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Defining Active Efforts in the Indian Child Welfare Act

by Judge Leonard Edwards (ret.)

INTRODUCTION

The text of Indian Child Welfare Act (the ICWA) includes the term 'active efforts'.[1]

> **(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.[2] (emphasis added)

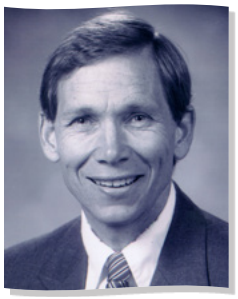
The United States Supreme Court affirmed the controlling legality of the ICWA in the case of *Mississippi Band of Choctaw Indians v. Holyfield.*[3]

What this statute means is that the state has an obligation to provide services and other types of interventions to prevent the necessity of removing a child from parental care and, if removed, to assist in the reunification of the child with family. It can be argued that this obligation is the most important aspect of the ICWA. The state removes a child when there is a crisis in the family, a crisis that endangers the health or well-being of the child. The ICWA makes clear that the major purpose of the law is to retain Indian children with their family.[4] The ICWA emphasizes that the state has a duty to intervene in the family with support and services to prevent the removal of the child and to provide services that will permit a child safely to return home.[5] What is unclear is what kinds of services and interventions must be provided to accomplish these goals. Put another way, what does active efforts mean?

In the original act, the statute did not define the term 'active efforts.' That is understandable as active efforts will depend on the unique facts of each case. Different states have had various approaches to defining the term. When the Bureau of Indian Affairs (BIA) issued Regulations in 2016, a definition was included in the Regulations.[6] While that definition still lacks precision, it generally delineates specific steps that should be taken to satisfy the active efforts mandate. The Regulations outline a process the state agency must follow in each case.

State appellate courts have struggled to define 'active efforts,' and since the publication of the new

See ICWA on page 2 ➜



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1. The Indian Child Welfare Act, 25 U.S.C. §§ 1901-63
2. *Id.* §1912(d)
3. 490 U.S. 30; 109 S. Ct. 1597 (1989)
4. Congressional Findings: (3) "...that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;" 25 U.S.C.§1901(3).
5. "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C. §1902.
6. A copy of the definition is contained in the text below.

regulations, there has been very little clarification.[7] This paper will address the ways that states have responded to the 'active efforts' concept. First, the paper will recite that part of the ICWA where 'active efforts' appears. Second, it will explain the relationship between 'active efforts' and 'reasonable efforts,' the latter concept created by the Adoption Assistance and Child Welfare Act of 1980.[8] Third, the paper will review some of the most important appellate decisions from different states that discuss the 'active efforts' mandate. Fourth, the paper will discuss the few cases that discuss 'active efforts' after the regulations have come into effect. Fifth, the paper will discuss the concept of "passive efforts." Sixth, the paper will address the question: What are Active Efforts? The conclusion will argue that many state agencies are failing to provide 'active efforts' when Indian children are the subject of child welfare proceedings, that most states should update their laws so they are consistent with the new regulations, that trial courts should carefully review in detail the efforts expended by the state, and that appellate courts should require that active efforts be provided by state agencies when dealing with the removal and return of Indian children.

7. An exception is the case of *In the Interest of L.M.B.*, 54 Kan. App. 2d 285; 398 P. 3d 207 (2017) discussed below.
8. The Adoption Assistance and Child Welfare Act of 1980 (Public Law 96-272

I. ACTIVE EFFORTS AND THE ICWA

> Section 1912(d) states in part that "any party ...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 these efforts have proved unsuccessful."

The active efforts in this section refers to the actions taken by the state, usually by a child protection or social worker, to provide services and programs to prevent the breakup of the Indian family.

II. ACTIVE EFFORTS AND REASONABLE EFFORTS

Federal law created the term 'active efforts' in 1978 as a part of the ICWA. Two years later, in 1980, the Adoption Assistance and Child Welfare Act was signed into law. That legislation created the term 'reasonable efforts.' That legislation mandated states to provide reasonable efforts to prevent removal of a child from parental care and reasonable efforts by the state to facilitate reunification should a child be removed and placed in out-of-home care.

