
COMMENT

TERMINATING ACTIVE EFFORTS: THE ALASKA SUPREME COURT MISFIRES IN *J.S. V. STATE*

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This Comment evaluates the Alaska Supreme Court's decision in J.S. v. State, which held that the Department of Health and Social Services may terminate "active efforts" to reunify an Indian family where a parent has subjected the child to sexual abuse. The Comment suggests that the court's reasoning was unfounded given the guarantees of the Indian Child Welfare Act and the current state of federal law. The Comment suggests alternatives to the court's ruling to protect children while also preserving a parent's privilege against self-incrimination.

I. INTRODUCTION

In *J.S. v. State*,¹ the Alaska Supreme Court held that the Department of Health and Social Services ("Department") may, under certain circumstances, terminate "active efforts" to reunify a parent and an Indian child.² The Department's duty to make "active efforts" normally arises when it takes an Indian child into protective custody.³ The Indian Child Welfare Act ("ICWA")⁴ requires the agency to attempt reunification of the torn family.⁵ *J.S.*

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1. 50 P.3d 388 (Alaska 2002).

2. *Id.* at 392.

3. *Id.* at 391 (discussing the Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(d) (2000)).

4. 25 U.S.C. §§ 1901-1963.

5. *Id.* § 1912(d).

held, however, that when a parent has subjected a child to sexual abuse, the Adoption and Safe Families Act of 1997 (“ASFA”)⁶ relieves the Department of its duty to reunify.⁷

J.S. makes a radical, unsupported, and unnecessary departure from the guarantees of ICWA. Other states have found alternatives that protect the child, preserve the state’s ability to require therapy by the parent, and yet avoid dilution of the parent’s right to reunification efforts.

II. THE *J.S.* OPINION

In *J.S.*, Jack,⁸ the father of three Indian boys, was convicted of sexually assaulting his three sons and was sentenced to nineteen years in prison with four years suspended.⁹ The Department took custody of the boys and petitioned to terminate Jack’s parental rights.¹⁰ The trial court found that Jack’s long incarceration and the needs of his children justified this termination.¹¹

It was undisputed that at the time of the termination the Department had failed to make any efforts to reunify Jack and his sons.¹² The trial court held that to avoid termination of his rights, Jack would have to admit his offense against his sons and enroll in treatment; the court then kept the record open for sixty days while the Department offered Jack a treatment plan.¹³ The agency’s treatment plan required that Jack accept responsibility for his behavior, apologize in writing to his sons, drop the pending appeals of his criminal conviction, and enroll in a sexual offender treatment program.¹⁴ Jack would neither accept responsibility for the offenses nor drop the appeals.¹⁵ After further proceedings, the trial court terminated Jack’s parental rights.¹⁶

The Alaska Supreme Court upheld the termination and approved the discontinuance of “active efforts.”¹⁷ The court observed

6. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

7. *J.S.*, 50 P.3d at 392.

8. “Jack” is the pseudonym assigned by the Alaska Supreme Court to the father in this case. *Id.* at 389 n.1.

9. *Id.* at 389-90.

10. *Id.* at 390.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 390-91.

16. *Id.* at 391.

17. *Id.* at 392.

that in 1997, ASFA amended the general federal requirement that the State must make “reasonable efforts” toward reunification in termination cases; ASFA allowed the state agency to stop reunification efforts when the parent subjected the child to sexual abuse.¹⁸

The court concluded:

Although this case is not governed by ASFA, that act is useful in providing guidance to congressional policy on child welfare issues. It suggests that in situations of adjudicated devastating sexual abuse, such as this one, a person’s fundamental right to parent is not more important than a child’s fundamental right to safety.¹⁹

Therefore, the court held that “active efforts” at reunification were not required after a judicial finding that a parent subjected a child to sexual abuse.²⁰

III. THE COURT’S ANALYSIS FAILS

A. The Court Reached the “Active Efforts” Issue Unnecessarily.

The Alaska Supreme Court has issued a long line of decisions justifying minimal reunification efforts when the parent is uncooperative.²¹ Accordingly, the trial court in *J.S.* was within its discretion to require Jack to attend treatment.²² However, the further requirement that Jack admit guilt was unnecessary.²³ If Jack refused treatment, for whatever reason, that refusal alone would justify the termination of parental rights under existing case law.²⁴

