

“ACTIVE” VERSUS “REASONABLE” EFFORTS: THE DUTIES TO REUNIFY THE FAMILY UNDER THE INDIAN CHILD WELFARE ACT AND THE ALASKA CHILD IN NEED OF AID STATUTES

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In this Article, the author analyzes recent decisions of the Alaska Supreme Court pertaining to the duties imposed upon the Alaska Department of Health and Social Services to make efforts to reunify the family after a child is taken into State custody. The article analyzes the distinction between “active efforts” as required under the federal Indian Child Welfare Act and “reasonable efforts” as required under Alaska’s Child in Need of Aid statutes. The Article begins with a discussion of these statutory duties, and continues with a summary of the legal history and development of the two legislative “efforts” standards. The author argues that despite a few aberrations, the Alaska Supreme Court has consistently applied a single standard for both active and reasonable efforts.

I. THE PARENT AND THE SYSTEM

When a state agency takes a child into custody as a result of abuse or neglect, the child’s parent has a set of rights unique in American law. The parent has a status similar to that of a defendant, and yet the parent is entitled to substantial help from the State before his or her parental rights are altered or lost. Before

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the State may permanently separate the parent and child, the State, through the Department of Health and Social Services, has a duty to try to reunify them. The substance of that duty is the subject of this Article.

The child's ethnicity changes the level of the State's duty. When the child in custody is an Indian, the State has an affirmative duty to make "active efforts" to reunify the family.¹ When the child is non-Indian, the State must make "reasonable efforts."² These two phrases, "active efforts" and "reasonable efforts," embody duties that touch on important rights of parents. However, differences between the two are rarely addressed. This Article will compare them, arguing that the Alaska Supreme Court has applied a central principle that unifies both standards.

In *R.J.M. v. State, Dep't of Health and Social Services*,³ a decision that upheld the constitutionality of the child protection statutes against a challenge that they were void for vagueness,⁴ one particular phrase by the court stands out: the statutes "limit[] intervention to cases in which the State can prove an ongoing, objectively demonstrated failure to provide basic parental care that reflects unwillingness to serve as a parent."⁵ The Alaska Constitution is not the source of "efforts" requirements. However, *R.J.M.* articulated the rule that the court has actually applied in interpreting the statutory "efforts" requirements in children's cases. The court had earlier held that the right of a parent to the custody and companionship of his or her child is one of the most basic civil liberties.⁶ Before parental rights are altered or lost, the trial court must assure itself that it is relying on accurate, objective information relevant to the question of this particular adult's willingness to parent this particular child; then the case may proceed safely to the serious judgment of whether parent and child must be separated.

The "efforts" finding thus becomes part of the picture that the court uses to compare parental conduct to the statute's requirements. Do the actions of the Department of Health and Social Services ("the Department") sufficiently reduce the possibility that a decision to alter a parent's rights will not be based upon subjective impressions, or on temporary or incidental behavior? Do the Department's actions reliably allow the court to predict future pa-

1. 25 U.S.C. § 1912(d) (2000).

2. ALASKA STAT. § 47.10.086 (Michie 2000).

3. 973 P.2d 79 (Alaska 1999).

4. *R.J.M. v. State, Dep't of Health & Soc. Servs.*, 973 P.2d 79 (Alaska 1999).

5. *Id.* at 87.

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

rental behavior? The distinctions between “active” and “reasonable” efforts build upon these fundamental analytical principles.

The “efforts” requirements originate in federal law, but federal law does not define either of the two. Alaska has judicially adopted three substantive distinctions between the “active” and “reasonable” requirements. First, as the plain meaning of “active efforts” implies, the State must make an affirmative effort to offer programs and services to facilitate reunification; simply stating the need for the parent to take advantage of and making the parent aware of such services is insufficient. Second, “active efforts” is a more stringent standard than “reasonable efforts.” Finally, there is a distinctly Indian character to active efforts; therefore, the State must search for reunification services uniquely offered by the Indian community itself.

II. THE SIGNIFICANCE OF THE “EFFORTS” REQUIREMENTS

In Alaska, the Department of Health and Social Services is the executive agency that assumes custody of abused or neglected children.⁷ The Department must show the trial court at every important stage of an Alaska child dependency proceeding that the State is fulfilling its duty to make active or reasonable efforts.

Pursuant to the Indian Child Welfare Act (“ICWA”)⁸ the Department may not place an Indian child in foster care until the Department has made active efforts to provide “remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.”⁹ Emergencies are the major exception; in such cases the agency may take a child into custody “under applicable state law” without first showing active or reasonable efforts.¹⁰

If the child is non-Indian, the Department must make reasonable efforts “designed to prevent out-of-home placement of the child or to enable the safe return of the child to the family home, when appropriate.”¹¹ The “reasonable efforts” requirement is taken directly from federal law.¹² However, in contrast to the ICWA, other federal law does not impose the efforts requirement directly. Rather, the state plan for dependent children must in-

7. See ALASKA STAT. § 47.05.060 (Michie 2000).

8. 25 U.S.C. §§ 1901-63 (2000).

9. *Id.* § 1912(d) (2000); see also *C.J. v. State, Dep’t of Health & Soc. Servs.*, 18 P.3d 1214, 1217 (Alaska 2001).

10. 25 U.S.C. § 1922 (2000).