> ...reasonable efforts will be made to prevent the removal of a child from his or her home and to make it possible for a child to return home.[9]

The Adoption and Safe Families Act of 1997[10] added that reasonable efforts must be made by the state to help a child achieve a permanent home. The penalty for not providing reasonable efforts is a loss of federal funding.[11]

Both active efforts and reasonable efforts place demands on state agencies when working with a family when their child is about to be removed or has been removed from parental care. The primary monitor of the state's actions is the juvenile or family court judge, the judge who has legal responsibility for oversight of the process when a child is removed involuntarily from parental care. ➜

9. *Id.*
10. Adoption and Safe Families Act of 1997 (ASFA), Public Law 105-109.
11. 42 U.S.C. §671(a)(15)(B) & (b) (1989); 45 Code of Federal Regulations §1356.21(b)(1) & (2).

The primary monitor of the state's actions is the juvenile or family court judge, the judge who has legal responsibility for oversight of the process when a child is removed involuntarily from parental care.

Are active efforts and reasonable efforts the same or does one make greater demands upon the state? This issue has been discussed in several of state appellate opinions (described below), and almost all state appellate opinions agree that active efforts require more "effort" than reasonable efforts.

The federal law did not define reasonable efforts, but some states have attempted a definition.[12] These definitions are general at best. For example, the Georgia legislature declared that

> Reasonable efforts are measures taken by the Division of Family and Children's Services of the Department of Human Services and other appropriate agencies to preserve and reunify families.[13]

South Carolina laws describe reasonable efforts as

> Reasonable efforts include services that are reasonably available and timely, reasonably adequate to address the needs of the family, reasonably adequate to protect the child, and realistic under the circumstances.[14]

Federal Regulations have given active efforts a much more detailed definition.

§ 23.2 Definitions.[15]

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

1. Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
2. Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
3. Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
4. Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
5. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child›s Tribe;
6. Taking steps to keep siblings together whenever possible;
7. Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
8. Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child›s family, in utilizing and accessing those resources;
9. Monitoring progress and participation in services;
10. Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
11. Providing post-reunification services and monitoring.

Based on this definition and the typical state definitions, it is clear that 'active efforts' involves more attention and work on the part of the state than reasonable efforts when the state considers removing a child from parental care involuntarily and after a child has been removed. 'Active efforts' has a distinctively Indian character. This is evidenced throughout the definition above. While the regulation lists some examples of what the state agency should consider, the opening paragraph sets the tone for all of the following ➜

12. For a list of those states and the legislative definitions, see Edwards, L., *Reasonable Efforts: A Judicial Perspective*, (2014), Appendix B, pp 363-372. A copy of the book is available online at judgeleonardedwards.com. It can be downloaded at no cost.
13. Georgia Ann. Code §115-11-58.
14. South Carolina Ann. Code §63-7-1680
15. Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1912 *et seq.*

sections: the state must engage in "affirmative, active, thorough, and timely efforts," and "must involve assisting the parent, parents, or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan."

III. STATE APPELLATE DECISIONS

Not all states have addressed the active efforts issue, but most of the appellate court cases that have conclude that active efforts require more "efforts" by the state than reasonable efforts. For example, the Court of Special Appeals of Maryland stated that "the 'active efforts' standard requires more effort than a 'reasonable efforts' standard does."[16] In that case two Indian children were removed from parental care and placed with an aunt because of neglect. A reunification plan was prepared. At a permanency planning hearing the parents were making little progress and the children were doing well with the aunt. The trial court changed the permanency plan from reunification to custody and guardianship with the aunt. The trial court made findings that the agency provided reasonable efforts and specifically monitored the placement, supervised visitation, and provided referrals to parenting, evaluations, mental health treatment and more.[17] However, the trial court made no reference to active efforts and used the reasonable efforts standard to determine whether the social service agency had complied with the law. The appellate court noted that referrals were not active efforts and that the active efforts standard requires more effort than the reasonable efforts standard does. The appellate court vacated the trial court's finding and remanded the case for further proceedings consistent with their opinion.