The presence of two standards, “reasonable efforts” and “active efforts,” is easily resolved given the provisions of the underlying statutes. ASFA permits a state to discontinue reasonable efforts to reunify a family²⁵; ICWA contains no similar permission

18. *Id.* (citing 42 U.S.C. § 671(a)(15)(D)(i) (2000); ALASKA STAT. § 47.10.086(c) (Michie 2002) (codifying an exception to the reasonable efforts requirement as applied to children in need of aid)).

19. *Id.*

20. *Id.*

21. *See, e.g., E.A. v. State, Div. of Family and Youth Servs.*, 46 P.3d 986, 991 (Alaska 2002) (citing earlier cases that allow a parent’s willingness to cooperate to be considered in deciding whether the state has made active efforts).

22. *J.S.*, 50 P.3d at 390.

23. *Id.*

24. *See, e.g., E.A.* 46 P.3d at 991.

25. 42 U.S.C. § 671(a)(15)(D) (2000) (allowing cessation of reasonable efforts if the parent has subjected the child to aggravated circumstances, which includes abandonment, torture, and chronic sexual abuse).

with regard to active efforts.²⁶ The usual rule of statutory construction is that the reviewing court resorts first to the plain language of the statute; if the language is unambiguous, the court need not inquire further.²⁷ To that end, the court in *J.S.* should have recognized that Congress intended to create two different standards for two different sets of children.

Why, then, did the Alaska Supreme Court reach the ruling that ASFA is a guide to ICWA? The key lies in a footnote.²⁸ Jack argued that when the court and the Department required him to admit to the criminal charges, the State violated his privilege against self-incrimination.²⁹ If that was in fact the case, the trial court should not have given the Department the additional sixty days to demonstrate “active efforts”; those efforts, regardless of their content, would violate Jack’s constitutional privilege against self-incrimination.³⁰ Thus, the substantive content of the plan would not make a difference until the overall unconstitutionality of the plan was cured.

Instead of facing this issue directly, the Alaska Supreme Court chose to moot the constitutional issue, holding that the Department had no reunification duty at all.³¹ In the complete absence of such a duty, the constitutionality of the trial court order ceased to be an issue. But in so ruling, the court ignored the complete dearth of authority supporting its interpretation, ignored three earlier decisions from other state appellate courts that resolved the same issue successfully,³² and ignored the guidance of a United States Supreme Court opinion³³ issued only two weeks earlier.

B. The Rationale in *J.S.* is Unsupported in Federal Law.

1. *Nothing Supports the Use of ASFA to Interpret ICWA.*

a. *The Plain Language of ICWA Settles Differences That Might Arise Between the Guarantees in ICWA and Those in Other Statutes.* ICWA provides:

26. See 25 U.S.C. §§ 1901-1963 (2000).

27. E.g., *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000); *Rubin v. United States*, 449 U.S. 424, 430 (1981); NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:01 (6th ed., West 2000).

28. *J.S.*, 50 P.3d at 392 n.16.

29. *Id.*

30. *Id.*

31. *Id.*

32. See *infra* Part IV.

33. See *infra* Part V.

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parents or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.³⁴

On the facts of *J.S.*, the guarantees to the Indian parent are lower under ASFA than they are under ICWA. Under ASFA, the state agency may sometimes end its efforts to reunify the family;³⁵ ICWA has no similar provisions.³⁶ The standard of protection is therefore stronger under ICWA. Thus, by the plain language of the federal statutes, the protections of ICWA apply. Accordingly, it is unnecessary to resort to ASFA to interpret ICWA.

b. *There is No Language in ICWA or ASFA Linking the Two Laws.* When Congress wants to establish a relationship between different sets of state and federal guarantees, it does so expressly. The most notable example in this arena is the ICWA provision cited above, which assures parents of Indian children that they will have the protections of either ICWA or another applicable law, whichever is stronger.³⁷ Congress has not codified any language connecting ICWA and ASFA to alter this guarantee. In effect, the Alaska Supreme Court drew its connection out of silence.³⁸

c. *The Legislative History of ASFA Does Not Support the Supreme Court's Conclusion.* The legislative history of the 1997 modification to the "reasonable efforts" requirement shows a lack of congressional intent to use the provisions of ASFA to interpret ICWA. One of the main proponents of the 1997 bill was Senator Mike DeWine.³⁹ One of his primary concerns was that the 1980 "reasonable efforts" standard had never been defined and that this injured children who languished too long in state custody.⁴⁰ At the

34. 25 U.S.C. § 1921 (2000).

