12. ACTIVE EFFORTS REQUIREMENT

Disclaimer: *A Practical Guide to the Indian Child Welfare Act* is intended to facilitate compliance with the letter and spirit of ICWA and is intended for educational and informational purposes only. It is not legal advice. You should consult competent legal counsel for legal advice, rather than rely on the *Practical Guide*.

25 U.S.C. § 1912. Pending court proceedings

(d) Remedial services and rehabilitative programs; preventive measures

Any 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.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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.

Disclaimer: The above provisions of the Indian Child Welfare Act are set forth to facilitate consideration of this particular topic. Additional federal, state or tribal law may be applicable. Independent research is necessary to make that determination.

☼☼☼

Frequently Asked Questions

_____

12.1 What service requirements are imposed on a party seeking to make a foster care placement or seeking termination of parental rights?

Whether a state or private party, the Indian Child Welfare Act (ICWA) § 1912(d) requires the party seeking foster care placement under § 1912(e) or termination of parental rights under § 1912(f) to prove that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that such efforts have proved unsuccessful. *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007); *In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007); *D.J. v. P.C.*, 36 P.3d 663, 667 (Alaska 2001). The active efforts requirement even applies in situations that involve the termination of the rights of a non-Indian parent. *C.J. v. State*, 18 P.3d 1214 (Alaska 2001).

At least one court has held that a parent who is voluntarily consenting to terminate her parental rights is not entitled to active efforts to prevent the termination of that relationship. *See B.R.T. v. Executive Dir. of Soc. Servs. Bd.*, 391 N.W.2d 594 (N.D. 1986). However, if a proceeding is commenced as an involuntary, one the active efforts requirement applies even if the parent or Indian custodian ultimately voluntarily consents to a placement or admits the petition initiating the proceeding.

In some circumstances it may appear to be impractical for the party initiating the child custody proceeding to be required to provide "active efforts." This is true, for example, in stepparent adoption proceedings where the initiating party is a private party. However, a private party is obligated as a matter of law to provide active efforts. *See, e.g., In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007). In those situations, the onus may also fall upon the state court to refer the biological parent to appropriate services to rehabilitate that parent prior to making the decision whether to terminate parental rights and permit the adoption.

12.2 What is the burden of proof to show that active efforts have been provided?

Section 1912(d) does not contain a burden of proof. Some courts will apply the burden of proof required in the underlying action. They will apply the clear and convincing burden required in a foster care placement under § 1912(e) and the beyond a reasonable doubt burden required in a termination of parental rights under § 1912(f). Other state courts, on the other hand, will apply a lesser burden based on state law.

Courts Applying the Burden of the Underlying Proceeding

Iowa: *In re L.N.W.*, 457 N.W.2d 17 (Iowa Ct. App. 1990) (applying the § 1912(f) "beyond a reasonable doubt" standard in TPR)
Michigan: *In re Morgan*, 364 N.W.2d 754 (Mich. Ct. App. 1985); *In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986)
Minnesota: *In re M.S.S.*, 465 N.W.2d 412 (Minn. Ct. App. 1991)
Montana: *In re G.S.*, 2002 MT 245, 312 Mont. 108, 59 P.3d 1063
Nebraska: *In re Enrique P.*, 709 N.W.2d 676 (Neb. Ct. App. 2006)
South Dakota: *In re S.R.*, 323 N.W.2d 885 (S.D. 1982); *In re P.B.*, 371 N.W.2d 366 (S.D. 1985)
Wisconsin: *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992)

Courts Applying a Lesser Burden Based on State Law.

Alaska: *K.N. v. State*, 856 P.2d 468 (Alaska 1993); *E.A. v. State*, 46 P.3d 986 (Alaska 2002)
California: *In re Michael G.*, 74 Cal. Rptr. 2d 642 (Ct. App. 1998); *In re Hannah S.*, 48 Cal. Rptr. 3d 605 (Ct. App. 2006)
Idaho: *In re Baby Boy Doe* (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995)
Illinois: *In re Cari B.*, 763 N.E.2d 917 (Ill. App. Ct. 2002)
Kansas: *In re A.P.*, 961 P.2d 706 (Kan. Ct. App. 1998)
Maine: *In re Annette P.*, 589 A.2d 924 (Me. 1991)
North Dakota: *In re M.S.*, 2001 ND 68, 624 N.W.2d 678
Oklahoma: *In re H.J.*, 2006 OK CIV APP 153, 149 P.3d 1073
Oregon: *In re Charles*, 688 P.2d 1354 (Or. Ct. App. 1984)
Utah: *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997)
Washington: *In re A.M.*, 22 P.3d 828 (Wash. Ct. App. 2001)

12.3 What are reasonable efforts?

The Adoption Assistance and Child Welfare Act was passed by Congress in 1980. Under it, reasonable efforts, an undefined term, must be made to preserve and reunify families where a child is removed. The states have passed implementing legislation on their part. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES ET AL., MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 41 (Linda Lange ed., 1988) [hereinafter MAKING REASONABLE EFFORTS]. Reasonable efforts must be made in most ICWA cases. ICWA also requires "active efforts" in every case, a stringent requirement. There is no exception. *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007); *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611.