16. *In re Nicole B.*, 175 Md.App.450, at p. 472. (2007)
17. *Id.* at 462.

Numerous other appellate courts across the country have taken the position that active efforts require a higher degree of effort than reasonable efforts.

The Michigan Supreme Court found "...that 'active efforts' require more than 'reasonable efforts' required by state law."[18] In that case the mother and children were all members of the Sault Ste. Marie Tribe of Chippewa Indians. The mother's parental rights had been terminated to three of her four children before this case arose. The child in this case (JL) was born when the mother was 16 years of age and living in foster care. Based on mother's abusive and neglectful behavior, the child was removed from her care. The social worker provided wraparound services until the case was transferred to the Sault Ste. Marie Tribe of Chippewa Indians Tribal Court. That court released JL to the mother when she was 18. The wraparound coordinator and others worked with mother to help her with budgeting and obtaining social security benefits. However, the mother continued to demonstrate that she could not safely parent her children and her parental rights were terminated as to JL, the trial court finding that the 6 years of services including the services provided in the early cases involving three siblings satisfied the "active efforts" requirement of the ICWA.[19]

18. *Dep't of Human Servs. v. Lee (in re JL)*, 483 Mich. 300, at p. 321 (2009). A similar conclusion was reached by the following courts: *In re D.S.B. and D.S.B.*, 2013 MT 112 (2013) at pp. 5-6; *State v. Jamison M., and Shinai S.*, 18 Neb. App. 679 (2010) at p. 685; *In re S.A.D.* Jackson County Circuit Court, A156322 (2014) at p. 5; *People ex rel. P.S.E.*, 2012 SD 49 (2012) at pp. 58-59; *P.D.C. v D.J.C.R.*, Utah Court of Appeals, 2001 UT App 353 at pp 356-357; *In re Welfare of Children of S.W.*, 727 N.W. 2d 144 (2007)
19. *Id.* In re JL at p.328.

No state has more appellate decisions regarding the ICWA than Alaska.[20] That is likely since Native Americans comprise over 14% of the Alaska population.[21] In the case of *Denny M. v State of Alaska, Department of Health & Social Services, Office of Children's Services*,[22] the mother appealed a termination of parental rights, arguing that the state did not provide active efforts to prevent the breakup of her family. The mother was seriously mentally ill and resided in a care home. The Supreme Court affirmed the trial court finding that the state OCS made active efforts toward reunification, as the mother received extensive resources directly from OCS, including case planning, frequent and in-person support from caseworkers, monthly therapeutic visits with the children, and referrals for neuropsychological and psychological evaluations. Moreover, after the mother had moved, the state assigned a second social worker to ensure that the mother's visits would take place and provided cab vouchers since the mother could not navigate the bus system.[23] Numerous other appellate courts across the country have taken the position that active efforts require a higher degree of effort than reasonable efforts.[24] ➜

20. An annual summary of cases involving The ICWA can be found in the *American Indian Law Journal* in its "Indian Child Welfare Act Annual Case Law Update and Commentary" written by Kathryn Fort and Adrian T. Smith, Volume 6, Issue 2 (2018).
21. Alaska Population 2017 World Population Review.
22. 365 P.3d 345 (2016).
23. *Id.* at 350.
24. *Winston J. v. State*, 134 P.3d 343, 347 n.18 (Alaska 2006); *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. Ct. App. 2007); *In re A.N.*, 2005 MT 19, 325 Mont. 379, 106 P.3d 556, 560 (Mont. 2005); *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55, 61 (Neb. 2008); *In re J.S.*, 2008 OK CIV APP 15, 177 P.3d 590, 593 (Okla. Civ. App. 2008); *Dep't of Human Services v. K.C.J.*, 228 Ore. App. 70, 207 P.3d 423, 425 (Or. Ct. App. 2009); *People in Interest of P.S.E.*,

Only one state takes the position that active efforts are equivalent to reasonable efforts.[25] California appellate courts have consistently held that active efforts are the same as reasonable efforts.[26] The leading California case is *In re Michael G.*[27]

> Under California law there is no significant differencebetween active efforts and reasonable efforts reasonable services and active efforts are essentially undifferentiable under California law.[28] and therefore the finding that the agency failed to demonstrate reasonable services were provided, it follows that no "active efforts" were made to prevent the breakup of the family.