35. 42 U.S.C. § 671(a)(15)(D) (2000).

36. See 25 U.S.C. §§ 1901-1963.

37. *Id.* § 1921.

38. On July 15, 2003, Representative Don Young introduced legislation that would substantially amend ICWA. H.R. 2750, 108th Cong. (1st Sess. 2003). Among other things, the amendments would reinforce the rule that no other law modifies the duty of active efforts. See *id.* § 7. The amendment to 25 U.S.C. § 1912(d) would read: "The active efforts required under this subsection shall not be abridged by any other Federal or State law. . ." *Id.* This amendment would preclude the use of ASFA to abridge such rights in ICWA.

39. See 143 Cong. Rec. S12668-74 (daily ed. Nov. 13, 1997) (Statement of Sen. DeWine) [hereinafter 143 Cong. Rec. S12668-74].

40. *E.g., id.*; 143 Cong. Rec. S11175 (daily ed. Oct. 24, 1997) (Statement of Sen. DeWine); 143 Cong. Rec. S551 (daily ed. Jan. 21, 1997) (Statement of Sen.

time, state agencies resolved all doubts on the side of reunification, to the point where children died in foster care and otherwise risked serious injury.⁴¹ In his floor testimony, Senator DeWine limited his comments to the “reasonable efforts” standard; he made no comment on ICWA, and did not draw a connection between ICWA and the pending amendments.⁴²

In addition, the 1997 House Report explained its rationale for modifying “reasonable efforts.”⁴³ The Report stated that the bill would require states to define “aggravated circumstances,” such as torture of a child, to allow a more expeditious termination of parental rights.⁴⁴ Under its “Reason for Change,” the Report pointed to the lack of a statutory definition for “reasonable efforts” and the resulting confusion among the states in administering the law.⁴⁵ The Report, however, mentioned neither ICWA nor its “active efforts” requirement. Again, the Alaska Supreme Court drew its conclusion despite congressional silence.

2. *J.S. Disregards Contrary United States Supreme Court Precedent on the Nature of the Federal Guarantees Contained in ASFA.* The Alaska Supreme Court sought guidance on substantive law from a statute that grants no substantive rights. The predecessor to ASFA was the Adoption Assistance and Child Welfare Act of 1980 (“AACWA”).⁴⁶ In *Suter v. Artist M.*,⁴⁷ the United States Supreme Court examined whether AACWA granted private individuals substantive rights that allowed them to sue state officials.⁴⁸ The Court held that AACWA created a set of relationships only between the states and the federal government.⁴⁹ Although AACWA contained extensive and detailed provisions governing

DeWine); 142 Cong. Rec. S5710-12 (daily ed. June 4, 1996) (Statement of Sen. DeWine). The author has not reviewed every comment that Senator DeWine offered on the series of bills that eventually became the Adoption and Safe Families Act of 1997; however, nothing in the ASFA comments reviewed suggested that Senator DeWine wanted to change the “active efforts” provisions of ICWA.

41. 143 Cong. Rec. S12669 (daily ed. Nov. 13, 1997) (Statement of Sen. DeWine).

42. 143 Cong. Rec. S12668-74.

43. H.R. REP. 105-77, at 7 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2742-43.

44. *Id.*

45. H.R. REP. 105-77, at 11 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2743.

46. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.).

47. 503 U.S. 347 (1992).

48. *Id.* at 350.