11. ALASKA STAT. § 47.10.086(a) (Michie 2000).

12. 42 U.S.C. § 671(a)(15) (1994).

clude reasonable reunification efforts in order for the State to qualify for federal funds.¹³

There is no federal requirement of active efforts findings at specific stages of the Indian child dependency case. However, Alaska court rules require “active efforts” findings at the same points where the Alaska statutes require “reasonable efforts” findings: at the temporary custody hearing, when the court approves an out-of-home placement, in a temporary disposition order after the child is adjudicated as a child in need of aid, at disposition, at permanency hearings, and in orders terminating parental rights.¹⁴ In short, the Department must show that it is fulfilling the efforts tests at every significant stage of the proceeding.

The practical effect of requiring such findings is uncertain. A 1996 survey of children’s cases found that judicial officers touched only briefly upon the “efforts” issue, and usually checked the appropriate box on a form order rather than writing out separate findings.¹⁵ In nearly five hundred cases reviewed for the study, fewer than one percent had a finding of “no reasonable efforts” at some point in the case.¹⁶ The Department’s awareness that it must report its activities to the court may have made the agency more mindful of fulfilling its duties; appellate case law consistently shows that the Department makes a variety of reunification efforts before parental rights are terminated.

III. ALASKA LAW IN THE 1970S: A “NO EFFORTS” STANDARD

A. Case Law Through 1976

Historically, the legislature, not the judiciary, has led the way in creating substantive rights and duties in child dependency cases. Before passage of federal legislation that mandated efforts to reunify families, no such requirement existed under Alaska law. The Alaska Supreme Court has never created an affirmative duty to reunify families in the absence of a statutory directive or court rule.

13. 42 U.S.C. § 671(a)(15) (1994). The distinction between a substantive rule and a precondition for funding is important. *See, e.g., Suter v. Artist M.*, 503 U.S. 347 (1992) (stating that as an appropriations statute, 42 U.S.C. § 671 (1994), creates no private cause of action based on allegations of a failure to make reasonable efforts).

14. Child in Need of Aid (“CINA”) R. 10.1(a); 10.1(b); 15(f)(1),(2); 17(c); 17.2(f)(1); and (18)(c)(2)(A), (B), respectively.

15. TERESA W. CARNS ET AL., ALASKA JUDICIAL COUNCIL, IMPROVING THE COURT PROCESS FOR ALASKA’S CHILDREN IN NEED OF AID 98-100 (1996).

16. *Id.* at 100.

At the beginning of the 1970s, the overriding goal in child dependency proceedings was to rescue the child, which meant removal from the abusive home.¹⁷ Family preservation and reunification concerns were essentially nonexistent. In 1971, the legislature strengthened protections for the child by enacting new legislation, but did not require family reunification efforts.¹⁸ Under the new legislation, before an agency can petition to terminate parental rights, “it shall offer protective social services and pursue all other reasonable means of protecting the child.”¹⁹ The law created a provision for a voluntary agreement between the Department and the parent, whereby the parent could have the child placed in state custody and returned at any time.²⁰ However, the law created no Departmental duty to reunify the child with the parent.

In a 1971 case, *In re E.M.D.*,²¹ the Alaska Supreme Court limited the Department’s ability to institutionalize a child to only those situations involving categories of civil custody authorized by state statute. The court noted that “benevolent social theory . . . does not furnish justification for dispensing with constitutional safeguards.”²² Despite the limited nature of the ruling, it set a tone the supreme court has followed since: the Department will be held to its powers and duties as defined by statute. Despite a judicial reluctance to create rights in the family or duties for the Department, the court is willing, within the boundaries of the statutes, to examine Departmental actions closely and to give substantive meaning to the rights and duties created there.

Reunification, however, was not a legislative goal at this time. Departmental attempts to reunify parent and child were the result of stipulation, not legislation or court decision.²³ In the 1976 case of *In re E.J.(T.)*, the supreme court left open the possibility that the trial court could impose a duty to reunify as a matter of discretion.²⁴

In re E.J.(T.) highlights the differences between child dependency cases in the 1970s and today. Today, a case plan must be aimed toward reunification, even if it is unlikely to succeed. *In re E.J.(T.)*, however, observed “that a rehabilitation program is not a common practice in the trial courts absent approval by a represen-

17. *See id.* at 2.

18. ALASKA STAT. § 47.17.030 (Michie 2000).

19. *Id.* § 47.17.030(d) (Michie 2000).

20. *Id.* § 47.10.230 (repealed 1996) (current version at § 47.14.100(c)).

21. 490 P.2d 658 (Alaska 1971).

22. *Id.* at 660 (citation omitted).

23. *See In re S.D., Jr.*, 549 P.2d 1190, 1201-02 (Alaska 1976); *see also In re B.J.*, 530 P.2d 747, 748 (Alaska 1975).