After the *Michael G.* case, in 2007, the California legislature re-defined "active efforts" by adding section 361.7 to the Welfare and Institutions Code.

> 361.7(b): What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.[29]

Despite this legislative change other California appellate cases have followed the holding in the *Michael G.* case.[30] That California appellate courts have continued to insist that the two terms are the same is surprising given the publication of the definition of active efforts in the BIA regulations.[31] Those regulations make it clear that there are more efforts and services that the state must provide than any reasonable efforts requirements,[32] and that these efforts must be delivered in an "affirmative, active, thorough, and timely" fashion."[33] Colorado appellate courts issued one opinion stating that active efforts were the same as reasonable efforts.[34] However, subsequent Colorado cases have declined to follow the *K.D.* case.[35]

IV. CASELAW AFTER THE NEW ICWA REGULATIONS

In June of 2016 the Bureau of Indian Affairs (BIA) published regulations regarding the ICWA. These regulations took effect as of December 2016, and they are law. However, if state laws provide greater protection than the new regulations, the state law will prevail. Otherwise, the new regulations are binding on the state. For the purposes of this paper, section 23.2 (Definitions) is the critical change in the law. The definition of active efforts is listed above in Part III. These regulations list 11 examples of active efforts, emphasizing the engagement of family and Indian tribes in accessing services. 'Active efforts' means affirmative, active, thorough and timely efforts intended primarily to maintain or reunite and Indian child with his or her family. The definition emphasizes using culturally appropriate services and working with the child's Tribe to provide services. Prior to ordering involuntary foster care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the family and that they have been unsuccessful.

Active efforts must be documented in the court records before requesting foster care or termination of parental rights.[36] The Guidelines recommend that the documentation include the following in addition to any other relevant information. (1) The issues the family is facing that the State agency is targeting with the active efforts (these should be the same issues that are threatening the breakup of the Indian family or preventing reunification); (2) A list of active efforts the State agency determines would best address the issues and the reasoning for choosing those specific active efforts; (3) Dates, persons contacted, and other details evidencing how the State agency provided active efforts: (4) Results of the active efforts provided and, where the results were less than satisfactory, whether the State agency adjusted the active efforts to better address the issues.[37] Courts that simply check a box on a pre-printed form that active efforts have been provided would not be following the law.

In 2017 the Kansas Court of Appeals in the case of *In re L.M.B.* found "...that 'active efforts' means something more than the 'reasonable efforts' standard that may apply in non-Indian-child termina- ➜

2012 SD 49, 816 N.W.2d 110, 115 (S.D. 2012); *J.S.B.*, 691 N.W.2d at 619; *State ex rel. C.D.*, 200 P.3d 194, 205, 2008 UT App 477 (Utah Ct. App. 2008); *In re M.L.M.*, 388 P.3d 1226 (2017).

25. *In re Adoption of Hannah S.*, 142 Cal.App.4th 988, at 998 (2006).
26. *People ex rel. K.D.*, 155 P.3d 634 (2007).
27. 63 Cal. App. 4th 700 (1998).
28. Id. at 714.
29. California Welfare and Institutions Code §361.7, West, 2018.
30. *In re T.W.*, 9 Cal.App.5th 339 (2017); *Adoption of Hannah S.*, 142 Cal.App.4th 988, at 998 (2006); *In re C.F.*, 230 Cal.App.4th 227 (2014).
31. 25 CFR PART 23.2 – Definitions.
32. See Edwards, L., "Active Efforts" and "Reasonable Efforts": Do They Mean the Same Thing? Spring 2015, *The Bench*, the official magazine of the California Judges Association on pages 6 and 34. A copy of this article is available at no cost at judgeleonardedwards.com.
33. Op.cit., footnote 15.
34. *People ex rel. K.D.*, 155 P.3d 634 (2007)
35. See *People ex rel. A.R.*, 2012 COA 195M (2012); *People ex rel. T.E.R.*, 2013 COA 73, 305 P.3d 414 (2013).
36. ICWA Regulations §§23.120(a) and 23.120(b). "Active efforts must be documented in detail in the record."
37. ICWA Regulations §23.120(b) Guidelines.