49. *Id.* at 358.

the contents of a state plan for children and families, those provisions were only preconditions to the award of grant money to the states.⁵⁰ The right to enforce grant conditions belonged to the United States.⁵¹ Accordingly, the provisions did not give substantive rights to individuals to sue when the state violated the grant conditions.⁵²

In light of *Suter's* ruling that ASFA grants no substantive rights to individuals, it is difficult to see how the Alaska Supreme Court could find that ASFA imposes substantive disabilities on those same individuals.⁵³ Federal law still requires the state plan to include reasonable efforts at reunification, but this requirement is only a condition of a federal grant.⁵⁴ Therefore, ASFA affects relations between the Alaska Department of Health and Social Services and the federal agency that administers the grant program, but not between the Department and private individuals.⁵⁵ Given that ASFA gives private individuals no federal rights, it is difficult to see how the Alaska Supreme Court would give ASFA a construction that imposes substantive disabilities on those individuals.

3. *The J.S. Rationale Contradicts Rules Governing the Construction of Statutes.* First, the rule that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit” has existed for almost ninety years.⁵⁶ *J.S.* disregards this bedrock principle, which would have effectively

50. *Id.* at 358, 361-62.

51. *Id.* at 360.

52. *Id.* at 363-64.

53. A congressional amendment to a statute will be construed to have adopted the settled judicial interpretation of that statute. *See Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (finding that when Congress reenacted a statute with substantially the same language as the original statute, the accepted judicial interpretation applies to the reenacted statute)). In 1994, Congress amended the Social Security Act overruling the test used in *Suter* to determine whether a private right of action is available under a federal statute. *See* 42 U.S.C. § 1320a-2 (2000). However, this amendment did not overrule the specific result in *Suter* that a private right of action is unavailable under 42 U.S.C. § 671(a)(15). *Id.*

54. *See* 42 U.S.C. § 671(a)(15) (2000).

55. *See* Pub. L. No. 96-272 § 470 (1980) (codified as amended at 42 U.S.C. § 670).

56. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (supporting the general rule that statutes passed to benefit Indian tribes should be construed liberally).

resolved the issue in the case. ASFA applies to all children;⁵⁷ ICWA applies only to Indian children.⁵⁸ Additionally, an Indian parent has more protection under ICWA than under ASFA.⁵⁹ Under such circumstances, the rules of construction favor application of the higher standards of ICWA and thus provide greater protection for the Indian parent. The Alaska Supreme Court has followed this rule of statutory construction in the past,⁶⁰ but did not explain why it was not following this rule in *J.S.*

Second, in *J.S.*, the court disregarded its long-standing rule that “no judicial exception to ICWA can be created.”⁶¹ Specifically, the court has previously expressed its “serious policy reservations concerning the creation of judicial exceptions to the plain language of ICWA.”⁶² However, there was no compelling reason in *J.S.* to avoid this rule of construction because ASFA and ICWA never reference each other. Third, a threat to the privilege against self-incrimination raises a serious issue. Alternatives were and are available to require the parent to attend treatment, to protect the child, and to avoid damage to ICWA.⁶³

IV. OTHER JURISDICTIONS RESOLVE THE ISSUE

Serious issues concerning a person’s privilege against self-incrimination were raised in *J.S.* Although the court could not avoid this issue, the court did not need to endanger the children or dilute the guarantees of ICWA. The United States Constitution

57. The pertinent sections of ASFA cover “all children.” 42 U.S.C. § 625(a)(1) (2000). The requirements for a state case plan do not limit coverage to less than all children. 42 U.S.C. § 671 (a).

58. 25 U.S.C. §§ 1901-1902 (2000).

59. *E.g.*, 25 U.S.C. § 1912 (substantive rights in pending court proceedings), § 1913 (rights for voluntarily relinquishing parental rights), § 1914 (right to petition to invalidate some proceedings for violation of ICWA), § 1916 (rights to return of the child in certain circumstances).

60. *See* *John v. Baker*, 982 P.2d 738, 752 (Alaska 1999) (“Courts must resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans.”).

61. *A.M. v. State*, 891 P.2d 815, 827 (Alaska 1995).