24. *In re E.J.(T.)*, 557 P.2d 1128, 1132 (Alaska 1976).

tative of the State.”²⁵ In *In re E.J.(T.)*, both the State and the guardian ad litem opposed such a plan,²⁶ and it was neither adopted by the trial court nor required by the supreme court.²⁷

In the same year that *In re E.J.(T.)* was decided, perhaps signaling dissatisfaction with the existing child dependency system, the Alaska Supreme Court referred favorably to the idea of reunification efforts: “Children should, if at all possible, be maintained in their homes with society providing the supportive services necessary to keep the family together.”²⁸ The court offered an inventory of such services, including “homemaker training, child care, job placement, income supplements, alcohol rehabilitation, psychological counseling, and psychiatric therapy.”²⁹ The court cited and quoted at length the family preservation and reunification statutes of four other states.³⁰ As will be seen, when the Alaska legislature defined “reasonable efforts” in 1998, its definition reflected the supreme court’s 1976 inventory of services.³¹

B. 1976 Legislative Changes

In 1976 the Alaska State Legislature took a tentative step toward recognizing the value of family preservation.³² The new state policy removed the child from her parents “only as a last resort.”³³ However, the statute created no affirmative duties for the Department to fulfill before removal. The law outlined only general purposes, gave no specific directives to the executive agencies and created no sanctions for failure to follow the statute.

The Alaska Supreme Court interpreted this new provision no more expansively than the general provisions of the statute. In the 1981 case of *E.A. v. State, Dep’t of Health and Social Services*³⁴ the court acknowledged that Alaska Statutes section 47.05.060 required the State to “preserve and strengthen the family ties.”³⁵ But in keeping with the generalized nature of the Department’s duties, the court noted that the Department fulfilled its obligation to pre-

25. *Id.* at 1132-33.

26. *Id.* at 1133.

27. *Id.*

28. *In re S.D., Jr.*, 549 P.2d at 1199.

29. *Id.* at 1199 n.29.

30. *Id.* (citing the statutes of California, Minnesota, Colorado and Vermont).

31. ALASKA STAT. § 47.10.990(9) (Michie 2000); see *In re S.D. Jr.*, 549 P.2d at 1199 n.29.

32. ALASKA STAT. § 47.05.060 (Michie 2000).

33. *Id.*

34. 623 P.2d 1210 (Alaska 1981).

35. *Id.* at 1213 n.5.

serve the family “by offering counseling and supervision to E.A. on numerous occasions.”³⁶ The court then remanded the case to determine whether there was clear and convincing evidence that E.A.’s conduct initially leading to termination proceedings would continue if the court decided against termination.³⁷ Thus, in 1981, the bare offer of services was sufficient; no further requirements stated that the services be actively promoted or reasonably related to the parents’ problem.³⁸ The contrast between the standard under *E.A.* and the Department’s duties today could scarcely be greater.

Thus, as the Indian Child Welfare Act was under consideration, Alaska law favored, but did not require, some set of efforts toward preserving the child’s home.

IV. THE “EFFORTS” REQUIREMENTS TAKE SHAPE

A. Active Efforts

1. *The Indian Child Welfare Act of 1978 (“ICWA”).* The ICWA³⁹ established an affirmative state duty to make active efforts to reunify Indian families. It addressed the high frequency of removal of Indian children from Indian homes, the many placements of those children with non-Indian families and the states’ consistent failure to recognize and give credence to Indian cultural practices. Requiring active efforts to reunify Indian families, among other guarantees, was the cure.

The pertinent subsection of the ICWA states:

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.⁴⁰

This requirement complemented congressional findings.⁴¹ After recognizing both the importance of children to the “continued existence and integrity of Indian tribes”⁴² and the federal trustee inter-

36. *Id.*

37. *Id.* at 1213.

38. *E.A. v. State, Dep’t of Health and Social Services* involved an Indian child, but the termination of parental rights became final before the effective date of the Indian Child Welfare Act.

39. 25 U.S.C. §§ 1901-63 (2000).

40. *Id.* § 1912(d).

41. *Id.* § 1901.

42. *Id.* § 1901(3).

est in protecting Indian children,⁴³ the United States 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 . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.⁴⁴

The next section of the statute states the federal purpose, in light of these problems: “[I]t 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.”⁴⁵ The requirement of active efforts promoted this policy.

2. *Active Efforts Defined.* The Alaska Supreme Court has held that “no pat formula” distinguishes active from non-active efforts.⁴⁶ The Indian Child Welfare Act does not define active efforts. However, state court rulings have drawn three distinctions between the “active” and “reasonable” standards.

First, an active efforts standard requires that the State provide services. Congress had observed the general lack of state efforts to provide even those reunification services that were nominally available. As one remedy to preserve Indian families, Congress expected that such services would actually be made available. The House Interior and Insular Affairs Committee reported:

[25 U.S.C. section 1912(d)] provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide assistance designed to prevent the breakup of Indian families. The Committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a federal requirement in that regard with respect to Indian children and families.⁴⁷

43. *Id.*

44. *Id.* § 1901(4)-(5).

45. *Id.* § 1902.

46. *A.A. v. State*, 982 P.2d 256, 261 (Alaska 1999).

47. H.R. REP. NO. 95-1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7545, *quoted in* *K.N. v. State*, 856 P.2d 468, 476 (Alaska 1993).

The Alaska Supreme Court followed this legislative history in *A.M. v. State*⁴⁸ (“*A.M. I*”) and adopted this definition:

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, the intent of the drafters of the Act, 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. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, 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.⁴⁹

The court has reaffirmed this standard several times.⁵⁰

The Alaska Supreme Court has disapproved of Departmental claims that it satisfies its “active efforts” duty when the agency writes a case plan and encourages the parent to follow it.⁵¹ In *A.M. I* the parent was incarcerated and the chance of fulfilling the case plan was low.⁵² The court noted, “The State simply claims that, by preparing a reunification plan and encouraging [the father] to seek services available within the institution, it fulfilled its duty of making active efforts to provide remedial services.”⁵³ The court refused to hold that this effort constituted active efforts.⁵⁴

48. 891 P.2d 815 (Alaska 1995) (“*A.M. I*”), *appeal after remand*, 945 P.2d 296 (Alaska 1997) (“*A.M. II*”), *overruled in part on other grounds by In re S.A.*, 912 P.2d 1235, 1241 (Alaska 1996), *legislatively overruled on other grounds by* 1998 Alaska Sess. Laws ch. 99 § 1(b)(2)(B), *and later appeal sub nom.* *N.A. v. State*, Div. of Family & Youth Servs., 19 P.3d 597 (Alaska 2001).