tion proceedings."[38] In that case all family members were members of the Citizen Potawatomi Nation. The Nation was involved with the case from the outset. The children were removed from parental care because of parental drug abuse and sexual abuse by the father. The parents were granted reunification services, but visited the children infrequently, were using drugs extensively, and were homeless. Over the next year the parents were in and out of jail and out of contact with the social worker. They completed some of the services offered by the agency. The trial court found that the state used active efforts to prevent the breakup of the family, including involving the tribe and keeping the children with family members in line with the cultural traditions of the tribe. The trial court finally terminated parental rights.

The Court of Appeals affirmed the trial court's decision. In its ruling the appellate court noted that "active efforts" means something more than "reasonable efforts."[39] In reaching this conclusion the appellate court cited the Bureau of Indian Affairs Guidelines and included in its decision a recitation of the guidelines as they appear in this paper (supra).[40] The appellate court noted the details of the efforts provided by the state. They included: (1) the tribe participated in the creation of the case plan; (2) relatives who were members of the tribe participated throughout the case; (3) the social worker met regularly with the relatives and children; (4) the children were placed with maternal relatives which was consistent with the cultural tradition of the Citizen Potawatomie Nation; (5)

38. *In the Interest of L.M.B.*, 398 P.3d 207, at p. 218 (2017)
39. Id.
40. Id. at pp 219-220.

> *As numerous state appellate decisions have written, "Family reunification services are not 'reasonable' if they consist of nothing more than handing the client a list of services and then putting the entire responsibility on the client to find and complete the services."*

the social worker attempted to facilitate parent-child visits, conditioned on clean drug tests by the parents, but the parents only showed up for one visit, (6) and the state provided therapy for the children when needed. The state also provided referrals for a parenting class and for a drug-and-alcohol assessment. The court found some of the efforts provided by the social worker "hazy" because it was so difficult to contact the parents, "let alone provide them with additional help."[41] The court concluded that it was highly probable that the State used active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the family.[42]

V. ACTIVE EFFORTS AND PASSIVE EFFORTS

Some commentators and appellate courts have suggested that active efforts should be contrasted with passive efforts. As a Montana appellate court stated: "[t]he term active efforts, by definition, implies heightened responsibility compared to passive efforts."[43] Apparently the term 'passive efforts' was created by Craig J. Dorsey in his book, "The Indian Child Welfare Act and Laws Affecting Indian Juveniles."[44] An Alaskan appellate court cited Dorsey as stating that "passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition."[45] The appellate court went on to explain that "[a]ctive 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."[46] The National Indian Law Library discusses "active efforts" in its Online Guide. It provides a 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.[47]

These approaches to an analysis of the meaning of "active efforts" are inaccurate. First, nowhere in the law is there reference to "passive efforts." That ➜