62. *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989). The court expressed such reservations as early as 1982. *A.B.M. v. M.H.*, 651 P.2d 1170, 1173 (Alaska 1982) (“[W]e find no compelling basis for implying any other [exceptions].”). In *J.S.* itself, the court described an earlier opinion as “holding that there was no compelling reason for implying a judicially created exception to ICWA.” 50 P.3d 388, 392 n.12 (Alaska 2002) (citing *A.B.M.*, 651 P.2d at 1173).

63. *See* discussion *infra* Part VI.

grants a privilege against self-incrimination⁶⁴ that applies to the states through the Fourteenth Amendment.⁶⁵ In accordance with the privilege, individuals may refuse to answer questions in any proceeding “civil or criminal, formal or informal, where the answers might incriminate [the individual] in future criminal proceedings.”⁶⁶ The Alaska Constitution similarly grants a privilege against self-incrimination.⁶⁷ However, statements made during sex offender therapy are not privileged.⁶⁸

Prior to *J.S.*, the Alaska Supreme Court had seen only one challenge questioning parental rights and self-incrimination. In *Nelson v. Jones*,⁶⁹ the court held that conditioning future visitation upon an admission of sexual abuse lies within the discretion of the trial court.⁷⁰ However, the father had stipulated to a finding of abuse.⁷¹ Thus, whatever privilege against self-incrimination the father might have had, he waived it when he agreed to the stipulation. The appellate decision concerned the father’s efforts to vacate the stipulated order.⁷² However, in *J.S.* Jack prosecuted the issue of self-incrimination, while the father in *Nelson* did not; thus, the result in *Nelson* is not helpful to resolving *J.S.*

Three other jurisdictions have examined this problem and concluded that the trial court may not terminate parental rights, or deny visitation, based on a parental refusal to waive the privilege against self-incrimination.⁷³ However, these courts also held that a court may do so based on a parental failure to undergo effective

64. U.S. CONST. amend. V.

65. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

66. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

67. ALASKA. CONST. art. 1, § 9.

68. *See* *Beaver v. State*, 933 P.2d 1178, 1186 (Alaska Ct. App. 1997) (holding that disclosure of statements made voluntarily during prison sex offender treatment regarding other crimes did not violate the prisoner’s Fifth Amendment rights); Christina L. Lewis, *The Exploitation of Trust: The Psychotherapist-Patient Privilege in Alaska as Applied to Prison Group Therapy*, 18 ALASKA L. REV. 295, 296 (2001) (“There is no existing judicial opinion on legal precedent in Alaska interpreting [the psychotherapist-patient privilege] in the context of group therapy.”).

69. 781 P.2d 964, 969-70 (Alaska 1989).

70. *Id.* at 970.

71. *Id.* at 966 (stating that the father agreed to the stipulation in open court, but said that he was not admitting guilt).

72. *Id.* at 967.

73. *See, e.g., In re Clifford M.*, 577 N.W.2d 547 (Neb. Ct. App. 1998); *Mullin v. Phelps*, 647 A.2d 714 (Vt. 1994); *In re the Welfare of J.W.*, 415 N.W.2d 879 (Minn. 1987).

treatment.⁷⁴ All three decisions overturned lower court decisions that conditioned treatment or visitation upon a waiver of the privilege against self-incrimination. Further, although the courts noted the difficult position of the parent, all held that the safety of the children was the paramount consideration.

Although none of the three decisions was based on ICWA, all were decided after the creation of the “reasonable efforts” standard contained in AACWA and one was decided after passage of ASFA. Notably, none of the courts found it necessary to hold that the “reasonable efforts” provisions of either AACWA or ASFA excused the duty of active efforts in ICWA.

A. Minnesota: *In re the Welfare of J.W.*

In *In re the Welfare of J.W.*,⁷⁵ the Minnesota Supreme Court reversed a trial court order that required parents to undergo psychological evaluations that would ultimately require them to explain the death of a child present in their home.⁷⁶ During the first part of the proceedings, the parents refused to answer questions about the death of the child.⁷⁷ However, as a discovery sanction, the trial court deemed it admissible that either or both parents were responsible for the child’s death.⁷⁸ Since the remaining children were at high risk of physical abuse, the trial court placed them in foster care.⁷⁹

At a later disposition hearing, the court ordered the parents to undergo psychological examinations.⁸⁰ The court ordered that such evaluations “[would] include the explanation of the death of [the 2-year-old nephew], consistent with the medical findings.”⁸¹ The parents appealed this disposition order on the grounds that it violated their privilege against self-incrimination.⁸² At the time of appeal, the trial to terminate parental rights had not been held.⁸³

74. See, e.g., *In re Clifford M.*, 577 N.W.2d at 554; *Mullin*, 647 A.2d at 734; *J.W.*, 415 N.W.2d at 884.

75. 415 N.W.2d 879.