49. *Id.* at 826 n.12 (quoting CRAIG DORSAY, *THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES MANUAL* 157-58 (1984)). Dorsay quoted a letter from attorney Bert Hirsch, one of the drafters of the ICWA.

50. *N.A. v. State*, Div. of Family & Youth Servs., 19 P.3d 597, 602-03 (Alaska 2001); *C.J. v. State*, Dep’t of Health & Soc. Servs., 18 P.3d 1214, 1219 n.17 (Alaska 2001); *A.A. v. State*, Dep’t of Health & Soc. Servs., 982 P.2d 256, 261 (Alaska 1999).

51. *A.M. I*, 891 P.2d at 826-27.

52. *Id.*

53. *Id.* at 827.

54. *Id.* The court’s response to such testimony in the context of “reasonable efforts” is uncertain. When the court reviewed similar testimony in the context of “reasonable efforts,” it seemed inclined to accept identification and referral as actions that supported the reasonableness of the Department’s efforts. *M.W. v. State*, Dep’t of Health & Soc. Servs., 20 P.3d 1141, 1146 (Alaska 2001). However, earlier case law also approved Departmental actions that consisted of nothing but the offer of service. *E.A. v. State*, 623 P.2d 1210 (Alaska 1981). Alaska law has undergone a radical change on this issue since then.

The second distinction that the Alaska Supreme Court has drawn between active and reasonable efforts is that “active efforts” is the higher standard. For example, when interpreting the former Child in Need of Aid (“CINA”) Rules, the court held that “active efforts” is a “more stringent” burden than “reasonable efforts.”⁵⁵ After passage of the 1998 revisions to Alaska CINA statutes, the court continued to cite the “more stringent protections of ICWA”⁵⁶ and referred to the “high standards of ICWA.”⁵⁷

The final distinction that the court has drawn between active and reasonable efforts is that active efforts have a distinctly Indian character. The year after the passage of the ICWA, the Bureau of Indian Affairs (“BIA”) developed the meaning of “active efforts.”⁵⁸ Active efforts began to include a search for help from within the Indian culture.⁵⁹ Active efforts “shall take into account the prevailing social and cultural conditions and the way of life of the Indian child’s tribe. They shall involve and use the available resources of the extended family, the tribe, Indian social services agencies, and individual Indian care givers.”⁶⁰ The BIA extended “individual Indian care givers” to include traditional healers and other tribal members who have special skills “that can be used to help the child’s family succeed.”⁶¹

This essentially Indian character of active efforts has not been extensively developed in Alaska case law. However, the Alaska Supreme Court has cited tribal efforts to reunify when listing the

55. *E.M. v. State*, Dep’t of Health & Soc. Servs., 959 P.2d 766, 768 (Alaska 1998) (interpreting former CINA Rule 15(g)).

56. *C.J. v. State*, Dep’t of Health & Soc. Servs., 18 P.3d 1214, 1217 (Alaska 2001).

57. *Id.* at 1219; *see also* *M.W.*, 20 P.3d at 1146 n.18 (imposing a “higher ‘active efforts’ requirement”).

58. The BIA did not publish these guidelines as regulations because the agency did not intend to make them binding. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). The Alaska Supreme Court, however, has reviewed the guidelines for assistance when interpreting the ICWA. *See, e.g.*, *L.G. v State*, Dep’t of Health & Soc. Servs., 14 P.3d 946, 952, 954-55 (Alaska 2000); *Adoption of N.P.S.*, 868 P.2d 934, 936 (Alaska 1994); *Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989) (per curiam); *Matter of Parental Rights of T.O.*, 759 P.2d 1308, 1309-10 (Alaska 1988) (per curiam); *D.E.D. v. State*, 704 P.2d 774, 779 n.8 (Alaska 1985); *D.A.W. v. State*, 699 P.2d 340, 342 (Alaska 1985) (per curiam).

59. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

60. *Id.* at 67,592.

61. *Id.*

services that comprised “active efforts” toward unifying a parent and child.⁶²

3. *Applying the Federal Standard.* The application of the active efforts standard to specific cases has shown the Alaska Supreme Court’s insistence on accurate information about the parent’s willingness and ability to care for the child. Notwithstanding this insistence, the court frequently has found that the Department has provided active efforts. Where the parent has shown an unwillingness to accept parental duties, courts have found that the Department has met the active efforts standard.

