds that "any objection to how the evaluation was conducted has been waived."

CINA Rule 16(b) provides: "The court may order mental and physical examinations of the child and the child's parents" to aid in disposition. CINA Rule 8(a)

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[25] *Pravat P.*, 249 P.3d at 271 (citing *Dale H.*, 235 P.3d at 213); *see also Ben M. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 204 P.3d 1013, 1021 (Alaska 2009) ("Where services have been provided and a parent has demonstrated a lack of willingness to participate or take any steps to improve, this court has excused minor failures by the state and rejected arguments that the state could possibly have done more.").

[26] *Roland L.*, 206 P.3d at 456 (internal citations omitted); *see also Thomas H. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 184 P.3d 9, 16 (Alaska 2008) (holding that OCS made active efforts despite failing to refer parent to mental health evaluation).

further states that physical and mental examinations are permissible discovery methods. Section 8(b) explains that "[d]iscovery and [d]isclosure[s] in CINA actions are governed by Civil Rules 26-37," with some exceptions not relevant here. Therefore, Civil Rule 35, which addresses compelled mental and physical examinations, also applies in cases for terminating parental rights.[27] That rule states:

> When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner. . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person . . . by whom it is to be made.

Janelle does not dispute that OCS had good cause for requesting a psychological evaluation.[28] Her argument is that alleged procedural faults with the evaluation render it inadmissible. Although we conclude that there were procedural irregularities in the way the psychological report was obtained, we agree with OCS that Janelle waived her objection to the examination.

As explained, Janelle's therapist recommended that Janelle undergo a psychiatric evaluation and a psychological evaluation. Assistant attorney general David Noteboom spoke with Janelle's counsel, Joe Faith, about OCS's desire to arrange a psychological exam. Faith and Noteboom contest whether or not Faith opposed the

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[27] *See Alyssa B. v. State, Dep't of Health and Soc. Servs.*, 123 P.3d 646, 650 (Alaska 2005) (applying Civil Rule 35's requirements in termination proceeding).

[28] The superior court ordered Janelle to undergo a psychiatric evaluation in July 2009 but a psychiatric evaluation was not done. Janelle argued before the superior court that OCS did not need both psychiatric and psychological evaluations. She does not renew that objection here.

evaluation during their conversation, but Faith encouraged Noteboom to file a motion to which he would respond. Hallmark gave Faith the name and telephone number of the psychologist expected to perform the evaluation, Dr. Bock, and Faith contacted Dr. Bock's office on August 19.

OCS filed a motion to order psychological evaluation on September 14, 2009. The accompanying memorandum explained:

> A psychological examination will be arranged for [Janelle] by the Office of Children's Services. The examination is going to be scheduled as soon as a time is coordinated with the psychologist, social worker Debra Hallmark and [Janelle]. The department requests that [Janelle] be evaluated and that the scope of the evaluation be to assess [Janelle's] present mental health, the historical context of her mental health and child protective and juvenile justice history, cognitive and emotional well-being, and her current mental status.

The guardian ad litem did not oppose OCS's motion. Janelle's counsel failed to file anything because of an "oversight," although he spoke with Janelle about the motion.

OCS scheduled Janelle's evaluation for Sunday, September 20 and Monday, September 21 to accommodate Dr. Bock's schedule. Janelle's counsel swore in an affidavit that he was never informed of the date, time, or place of the evaluation; Hallmark swore in an affidavit that she did inform him of the date of the evaluation, and that she did so before it was performed. Hallmark's affidavit also included the statement that Janelle "agreed to have the evaluation done. [Janelle] never once said a word about talking with her attorney or not wanting the evaluation performed." Dr. Bock conducted the evaluation as scheduled.

On September 22, one day after the evaluation was completed, the superior court issued a one-sentence order granting OCS's motion.

Janelle filed a motion for reconsideration on September 24, claiming that OCS took advantage of her vulnerable state and that it violated her due process rights by performing the evaluation without having her attorney present. Janelle also claimed the court's order was defective because it failed to specify the time, place, manner, and conditions of the examination. She requested the court either exclude all evidence related to the evaluation and deny OCS's motion, or require OCS to obtain a new evaluation, using an order that strictly complied with Civil Rule 35, and which allowed Faith to be present.

The superior court agreed to hear arguments on the motion for reconsideration at a permanency hearing scheduled for October 14. OCS's written opposition argued that Janelle waived any right to have counsel present during the examination because she and her counsel were both aware of the dates of the evaluation and of the contact information for the psychologist, and yet "[i]n no conversation did [Janelle] or [her counsel] request counsel to be present during the psychological evaluation or to record the evaluation." At the hearing, the superior court denied reconsideration of its order authorizing Dr. Bock's evaluation. Janelle argues on appeal that the superior court erred in admitting Dr. Bock's evaluation report and corresponding testimony.

Even putting aside the factual dispute over whether Janelle's counsel was expressly told the dates of the evaluation, we recognize two reasons the psychological evaluation was undertaken in a procedurally deficient manner. First, Rule 35 provides that the trial court's order "shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." Here, the superior court's order simply stated that "[Janelle] shall complete a psychological evaluation at the request of [OCS]." It may have been the superior court's intention to adopt the terms outlined in OCS's motion, but in this case the details of the evaluation

were left mostly unspecified; only the evaluation's scope was defined in OCS's motion. Second, OCS scheduled the evaluation to occur before the court ruled on its pending motion. Although the court granted the unopposed motion one day later, neither OCS's motion nor the court's order would have given Janelle's counsel notice of the scheduled evaluation if he was not explicitly informed of the date, place, or time by OCS, Noteboom, or Dr. Bock's office.