41. Id. at p. 221. A similar conclusion was reached by the following courts: *In re D.S.B. and D.S.B.*, 2013 MT 112 (2013) at pp. 5-6; *State v. Jamison M., and Shinai S.*, 18 Neb. App. 679 (2010) at p. 685; *In re S.A.D.* Jackson County Circuit Court, A156322 (2014) at p. 5; *People ex rel. P.S.E.*, 2012 SD 49 (2012) at pp. 58-59; *P.D.C. v D.J.C.R.*, Utah Court of Appeals, 2001 UT App 353 at pp 356-357; *In re Welfare of Children of S.W.*, 727 N.W. 2d 144 (2007).
42. Other appellate courts have made similar findings. *In the Matter of A.N.and M. N.*, 325 Mont. 379, 384, 106 P.3d 556, 560 (Montana Supreme Court, 2005); *Sandy B. v State, Dept. of Health & Social Services*, 216 P.3d 1180 (Alaska, 2009); *M.W. v Dept. of Health and Social Services*, 20 P.3d 1146 (Alaska Supreme Court, note 18, 2001).
43. 2005 MT 19, 23, 325 Mont. 379, 384, 106 P.3d 556, 560. See also the Alaska appellate decisions, *Sandy B.*, 216 P.3d at 1188 and *A.A v State*, 982 P.2d 256 at 261 (1999).
44. Dorsay, Craig, "The Indian Child Welfare Act and Laws Affecting Indian Juveniles," Legal Services Corporation, Window Rock, Arizona, Native American Rights Fund, 1984, at pp. 157-158.
45. *Sandy B.*, 216 P.3d at 1188. (2009). See also *Sylvia v State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 343 P.3d 425, 432 (Alaska, 2015) "Generally OCS makes active efforts...when it helps the parents develop the resources necessary to satisfy their case plans, but its efforts are passive when it requires the parents to perform these tasks on their own." Also cited in *Denny M. v. Dep't of Health & Social Servs., Office of Children's Servs.*, 365 P.3d 345, 350 (2016) and *Dale H. v State* 235 P. 3d 203 (2010).
46. Id.
47. "A Practical Guide to the Indian Child Welfare Act," National Indian Law Library, Topic 12, Active Efforts Requirement. See also *In re K.B.*, 173 Cal. App.4th 1275, (2009) "Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts ... is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own." At p.1287.

is a term apparently created by Mr. Dorsey. It is true that in the dictionary "passive" is the opposite of "active," but there is no legislative support for using the term. Second, "passive efforts" is not the same as "reasonable efforts." As numerous state appellate decisions have written, "Family reunification services are not 'reasonable' if they consist of nothing more than handing the client a list of services and then putting the entire responsibility on the client to find and complete the services.[48] When the agency writes up a case plan and encourages the parent to follow it, an Alaskan appellate court that such action is insufficient to meet the active efforts requirement.[49]

Several appellate decisions confirm this statement. In a Delaware case, the agency's drug treatment professionals made clear that the substance abusing mother needed more than referrals to outpatient services. When the agency failed to provide those services, the Family Court denied a petition to terminate parental rights.[50] Two other appellate courts ruled that the agency has a responsibility to ensure that visitation takes place and that transportation is provided for the child and parents.[51] Numerous cases require the agency to ensure that visits take place when a parent is incarcerated.[52] For example, in one case the social worker provided only stamped envelopes and failed to respond to father's request for visits. The appellate court found that reasonable efforts had not been provided.[53]

Some state definitions of reasonable efforts indicate that they are not passive. For example, the Arkansas legislature's definition states as follows:

> [T]he "agency shall exercise reasonable diligence and care to utilize all available services." "'Reasonable efforts' are measures taken to preserve the family and can include reasonable care and diligence on the part of the department or agency to utilize all available services related to meeting the needs of the juvenile and the family. Reasonable efforts may include the provision of 'family services,' which are relevant services provided to a juvenile or his or her family, including, but not limited to:
>
> Child care
> Homemaker services
> Crisis counseling
> Cash assistance
> Transportation
> Family therapy
> Physical, psychiatric, or psychological evaluation
> Counseling or treatment.[54]

A California appellate court describes reasonable efforts as:

> Reunification services will be found to be reasonable if the child welfare department has 'identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained reasonable contact with the parents during the course of the service plan, and made reasonable efforts to assist parents in areas where compliance proved difficult (such as helping to provide transportation.)[55]

VI. WHAT ARE ACTIVE EFFORTS?

Except for the California cases,[56] it is also clear that active efforts involve more than reasonable efforts. First, by their very definition, "active" means more activity that "reasonable." Second, the ICWA Regulations and Guidelines discuss steps that a social worker must take to satisfy the "active efforts" mandate. The social worker must engage "the Indian child, the Indian child's parents, the Indian child's extended family members, and the Indian child's custodian(s)".[57] The social worker must actively assist the parents obtaining services.[58]