76. *Id.* at 880-81. The death was apparently caused by an adult in the household. The children in custody were the parents’ own, but the child who died was not.

77. *Id.* at 880.

78. *Id.*

79. *Id.* at 881. The discovery sanctions were appealed but upheld. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

The Minnesota Supreme Court held that the trial court could not require that the parents incriminate themselves as part of a disposition order.⁸⁴ However, this ruling did not leave the children unprotected:

[T]he trial court's order, to the extent it requires appellants to incriminate themselves, violates appellants' Fifth Amendment rights and is unenforceable. This means that appellants' non-compliance with the order requiring them to divulge details of the nephew's death to psychologists cannot be used as grounds . . . for termination of parental rights nor for keeping [the other two children] in foster care. . . .

But this is as far as the privilege extends protection. While the state may not compel therapy treatment that would require appellants to incriminate themselves, it may require the parents to undergo treatment. Therapy, however, which does not include incriminating disclosures, may be ineffective; and ineffective therapy may hurt the parents' chances of regaining their children. These consequences lie outside the protective ambit of the Fifth Amendment.⁸⁵

The court held that the best interests of the children took priority over many of the rights of the parents.⁸⁶ To that end, the parents could not prevent the State from presenting evidence of how the child died or from seeking further orders to keep the children in foster care.⁸⁷ The parents, however, retained the power to offer evidence that they had overcome their abusive and violent background.⁸⁸ Specifically, the court said:

In the lexicon of the Fifth Amendment, the risk of losing the children for failure to undergo meaningful therapy is neither a "threat" nor a "penalty" imposed by the state. It is simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent.⁸⁹

The court finally observed that if the State believed that therapy would help the parents improve and thus regain their children, the State could grant the parents immunity.⁹⁰ The parents could then participate in therapy without fear of criminal sanctions.⁹¹

84. *Id.* at 883.

85. *Id.* (internal citations omitted).

86. *Id.* at 883-84.

87. *Id.*

88. *Id.* at 884.

89. *Id.*

90. *Id.*

91. *Id.*

B. Vermont: *Mullin v. Phelps*

In *Mullin v. Phelps*,⁹² the Vermont Supreme Court held that conditioning a father's visitation rights on an admission of sexual abuse violated his privilege against self-incrimination.⁹³ *Mullin* was a child custody dispute that arose after a divorce decree.⁹⁴ When the proceedings began, the two sons were in the custody of the father.⁹⁵ The mother of the boys petitioned the court repeatedly for a change in custody, alleging that the father had sexually abused the boys.⁹⁶ The court ultimately found that the father had abused his sons and transferred custody to the mother.⁹⁷

As a condition precedent to the resumption of contact with the sons, the trial court required the father to acknowledge the sexual abuse.⁹⁸ The order stated:

Plaintiff shall have no right to a regular schedule of parent child contact with the minor children until such time as he acknowledges responsibility for his abuse of [his son], engages in appropriate sex offender treatment including individual and group therapy as recommended by his therapist and visits between himself and the child are recommended by the child's therapist.⁹⁹

On appeal, the Vermont Supreme Court upheld the finding that one of the sons had been abused, and further held that this finding was sufficient to support a transfer of custody.¹⁰⁰ The court then turned to the question of whether the trial court's conditions violated the father's privilege against self-incrimination.¹⁰¹ The supreme court reversed the trial court and suggested a constitutionally valid solution:

Regardless of the strength or credibility of the evidence of sexual abuse, specifically conditioning the father's future contact with his sons on his admitting that he sexually abused [the son] violates [the father's] privilege against self-incrimination. While a court may require abusive parents to submit to therapy, and parental rights may be terminated without violating the fifth amendment based on the fact that the parents' denial of their problem prevented effective therapy, the court's specific condi-

92. 647 A.2d 714 (Vt. 1994).