For example, *Matter of J.W.*⁶³ indirectly addressed the Department’s duty to make active efforts by addressing the corresponding question of the parent’s duty to cooperate with the Department. In particular, the court held that a parent’s unwillingness to participate in rehabilitation may be considered when determining the sufficiency of the State’s active efforts.⁶⁴ The Department may not assume, however, that a lack of willingness exists until active efforts to provide remedial and rehabilitative services have been made.⁶⁵

In *Matter of J.W.*, parental rights were terminated after the child had been in custody for about five years.⁶⁶ Over a two-year period, the Division of Family and Youth Services (“DFYS”) contacted the parent, who was addicted to alcohol, and provided services aimed at helping him overcome his alcoholism.⁶⁷ DFYS took steps to supplement the father’s treatment while incarcerated and to facilitate his treatment after release.⁶⁸ DFYS continued to help by transporting him to meetings of Alcoholics Anonymous and referring him to a Native sobriety group. Before the father was released from a halfway house, DFYS also contacted a substance abuse officer who was assigned to the apartments where the father was planning to live.⁶⁹ After the father was released and subsequently relapsed, social workers tried several times to contact him.⁷⁰ Additionally, they continued to do such things as set up

62. *N.A. v. State, Div. of Family & Youth Servs.*, 19 P.3d 597, 603 (Alaska 2001) (citing services offered by a tribal organization).

63. 921 P.2d 604 (Alaska 1996).

64. *Id.* at 610.

65. *Id.* at 609.

66. *Id.* at 605-06.

67. *Id.* at 609-10.

68. *Id.* at 610.

69. *Id.*

70. *Id.*

telephone visitation between the father and his children.⁷¹ The Department reduced its efforts after two years, but the court felt this reduction was justified because the parent had shown an unwillingness to participate in remedial efforts.⁷²

Even on these facts, the court expressed some disapproval of DFYS's efforts, suggesting that "arguably" their actions were not sufficiently active to satisfy the ICWA.⁷³ The court pointed out that DFYS only initiated contact with the father after one of his children asked about him.⁷⁴ DFYS did not follow up on the father's treatment program and failed to contact the treatment center.⁷⁵ In other words, DFYS "simply relied on the court system" to assure the follow-through.⁷⁶ Moreover, the social workers never contacted the state district attorney's office or the local city attorney's office regarding the father's compliance.⁷⁷ When the father left the program, DFYS did not obtain a discharge summary, nor did it make an attempt to coordinate efforts with the city regarding the father's failure to complete treatment.⁷⁸ These efforts violated the unifying principle—the Department's inaction threatened the ability of the court to determine what the parent could or could not do toward rebuilding his household. However, despite its apparent doubts, the Alaska Supreme Court affirmed the lower court's findings of reasonable and active efforts.⁷⁹

In *D.H. v. State, Dep't of Health and Social Services*⁸⁰ the court concluded that Departmental efforts to assist a mother to enroll in and complete drug rehabilitation satisfied the active efforts requirement.⁸¹ After the child was taken into custody, the Department tried to help the mother "in her expressed desire to participate in a substance abuse treatment program. This effort included various evaluations and programs, all of which [the mother] left prior to completion."⁸² The supreme court concluded that "the State's attempts to assist [the mother] in enrolling and completing drug rehabilitation programs" qualified as active efforts under the

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 929 P.2d 650 (Alaska 1996).

81. *Id.* at 650.

82. *Id.* at 652.

ICWA.⁸³ The court also received favorably the Department’s arguments that it made active and reasonable efforts by placing the child in relatives’ homes so the mother could stay with the child.⁸⁴

In *E.M. v. State, Dep’t of Health and Social Services*,⁸⁵ the trial court found “huge, almost embarrassing efforts” to provide help to the parents.⁸⁶ The supreme court found that the Department had provided adequate remedial services and rehabilitative programs by arranging visits with the children and also by offering the parents counseling, a Male Awareness Program, urinalysis, money and bus passes.⁸⁷

A parent’s incarceration affects the level of services that the Department must offer, but it does not excuse the Department from making active efforts. In *A.M. I*,⁸⁸ the court responded to a parent’s incarceration in two ways. First, the court found that incarceration is a legitimate consideration when the Department and the trial court consider what services are possible.⁸⁹ Second, the court found that incarceration must be distinguished from a parental unwillingness to cooperate.⁹⁰ Without expressly stating the nature of the distinction, the court in a later case assumed that because a prisoner is much less able to take advantage of services, the Department’s burden of making active efforts is reduced,⁹¹ but the court pointed out that incarceration does not eliminate entirely the duty to provide active efforts.⁹² The court also held that the length of the sentence is related to the minimum level of services that will constitute active efforts.⁹³ The unstated implication was that the longer the sentence, the lower the Departmental burden.

The Department has no duty to provide active efforts to the father until paternity is established and its own delay in identifying the father does not mean that the Department has failed to make active efforts.⁹⁴ Under the ICWA, “parent” does not include an unwed father where paternity has not been acknowledged or es-

83. *Id.* at 655.

84. *Id.* at 655 n.15.

85. *E.M. v. State, Dep’t of Health & Soc. Servs.*, 959 P.2d 766 (Alaska 1998).

86. *Id.* at 769.

87. *Id.* at 770 n.6.

88. *A.M. I*, 891 P.2d 815, 827 (Alaska 1995).

89. *Id.*

90. *Id.*

91. *A.A. v. State*, 982 P.2d 256, 261 (Alaska 1999).

92. *Id.*

93. *Id.* at 263.