Janelle claims that OCS's failure to provide notice to her lawyer of the impending evaluation violated procedural due process. She argues that she was vulnerable because her lawyer did not attend the evaluation and that this warrants excluding the evaluation report. The State responds that Janelle waived her right to have counsel attend by willingly going to the evaluation and by not indicating that she wanted her counsel present "until several days *after* the evaluation occurred."

Janelle cites *Langfeldt-Haaland v. Saupe Enterprises, Inc.*[29] and *State v. Johnson*[30] in support of her argument. The defendant in *Langfeldt-Haaland* moved for an order requiring the plaintiff to submit to a physical examination under Civil Rule 35.[31] The plaintiff did not object, but asserted rights to record the examination and have his attorney present.[32] The trial court granted the defendant's request but it did not permit

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[29] 768 P.2d 1144 (Alaska 1989).

[30] 2 P.3d 56 (Alaska 2000).

[31] *Langfeldt-Haaland*, 768 P.2d at 1144.

[32] *Id.*

the plaintiff to have the benefit of counsel or tape recording at the evaluation.[33] We reversed, concluding that the examinee was allowed to have counsel present.[34]

In *Johnson v. State*, Garry Johnson brought a claim against the State seeking recovery for injuries he sustained when a swinging jail-cell door knocked him down a stairway.[35] The State sought an evaluation of Johnson after discovery had closed, which Johnson's counsel cooperatively allowed.[36] But Johnson's counsel explicitly "expressed his desire to be present."[37] Despite this request, the State went ahead with the examination without sufficiently notifying Johnson's counsel.[38] As a result, the trial court excluded the testimony of the examining physician, and we affirmed that decision.[39]

We find these cases distinguishable. *Langfeltd-Haaland* and *Johnson* both involved examinees or attorneys who expressly requested that counsel be present at an evaluation.[40] Here, Janelle willingly went to the evaluation on September 20 and 21 without mentioning her attorney, and Faith never requested to be present at any

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[33] *Id.*

[34] *Id.* at 1146-47.

[35] *Johnson*, 2 P.3d at 58.

[36] *Id.*

[37] *Id.* at 62.

[38] *Id.* at 58.

[39] *Id*. at 58, 61-62.

[40] *See id.* at 62 ("Johnson's counsel . . . agreed to allow the examination but expressed his desire to be present."); *Langfeldt-Haaland v. Saupe Enterprises, Inc.*, 768 P.2d 1144 (Alaska 1989) ("Svend did not object [to the Rule 35 motion], but asserted rights to record the exam and to have his attorney present.").

evaluation despite talking with Noteboom, Hallmark, Dr. Bock's office, and Janelle about the evaluation before it was performed. This makes Janelle's situation more like that of the examinee in *In re John Lawrence M.*, where the New York Supreme Court, Appellate Division explained:

> As ground for reversal, respondents argue that their right to counsel was abridged because their counsel were not present at their court-ordered psychiatric examinations. Although respondents were entitled to have their counsel present at the court-ordered psychiatric examinations if they so requested, there is no showing that they made any such request.[41]

We have said that a party may choose to attend an evaluation without counsel.[42] Although Hallmark helped Janelle on the mornings of the evaluation, there was no showing that OCS forced Janelle to attend the evaluation. Also, there is no dispute that Janelle did not request her attorney's presence before undergoing the evaluation. Indeed, the only evidence of Janelle asking that her "lawyer [be] present at any psychiatric or psychological evaluation" is contained in an affidavit she filed three weeks after the September evaluation had been completed. Janelle must have known that her counsel was aware of the possible evaluation because she discussed OCS's motion with him earlier that week, but Janelle did not object or ask to consult with her lawyer when Hallmark picked her up on the mornings of the evaluation. Finally, Janelle's counsel never asked to be present at the evaluation, nor did he formally oppose OCS's

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[41] *In re Matter of John Lawrence M.*, 531 N.Y.S.2d 149, 150 (N.Y.A.D. 1988) (citation omitted).

[42] *Langfeldt-Haaland*, 768 P.2d at 1147 n.24 ("If the client does not wish his or her attorney to attend all or part of an examination, those wishes must of course govern.").

motion for the evaluation. Under these circumstances, Janelle waived any objection to her counsel's absence.[43]

Janelle also argues that OCS took "unfair advantage" of her because she was "extremely vulnerable." Janelle alleges she was vulnerable for three reasons: (1) she had depression and mental health issues; (2) OCS had custody of her children; and (3) OCS arranged for Alfred to enter treatment on the second day of her evaluation. The psychological report acknowledged all three problems but these circumstances do not show that OCS took unfair advantage of Janelle. Janelle testified that she unilaterally chose to leave the evaluation before it was completed because she "didn't really want to do [it]," and she chose not to return despite Dr. Bock's and OCS's urging. Further, Janelle's alleged vulnerability goes to the validity, accuracy, and weight of the evaluation, not whether it should have been admitted.[44] The superior court did not abuse its discretion by admitting Dr. Bock's evaluation report and corresponding testimony.

V. CONCLUSION

For the reasons discussed, we AFFIRM the superior court's order terminating Janelle's parental rights.

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[43] *See In re C.L.T.*, 597 P.2d 518, 522 (Alaska 1979) ("By consenting to certain procedures or by failing to object to others, a party may waive those rights which are arguably encompassed within due process guarantees.").

[44] *See State v. Phillips*, 470 P.2d 266, 272 (Alaska 1970) ("The weight to be given to expert testimony is within the province of the trier of fact.").