Practice Tip:
A state or private party should not be able to argue that a child cannot be reunified with his or her family because active efforts have not been met when reasonable efforts have been met.

12.4 What are active efforts compared to reasonable efforts?

The "'active efforts' standard requires more effort than a 'reasonable efforts' standard does." *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007). A Montana court stated "The term active efforts, by definition, implies heightened responsibility compared to passive efforts." *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 384, 106 P.3d 556, 560. An Alaska court cited an ICWA commentator who distinguished between active and passive efforts: "passive efforts entail merely drawing up a reunification plan and requiring the 'client' to use 'his or her own resources to . . . bring . . . it to fruition.'" *A.M. v. State*, 945 P.2d 296, 306 (Alaska 1997) (citing CRAIG J. DORSAY, THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES 157-58 (1984)). "Active efforts, on the other hand, include 'tak[ing] the client through the steps of the plan rather than requiring the plan to be performed on its own.'" *Id.* As part of active efforts, the party "shall take into account the prevailing social and cultural conditions and the way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social services agencies, and individual Indian care givers." Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,592 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts). A tribe may have an agreement with a state that defines active efforts. *See, e.g., Minn. Tribal/State Indian Child Welfare Agreement*, BULLETIN 99-68-11 (Minn. Dep't of Human Servs., Minn.) Aug. 25, 1999, at 5.

Practice Tip:
A rule of thumb is that "active efforts" is to engage the family while "reasonable efforts" simply offers referrals to the family, and leaves it to them to seek out assistance.

Some courts require proof that all active efforts to provide the parents with adequate rehabilitative services have been exhausted, but others do not require an undertaking of futile or nonproductive efforts. *See Nicole B.*, 927 A.2d 1194; *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611. In a recurring situation, courts have found that incarceration standing alone is not a justifiable excuse to limit active efforts. *See In re D.G.*, 2004 SD 54, 679 N.W.2d 497.

Practice Tip:
A state or private party cannot utilize the argument that it lacks resources to provide active efforts in order to refuse the mandate to provide efforts. There are no exceptions in ICWA to the mandate.

Generally, what constitutes active efforts is specific to the given situation, including the governing law and accepted social work standards, because such efforts are aimed at remedying the basis for the underlying proceedings, whether it is foster care placement or termination of parental rights. The types of required services and length of providing such services also depend on the facts of the case.

Practice Tip:
To best meet the needs of the child and family and to avoid unnecessary conflicts, the best practice is to seriously consider whether one has met the "active efforts" requirement, as opposed to reasonable efforts, prior to filing a petition to terminate parental rights.

12.5 Do active efforts include the extended family?

Yes. The Bureau of Indian Affairs (BIA) Guidelines provide that a court should take into account "the prevailing social and cultural conditions and way of life of the Indian child's tribe. [Remedial services] shall also involve and use the available resources of the extended family, the tribe, Indian

social services agencies and individual Indian care givers." Indian Child Welfare Proceedings, 44 Fed. Reg. 67,584, 67,592 (Nov. 26, 1979) (guidelines for state courts).

12.6 Why are active efforts required?

Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and . . . that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(4)-(5).

Active efforts are thus required to prevent the break up of an Indian family by preventing an out-of-home placement or by fostering reunification when the child is removed from the physical or legal custody of his or her parents.

12.7 How does Adoption and Safe Families Act change the ICWA active efforts requirement?

The Adoption and Safe Families Act of 1997 (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000), does not change the ICWA active efforts requirement. The ASFA recognizes certain circumstances under which no reasonable efforts are necessary such as where a court has found that a parent has subjected the child to aggravated circumstances of abuse or neglect. Thus, it purportedly relieves the showing of reasonable efforts under state law, but it does not alter ICWA's active efforts requirement. *See In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611. For a discussion on the interaction between ASFA and ICWA, see DAVID SIMMONS & JACK TROPE, P.L. 105-89 ADOPTION AND SAFE FAMILIES ACT OF 1997, ISSUES FOR TRIBES AND STATES SERVING INDIAN CHILDREN (1999). See also FAQs 19.8, 19.9, 19.10 Application of Other Federal Laws; and FAQ 16.17, Placement.