For example, if the parent encounters difficulties with long waiting lists for services, challenges in finding employment or housing, long distances to maintain visitation, mental health disabilities that prevent the parent from taking aggressive action to complete services, or any of a myriad of problems that prevent full participation in the case plan, the social worker must take action to assist the parent overcome those challenges.[59] That may mean that the social worker goes with the parent to service providers to ensure that the parent is enrolled and →

48. See *In re Taylor J.*, 223 Cal.App.4th 1446 (2014).
49. *A.M.I.*, 891 P.2d at 826-7.
50. *Division of Family Services v N.X.*, 802 A.2d 325 (Del. Fam. Ct. 2002).
51. *In re David D.*, 28 Cal.App.4th 941 (1994). *In re Precious J.*, 43 Cal. App. 4th 1463; (1996).
52. *In re Shaylon J.*, 782 A.2d 1140 (Rhode Island, 2001); *In re Brittany S.*, 17 Cal. App. 4th 1399 (1993); *In re Monica C.*, 31 Cal. App. 4th 296 (1995).
53. *Robin V. v Superior Court*, 33 Cal.App.4th (1995)
54. Ark. Code Ann. Section 9-27-303(43)(A)(iv).
55. *In re Riva M.*, 286 Cal. Rptr. 592,599 (1991).
56. It should be noted that California has more reversals on the reasonable efforts issue than all other states combined. The appellate courts take a careful look at social worker activity on each case and often reverse the trial court finding. For a list of all California cases involving reasonable efforts, go to the website: judgeleonardedwards.com
57. 23.2, ICWA Regulations.
58. *Id.*
59. In one case the appellate court opined that "...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, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child." *In re K.B.173* Cal. App. 4th 1275, 1287 (2009).

understands how he or she will participate in the program. It may involve the social worker transporting the child and/or parent so that visitation takes place. It may be that the social worker takes the parent to employment interviews. It may mean providing temporary housing for a parent and child. It should mean that the social worker is working closely with relatives and tribal members urging them to provide support for the parent. It certainly means that the social worker is in regular contact with the parent to determine how the parent is working on the case plan. Depending on the situation, the social worker must be ready to take whatever action is necessary to keep the parent fully engaged in the reunification process.

As Justice William Thorne (ret. Utah Appellate Court) has said: "'active efforts' means the social worker should treat the child as you would your own child and do whatever it takes." Judge April Attebury of the Karuk Tribal Court tells social workers they "should hold the client's hand from start to finish."

CONCLUSION

The active efforts requirement places great demands on the social worker. Yet that is what Congress intended when it wrote the ICWA. It was the "wholesale separation of Indian children from their families…" that led to its passage.60 Active efforts means just that — Active. Social workers must work aggressively with the parents to accomplish the congressional goals "to prevent the breakup of the Indian family."

Attorneys must be ready to raise the active efforts throughout the pendency of the case. Ask questions of the social worker. Put on the record all of the steps the social worker took to prevent removal of the child, to facilitate reunification, and to stay in contact with the parents. Ask the judge to make specific findings about the efforts expended by the social worker. In other words, make a record.

Judicial oversight is just as critical to implementation of the ICWA and to the requirement that social workers provide active efforts to prevent removal of Indian children from their families and facilitate reunification when they have been removed. Judges must monitor the actions of social workers to ensure that they are following the law.

In some jurisdictions the judicial officer is only required to check a box that indicates that active efforts have been provided to the child's family. The law requires more. The judicial officer must make specific findings on the record including detailing the services and the method those services were delivered.[61] Judges should be ready to ask the social worker questions regarding the efforts taken to meet the legal requirements.[62] Only through careful enquiry can the judge accurately determine whether the social worker followed the law. Only then can the judge make a finding that active efforts were provided to the family before the court. ■

60. *Establishing Standards for the Placement of Indian Children in Foster Care or Adoptive Homes, to Prevent the Breakup of Indian Families, and for other Purposes*, H R Rep. 96-1368, at 9 (July 24, 1978).

61. *Op.cit.* footnotes 35 and 36 and related text.

62. Edwards, L. "Should Judges Ask Questions: The Enquiring Magistrate," *The Bench;* a publication of the California Judges Association, Fall, 2016 at pp. 6 and 27.