94. *Id.* at 261.

tablished.⁹⁵ For example, in *A.A. v. State*, the father did not acknowledge paternity before the blood test established it, and so the Department owed him no duty of active efforts.⁹⁶ The court upheld the finding of active efforts, but disapproved of the Department's failure to arrange a case plan, calling its efforts "relatively passive."⁹⁷ The lack of a plan was made irrelevant because of the father's history of unwillingness to participate in any treatment and his history of violent behavior while incarcerated.⁹⁸

In *N.A. v. State*,⁹⁹ the supreme court found active efforts where the Department worked with several different programs to evaluate and provide treatment for the parent's addiction and mental health problems.¹⁰⁰ The supreme court listed many services that the Department provided over several years before parental rights were terminated.¹⁰¹ *N.A.* is an excellent illustration in which the Department provided sufficient services to ensure the trial court that the proposed termination of parental rights was based upon objective information about a particular parent's willingness to parent a particular child.¹⁰²

4. *The Court's Current Discontent.* In three 2001 decisions, the court showed more dissatisfaction with the Department's efforts. The court found for the parent in one case, and in the second, two Justices dissented from a ruling in favor of the Department. In the third decision, the court extended the duty of active efforts to private petitioners in adoption cases where an Indian child is involved.

The court found a lack of active efforts in *C.J. v. State, Dep't of Health and Social Services*.¹⁰³ However, the court found several interrelated problems, and it is difficult to isolate the absence of ac-

95. 25 U.S.C. § 1903(9) (2000).

96. *A.A.*, 982 P.2d at 262.

97. *Id.*

98. *Id.*

99. *N.A. v. State*, Div. of Family & Youth Servs., 19 P.3d 597 (Alaska 2001).

100. *Id.* at 603 (stating that the "state's efforts were more than active; they were exemplary").

101. *Id.* at 598-99.

102. In 2001, the court again addressed the situation where the parent faced addiction and mental health problems and found that the Department had made active efforts by its detailed attention to these problems over a period of years. *V.S.B. v. State, Dep't of Health & Soc. Servs.*, 2001 WL 1635939, Op.No. 5517 (Alaska Dec. 21, 2001), *amended on other grounds by V.S.B. v. State, Dep't of Health & Soc. Servs.*, 2002 WL 227310, Op.No. 5537 (Alaska Feb. 15, 2002).

103. 18 P.3d 1214 (Alaska 2001).

tive efforts as the factor that ultimately persuaded the court. The court found a departmental failure to prove several elements of 25 U.S.C. section 1912, as well as a lack of expert testimony, a failure to show that negative parental conduct would likely continue and an agency failure to make active efforts at reunification.¹⁰⁴

The primary focus of the court was on the absence of any serious Departmental inquiry about the parent’s true situation. The children were taken into custody in Alaska, but the parent lived in Florida and was trying to establish a household there.¹⁰⁵ The Department seemed satisfied to let Florida authorities handle the case. As a result, at the Alaska trial on the petition to terminate parental rights, the Department’s witnesses offered only unsupported hearsay reports from the Florida social workers about what the parent was doing or failing to do.¹⁰⁶ Firsthand information about the parent was absent, and the court refused to find that statutory standards had been met.¹⁰⁷

The Department’s failure to obtain reports directly from the parent or to seek confirmation of the Florida reports affected the expert witness testimony and the determination of active efforts. The expert witness offered only generalizations about the effect of parental absence on a child and failed to address the particular situation of these children and this specific parent.¹⁰⁸ As a result of the witness’s failure to discuss the specific facts of the case, the testimony was found insufficient to meet the standards of the ICWA.¹⁰⁹ Additionally, the Department’s failure to inquire about the parent’s situation in Florida was compounded by the court’s finding that the Department made only “minimal efforts.”¹¹⁰ Although the court did not suggest what services might have been offered, it expressed clear dissatisfaction with the efforts made.

The facts of *T.F. v. State, Dep’t of Health and Social Services*¹¹¹ divided the court. Here, the issue was the balance between the duty of the Department to make active efforts and the duty of the parent to cooperate with those efforts. On several levels, the opinion throws uncertainty into a fairly settled and consistent set of interpretive rules.

104. *Id.* at 1217-19.

105. *Id.* at 1216.

106. *Id.* at 1218-19.

107. *Id.* at 1219.

108. *Id.* at 1218.

109. *Id.*; 25 U.S.C. § 1912(d) (2000).

110. *C.J. v. State, Dep’t of Health & Soc. Servs.*, 18 P.3d 1214, 1219 (Alaska 2001).

111. 26 P.3d 1089 (Alaska 2001).

The facts were not in doubt, but their interpretation was sharply contested. The majority paid special attention to which party was responsible for each delay that occurred throughout the termination proceedings.¹¹² The decision to assign merit and blame to virtually every step in the case produced a meticulous recitation of the facts that is difficult to outline. The major events are summarized as follows: the Department took twin girls from their mother a few days after their birth in July 1999.¹¹³ In early August, the Department learned that the putative father, T.F., was incarcerated. The agency moved for a paternity test, which the court ordered for October 13, 1999.¹¹⁴ By that date, however, the father had fled custody.¹¹⁵

The father returned to police custody on November 7, 1999,¹¹⁶ and the Department filed its petition to terminate parental rights on November 15, 1999.¹¹⁷ The father appeared for the paternity test on December 28, 1999, and the confirming results arrived February 29, 2000.¹¹⁸ In an exchange where two opinions seldom agreed on the significance of certain facts, both the majority and the dissent concluded that the duty to make active efforts was triggered by the determination that T.F. was indeed the father.¹¹⁹

On March 1, 2000, the social worker wrote to the father, informing him that the girls were his biological children, and the father then asked for visitation.¹²⁰ Three weeks before the termination trial, the social worker, the father's attorney and the father met, and prepared a case plan.¹²¹ While incarcerated, the father began taking classes in parenting and fetal alcohol syndrome.¹²² The social worker supervised several visits between the father and the twins.¹²³ Despite these efforts on the father's part, the superior court terminated his parental rights at a trial in April 2000.¹²⁴ The

112. *Id.* at 1090-92.