12.8 How does Title IV-E of the Social Security Act interact with ICWA?

The Adoption Assistance and Child Welfare Act was passed by Congress in 1980. Under it, an agency must make reasonable efforts to safely maintain the child in the home or to reunify the family if the child is removed. Reasonable efforts must be made in each case for every child where a state seeks reimbursement under Title IV-E of the Social Security Act for federally funded foster care maintenance payments. 42 U.S.C. §§ 671(a)(15), 672(a)(2) (2000); MAKING REASONABLE EFFORTS, *supra* at 41. See also FAQ 19.5, 19.6, Application of Other Federal Laws.

Title IV-E was passed without taking into account that tribes have jurisdiction over the domestic affairs of tribal members, including the foster and adoptive care of their children. Indian children placed in foster or adoptive care by a tribal court where it has exclusive jurisdiction under § 1911(a) of the ICWA, or where jurisdiction is transferred to a tribe under § 1911(b), are not afforded services for such things as food, shelter, clothing, and school supplies because tribes are not allowed direct access to funds under Title IV-E. Tribes are also denied the ability to seek reimbursement for administrative and training costs. Tribes inevitably suffer because their children are disadvantaged by lack of services and additional burdens are placed on already severely limited tribal services and resources.

To support tribal foster care systems in an equitable manner, some tribes have entered into cooperative agreements with states to share funding received by the states under Title IV-E. But the current law erects barriers that foreclose the opportunity for most tribes and states to enter into cooperative agreements. It is imperative for the United States Congress to fix the problem. Eddie F. Brown et al., *Using Tribal/State Title IV-E Agreements to Help American Indian Tribes Access Forster Care and Adoption Funding*, 83 CHILD WELFARE 293 (2004).

**** Access to the full-text of opinions and additional materials is at www.narf.org/icwa ****

The following list is representative of cases that discuss the topic. The list is not exhaustive. The practitioner should conduct independent research.

FEDERAL CASES

District Courts
Doe v. Mann (*Mann I*), 285 F. Supp. 2d 1229 (N.D. Cal. 2003)

STATE CASES

Alabama
Long v. State, 527 So. 2d 133 (Ala. Civ. App. 1988)

Alaska
A.A. v. State, 982 P.2d 256 (Alaska 1999)
A.M. v. State (A.M. II), 945 P.2d 296 (Alaska 1997)
C.J. v. State, 18 P.3d 1214 (Alaska 2001)
D.H. v. State, 929 P.2d 650 (Alaska 1996)
D.J. v. P.C., 36 P.3d 663 (Alaska 2001)
E.A. v. State, 46 P.3d 986 (Alaska 2002)
E.M. v. State, 959 P.2d 766 (Alaska 1998)
Gilbert M. v. State, 139 P.3d 581 (Alaska 2006)
J.A. v. State, 50 P.3d 395 (Alaska 2002)
J.S. v. State, 50 P.3d 388 (Alaska 2002)
In re J.W., 921 P.2d 604 (Alaska 1996)
K.N. v. State, 856 P.2d 468 (Alaska 1993)
N.A. v. State, 19 P.3d 597 (Alaska 2001)
T.F. v. State, 26 P.3d 1089 (Alaska 2001)
V.S.B. v. State, 45 P.3d 1198 (Alaska 2002)
Wendell C., II v. State, 118 P.3d 1 (Alaska 2005)

California
In re Crystal K., 276 Cal. Rptr. 619 (Ct. App. 1990)
In re Hannah S., 48 Cal. Rptr. 3d 605 (Ct. App. 2006)
Letitia V. v. Superior Court, 97 Cal. Rptr. 2d 303 (Ct. App. 2000)
In re Michael G., 74 Cal. Rptr. 2d 642 (Ct. App. 1998)
In re Riva M., 286 Cal. Rptr. 592 (Ct. App. 1991) (certified for partial publication)
In re William G., 107 Cal. Rptr. 2d 436 (Ct. App. 2001) (certified for partial publication)

Colorado
In re A.G.-G., 899 P.2d 319 (Colo. Ct. App. 1995)
In re K.D., 155 P.3d 634 (Colo. Ct. App. 2007)
In re N.B., No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007)

Connecticut
In re Jessica T., 1993 WL 566662 (Conn. Super. Ct. 1993)

Idaho
In re Baby Boy Doe (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995)

Illinois
In re Cari B., 763 N.E.2d 917 (Ill. App. Ct. 2002)

Iowa
In re A.R., 690 N.W.2d 699 (Iowa Ct. App. 2004) (unpublished table decision) *available at* No. 04-0745, 2004 WL 2002834 (Iowa Ct. App. Sept. 9, 2004)
In re L.N.W., 457 N.W.2d 17 (Iowa Ct. App. 1990)
In re R.L.F., 437 N.W.2d 599 (Iowa Ct. App. 1989)

Kansas
In re A.P., 961 P.2d 706 (Kan. Ct. App. 1998)

Maine
In re Annette P., 589 A.2d 924 (Me. 1991)

Maryland
In re Nicole B., 927 A.2d 1194 (Md. Ct. Spec. App. 2007)