93. *Id.* at 716.

94. *Id.* at 715.

95. *Id.* at 716.

96. *Id.* at 716-18.

97. *Id.* at 718-19.

98. *Id.* at 719.

99. *Id.* at 730 (Morse, J., dissenting) (emphasis omitted).

100. *Id.* at 719-21.

101. *Id.* at 724.

tion requiring the father to acknowledge conduct for which he could be prosecuted must be stricken.¹⁰²

This rationale recognizes the concerns raised by the appellant father in *J.S.*, but it also points the way out of the dilemma: when the trial court is faced with an abusive parent who resists an admission of guilt, there is a remedy available that protects the child but does not violate the constitutional rights of the parent.

C. Nebraska: *In re Clifford M.*

In *In re Clifford M.*,¹⁰³ a Nebraska appellate court reversed a termination of parental rights that was based on a finding that a mother had refused to acknowledge that her boyfriend had sexual contact with her daughter.¹⁰⁴ The mother's rehabilitation plan included a treatment program that required her acknowledgment of her failure to protect her children against sexual abuse.¹⁰⁵ The court took note of the difficulty of the issue:

[T]here is a very fine, although very important, distinction between terminating parental rights based specifically upon a refusal to waive protections against self-incrimination and terminating parental rights based upon a parent's failure to comply with an order to obtain meaningful therapy or rehabilitation, perhaps in part because a parent's failure to acknowledge past wrongdoing inhibits meaningful therapy. The latter is constitutionally permissible; the former is not.¹⁰⁶

The court acknowledged that a termination may rest lawfully on a parent's "failure to undergo meaningful therapy."¹⁰⁷ However, relying on *J.W.* and *Phelps*, the court held that the trial court's decision, which effectively ordered the parent to surrender her privilege against self-incrimination, was unconstitutional.¹⁰⁸

V. THE *MCKUNE V. LILE* OPINION

Two weeks before the opinion in *J.S. v. State*, the United States Supreme Court issued its opinion in *McKune v. Lile*.¹⁰⁹ *McKune* held that when a state, as a precondition for participation in treatment, requires a prisoner to admit his history of sexual as-

102. *Id.* at 724-25 (citations omitted).

103. 577 N.W.2d 547 (Neb. Ct. App. 1998).

104. *Id.*

105. *Id.* at 550.

106. *Id.* at 554 (citations omitted).

107. *Id.* at 554-55.

108. *Id.* at 555-57.

109. 536 U.S. 24 (2002).

sault, that requirement does not violate the prisoner's privilege against self-incrimination.¹¹⁰

In *McKune*, the State ordered petitioner Robert Lile, a prisoner close to re-entering society, to participate in a sexual abuse treatment plan.¹¹¹ As a condition of entering the program, prisoners were required to admit responsibility for the crimes for which they were sentenced, as well as "all prior sexual activities," regardless of whether the activities were, or could have been, charged as crimes.¹¹² Prisoners who did not participate faced penalties, including the reduction or loss of visitation, work opportunities, ability to send money home, access to the prison canteen, and other activities.¹¹³

The plurality opinion of the Court was joined by four justices, with one concurring in the judgment. The result was predicated on the fact that the penalties imposed by the treatment program were not as severe as others already held not to violate the privilege, and that prisoners' claims to constitutional protection are measured against a different standard. Specifically, the Court held that "[t]he consequences in question [in *McKune*]. . . are not ones that compel a prisoner to speak about his past crimes despite a desire to remain silent."¹¹⁴ The Court added, "A broad range of choices that might infringe constitutional rights in free society fall within the expected conditions of confinement of those who have suffered lawful conviction."¹¹⁵ Expanding on earlier case law,¹¹⁶ the *McKune* court held:

A prison clinical rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.¹¹⁷

McKune and *J.S.* are distinguishable because of the different forums in which the deprivation occurred and because of the severity of the deprivation itself. The situation in *McKune* took place in the criminal system and arose out of a prison's offer of treatment to an inmate in advance of release.¹¹⁸ The Department of Corrections

110. *Id.* at 29.