113. *Id.* at 1090.

114. *Id.* at 1091.

115. *Id.*

116. *Id.*

117. *Id.* at 1090.

118. *Id.* at 1091.

119. *Id.* at 1095, 1097.

120. *Id.* at 1091.

121. *Id.* at 1095.

122. *Id.*

123. *Id.* at 1091.

124. *Id.* at 1092.

supreme court upheld the trial court finding that the Department had made active efforts.¹²⁵

The majority reiterated its previous ruling that a Departmental delay in determining paternity was not itself a violation of the active efforts requirement.¹²⁶ The majority saw the father’s failure to appear for the first paternity test as an intentional refusal to cooperate and, in its implications, virtually dispositive. The overall principle of *T.F.* is that, in advancing the goal of protecting children, the court will require the parent to cooperate with active efforts before it finds fault with a Departmental failure to act.

The dissent, however, criticized the majority’s decision as “one strike and you’re out.”¹²⁷ The majority denied that the analogy to criminal law was appropriate, but it did not deny that its ruling had serious consequences for the father. Further, the majority did not see this rule as punitive: “Rather, it is driven by the policy of protecting children in need of aid.”¹²⁸ Custody by either parent was likely to result in serious harm to the children, and further delay in the case would have been “detrimental to their welfare and best interests.”¹²⁹

The majority approved of the Department’s active efforts. The Department scheduled two paternity tests, attempted to contact the father during his absence, supervised three visits with his children, contacted his probation officer to make sure that he was enrolled in appropriate classes and met with him to discuss his case.¹³⁰ In relation to previous children’s cases, this list is fairly modest and illustrates the extent to which incarceration and non-cooperation reduce the Department’s duty to the parent.

The dissent reasoned as follows: because the ICWA imposes a duty of active efforts and requires that those efforts be found unsuccessful, sufficient time must be allowed for those efforts to fail or succeed.¹³¹ The only active effort that failed was the Department’s attempt to allow the father to establish paternity by setting up the October 1999 paternity test. Thus the question was whether

125. *Id.* at 1093-94.

126. *See id.* at 1092 (citing *A.A. v. State*, 982 P.2d 256, 262 (Alaska 1999)).

127. *Id.* at 1099.

128. *Id.* at 1095.

129. *Id.* (citing the superior court opinion) (internal quotations omitted).

130. *Id.* at 1095 n.28. The paternity tests thus played two roles. The scheduling of the tests satisfied the active efforts requirement because it was designed to locate a father; then the test results, once positive, created a new set of Department duties, this time to a specific man.

131. *Id.* at 1098.

that failure, in and of itself, relieved the Department of any further duty to make additional efforts.¹³²

The dissent argued that the Department had not fulfilled its duty to make active efforts.¹³³ The father was responsible for a three-week delay when he absconded from custody, but the Department delayed in scheduling a second paternity test for seven weeks after he returned.¹³⁴ The dissent argued that “[t]he underlying idea of subsection 1912(d) is that troubled and situationally unfit parents should receive rehabilitative services so that they may be able to fulfill traditional parental roles. In the process of receiving rehabilitative services, some false starts and setbacks are to be expected.”¹³⁵ According to the dissent, treating one missed appointment as a discharge of the active duty requirement is inconsistent with the purposes of the ICWA.¹³⁶

The dissent argued that the Department’s efforts did not meet the requirements of the ICWA.¹³⁷ The dissent described the extent of DFYS’s efforts: “What DFYS did was to formulate a case plan and arrange three visits between [the father] and the children.”¹³⁸ The case plan itself could not qualify as an effort toward reunification because its stated goal was adoption.¹³⁹ The dissent agreed that arranging for and monitoring the father’s attendance at prison classes might qualify as active efforts; however, these classes began so close to trial that they had no reasonable chance of success.¹⁴⁰ The dissent also pointed out that the trial court made no finding that active efforts as to the father had been unsuccessful.¹⁴¹ Before parental rights may be terminated, the party seeking to create a foster care placement must satisfy the court that active efforts have been made to prevent the breakup of the Indian family.¹⁴² The trial court found that the father had failed to cooperate, but this finding was directed at his failure to appear at a paternity test that was scheduled during the time he had absconded from custody.¹⁴³ The father cooperated at all times after his paternity was established,

132. *Id.*

133. *Id.*

134. *Id.* at 1098-99.

135. *Id.*

136. *Id.*

137. *Id.* at 1097.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. 25 U.S.C. § 1912(d) (2000).

143. *T.F. v. State*, 26 P.3d 1089, 1097 (Alaska 2001).

and the trial court never found that these later efforts were unsuccessful.¹⁴⁴ The dissent argued the trial court failed to adequately consider these later efforts.