Michigan
In re Dougherty, 599 N.W.2d 772 (Mich. Ct. App. 1999)
In re Kreft, 384 N.W.2d 843 (Mich. Ct. App. 1986)
In re Morgan, 364 N.W.2d 754 (Mich. Ct. App. 1985)

Minnesota
In re J.B., 698 N.W.2d 160 (Minn. Ct. App. 2005)
In re M.S.S., 465 N.W.2d 412 (Minn. Ct. App. 1991)
In re S.W., 727 N.W.2d 144 (Minn. Ct. App. 1999)
Sayers ex rel. Sayers v. Beltrami County, 481 N.W.2d 547 (Minn. 1992)
In re T.J.J., 366 N.W.2d 651 (Minn. Ct. App. 1985)
In re W.R., 379 N.W.2d 544 (Minn. Ct. App. 1985)

Missouri
C.E.H. v. L.M.W., 837 S.W.2d 947 (Mo. Ct. App. 1992)

Montana
In re A.N., 2005 MT 19, 325 Mont. 379, 106 P.3d 556
In re G.S., 2002 MT 245, 312 Mont. 108, 59 P.3d 1063
In re M.E.M., 635 P.2d 1313 (Mont. 1981)
In re S.R., 2004 MT 227, 322 Mont. 424, 97 P.3d 559

Nebraska
In re Enrique P., 709 N.W.2d 676 (Neb. Ct. App. 2006)
In re Phoebe S., 664 N.W.2d 470 (Neb. Ct. App. 2003)
In re Sabrienia B., 621 N.W.2d 836 (Neb. Ct. App. 2001)

North Dakota
B.R.T. v. Executive Dir. of Soc. Servs. Bd., 391 N.W.2d 594 (N.D. 1986)
In re J.P., 2004 ND 25, 674 N.W.2d 273
In re M.S., 2001 ND 68, 624 N.W.2d 678
In re T.F., 2004 ND 126, 681 N.W.2d 786

Oklahoma
In re Baby Girl B., 2003 OK CIV APP 24, 67 P.3d 359
In re H.J., 2006 OK CIV APP 153, 149 P.3d 1073
In re T.H., 2005 OK CIV APP 5, 105 P.3d 354

Oregon
In re Charles, 810 P.2d 393 (Or. Ct. App. 1991)
In re Charles, 688 P.2d 1354 (Or. Ct. App. 1984)
In re Tucker, 710 P.2d 793 (Or. Ct. App. 1985)
In re Woodruff, 816 P.2d 623 (Or. Ct. App. 1991)

South Dakota
In re B.S., 1997 SD 86, 566 N.W.2d 446
In re D.B., 2003 SD 13, 670 N.W.2d 67
In re D.G., 2004 SD 54, 679 N.W.2d 497
In re D.M. (*D.M. I*), 2003 SD 49, 661 N.W.2d 768
In re E.M., 466 N.W.2d 168 (S.D. 1991)
In re J.J., 454 N.W.2d 317 (S.D. 1990)
In re J.S.B., Jr., 2005 SD 3, 691 N.W.2d 611
In re K.A.B.E., 325 N.W.2d 840 (S.D. 1982)
In re P.B., 371 N.W.2d 366 (S.D. 1985)
In re S.D., 402 N.W.2d 346 (S.D. 1987)
In re S.R., 323 N.W.2d 885 (S.D. 1982)

Tennessee
In re Morgan, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. 1997)

Texas
Doty-Jabbaar v. Dallas County Child Protective Servs., 19 S.W.3d 870 (Tex. App. 2000)

Utah
In re D.A.C., 933 P.2d 993 (Utah Ct. App. 1997)
In re S.D.C., 2001 UT App 353, 36 P.3d 540
In re V.H., 2007 UT App 1, 154 P.3d 867

Washington
In re A.M., 22 P.3d 828 (Wash. Ct. App. 2001)
In re E.C., 115 Wash. App. 1032 (Wash. Ct. App. 2003)
In re Fisher, 643 P.2d 887 (Wash. Ct. App. 1982)

Wisconsin
In re Branden F., 2005 WI App 88, 281 Wis. 2d 274, 695 N.W.2d 905 (unpublished table decision) *available at* No. 04-2560, 2005 WL 645191 (Wis. Ct. App. March 22, 2005)
In re D.S.P., 480 N.W.2d 234 (Wis. 1992)
In re J.J., 462 N.W.2d 551 (Wis. Ct. App. 1990) (unpublished table decision) *available at* No. 90-0158, 1990 WL 174568 (Wis. Ct. App. Sept. 18, 1990)
In re S.L., 455 N.W.2d 678 (Wis. Ct. App. 1990) (unpublished table decision) *available at* 1990 WL 57500 (Wis. Ct. App. Feb. 7, 1990)