111. *Id.* at 30, 33-34.

112. *Id.* at 30.

113. *Id.* at 30-31, 39.

114. *Id.* at 36.

115. *Id.*

116. *See Sandin v. Conner*, 515 U.S. 472 (1995).

117. *McKune*, 536 U.S. at 37-38.

118. *Id.* at 30.

would provide the treatment or remove the privileges.¹¹⁹ The order in *J.S.* arose from a civil proceeding involving rights to the prisoner's children.¹²⁰ In *J.S.*, Jack was a prisoner, but he was navigating his way through the civil justice system, where parents are afforded more constitutional and statutory rights.

Second, in *McKune*, the prisoner did not face a loss of rights comparable to the loss of parental rights. On refusing to accept the conditions of treatment, the *McKune* petitioner faced a loss of visitation, work opportunities, and other freedoms.¹²¹ In *J.S.*, Jack faced the loss of rights to his children. This distinction is noteworthy in light of the fact that the Alaska Supreme Court has held that the right of a parent to custody and control of his child is one of the most basic civil liberties.¹²² The more serious consequences of such a deprivation enter into the calculation of whether testimony against oneself is coerced.

Notwithstanding these points, the Alaska Supreme Court had a fairly clear test available to decide when a treatment plan that requires the admission of a crime violates the constitutional privilege against self-incrimination.

VI. ALTERNATIVES TO *J.S.*

The superior court order in *J.S.* violated the privilege against self-incrimination because it conditioned the preservation of parental rights upon Jack's admission that certain incriminating statements were true. However, reasonable alternatives were available. A finding of sexual abuse was already in place because the Department had proven its case under state law.¹²³ Accordingly, the trial court could have held that so long as Jack refused to attend an effective treatment program, he was not cooperating with his case plan and thus refusing "active efforts."

This result preserves the ICWA mandate that the Department must make "active efforts" at reunification and avoids grafting a fictitious condition onto ICWA that relieves the Department of its duty to make such efforts. In *J.S.*, the trial court could have effectively required Jack to submit to therapy by two methods: approving the removal of the children from the home, which must include a finding that "active efforts" are being made,¹²⁴ and approving the

119. *Id.*

120. *J.S. v. State*, 50 P.3d 388, 389-90 (Alaska 2002).

121. 536 U.S. at 30-31, 39.

122. *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991).

123. 50 P.3d at 390.

124. ALASKA STAT. § 47.10.080(c)(10) (Michie 2002).

permanency plan, whereby the Department must describe the active efforts it is making.¹²⁵ If Jack persisted in refusing the terms of treatment, an order that terminated parental rights could lawfully rest on a finding that Department efforts at rehabilitation were not successful without comment about any refusal by Jack to admit a crime.¹²⁶

Under the rationale of *J.W.*, *Mullin*, and *In re Clifford M.*, Jack would have the choice of working to preserve his rights to his children or deciding to prosecute his criminal appeal. At any rate, a lawful result would have occurred if Jack had decided to preserve his rights in his criminal proceeding but to abandon further efforts to preserve contact with his children. When Jack refused to cooperate, his actions fell within the line of Alaska cases holding that the Department's burden to make further efforts falls to almost nothing.¹²⁷ Seen another way, Jack's refusal to cooperate showed that the efforts at rehabilitation had been unsuccessful.¹²⁸

VII. CONCLUSION

J.S. v. State distorted ICWA and ASFA in an unnecessary effort to avoid constitutional issues. It is difficult to see how *J.S.* can survive in the face of silence and hostility from both federal statutes and court decisions, and in the presence of reasonable and lawful alternatives to protect children in custody.

125. *Id.* § 47.10.086(3)(b).

126. 25 U.S.C. § 1912(d) (2000).

127. *See J.S.*, 50 P.3d at 392 n.16; *E.A. v. State, Div. Of Family and Youth Servs.*, 46 P.3d 986, 991 (Alaska 2002).

128. 25 U.S.C. § 1912(d).