Under the ICWA, the party proposing the foster care placement must satisfy the court that active reunification efforts have been unsuccessful.¹⁴⁵ The majority’s disregard of the “lack of success” issue is the question that creates the most uncertainty. The trial court found that, even assuming “the speediest possible recovery by the parents,” the delay in permanent placement would be too long for the girls, who urgently needed a stable family.¹⁴⁶ That finding is the only one cited by the majority that would address the “lack of success” issue, even tangentially. The majority does not offer its reasoning for disregarding the absence of this finding. The unspoken rationale might run as follows: assume the “speediest possible recovery” finding is correct—more delay would result in irreparable harm. On this assumption, no level of parental success in fulfilling case plan requirements would ever be adequate because even the shortest amount of time leading to that success would still injure the child. Thus, even a successful parental outcome would still cause emotional and physical harm to the child; by the majority’s definition, this is a lack of success at rehabilitation.

This line of reasoning is not explicitly stated in the court’s opinion. However, if the trial court’s failure to make an affirmative finding of a lack of success is covered by its finding that no parental recovery could ever be short enough, then such a train of assumptions and implications seems to be the only possible basis for making such a presumption valid. Yet the majority failed to articulate why it was willing to disregard the absence of a “lack of success” finding.

The dissent observed that the Department put this case on the fast track in response to the legislative changes of 1998.¹⁴⁷ But this speed prevented active efforts from succeeding. The dissent noted that “under ICWA lack of success is a precondition to termination. Termination cannot serve as the reason why active efforts fail to succeed.”¹⁴⁸ Under the supremacy clause of the United States Constitution, “the requirements of ICWA must be observed even if

144. *Id.* at 1097-98.

145. 25 U.S.C. § 1912(d). Other rights under the ICWA require a “determination . . . that continued custody . . . is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(e)-(f).

146. *Id.* at 1092.

147. *Id.* at 1098; 1998 Alaska Sess. Laws ch. 99 (substantially revising ALASKA STAT. § 47.10.088 (Michie 2000)).

148. *T.F.*, 26 P.3d at 1098.

that means some slippage in the state statutory scheduling requirements.”¹⁴⁹

T.F. creates a great deal of uncertainty in Alaska child protection law. The court disregarded several earlier cases that had formed a fairly coherent set of interpretive rules. Before *T.F.*, when ruling under state law, the Alaska Supreme Court insisted that trial courts affirmatively make findings required by court rule.¹⁵⁰ Because the party proposing foster care must demonstrate the lack of success of reunification efforts to know whether the court was satisfied by the proof at trial, there must be some affirmative finding for the benefit of the parties and the appellate court.¹⁵¹ The supreme court disregarded its previous findings requirement without explaining why it did so.

Before *T.F.*, the court held that the Department may not presume that efforts at reunification will be unsuccessful.¹⁵² In *T.F.*, the supreme court upheld the trial court’s finding that the Department made active efforts at reunification after only six weeks of such efforts.¹⁵³ *T.F.* does not negate prior Alaska case law, but rather dilutes it substantially. After *T.F.*, the Department is nominally forbidden to presume a lack of success but now may undertake active efforts on a schedule that effectively precludes any chance of success before trial.

T.F. is a throwback to the 1970’s, when removing the child from abusive parents was the only goal of the system and family reunification generally was not an important consideration. In *T.F.*, nearly all factors that might raise doubt that the court’s termination of parental rights was correct were subordinated to the goal of child protection.¹⁵⁴ This goal is legitimate, without question, but the ICWA also declares a policy of Indian family preservation.¹⁵⁵ The *T.F.* majority did not explain why the goal of reunification carries such little weight in relation to the goal of child protection.

The *T.F.* opinion does not fit the pattern that the Alaska Supreme Court had previously followed. Earlier opinions on the “efforts” issues could be joined by a single principle that the purpose

149. *Id.*

150. *Matter of J.L.F.*, 828 P.2d 166, 172 (Alaska 1992). Later cases held that the requirement to make findings was met if the trial court directly addressed and resolved the issue.

151. 25 U.S.C. § 1912(d).

152. *A.M. I*, 891 P.2d 815, 826-27 (Alaska 1995).

153. *T.F. v. State*, 26 P.3d 1089, 1094 (Alaska 2001).

154. *Id.* at 1096.

155. 25 U.S.C. § 1912(2) (2000).

of the Department’s efforts was to avoid a momentary and subjective picture of the parent and thus permit a decision that would reunify parent and child when circumstances allowed. *T.F.* calls that principle into doubt by emphasizing the negative factors of incarceration and parental noncooperation.

Near the end of 2001, the Alaska Supreme Court returned to its traditional interpretation that the ICWA requirements are present to protect the parent and that the trial court must directly and specifically address the question of future parental behavior. *D.J. v. P.C.*¹⁵⁶ applied the ICWA to private adoptions where the adoptee is an Indian child. The court noted that the duty to make active efforts extended to the private petitioner, the maternal grandmother, who was the child’s Indian custodian.¹⁵⁷ The father, who disputed the adoption, was serving a jail sentence of twenty years for attempted murder.¹⁵⁸ The court reiterated earlier rulings that although incarceration may diminish the level of active efforts, incarceration does not eliminate the duty of the Department to make such efforts.¹⁵⁹ The supreme court addressed the trial court’s generalized finding that because the father was incarcerated, the active efforts requirement had been met “to the extent necessary, under the circumstances of this case.”¹⁶⁰ The supreme court indicated that such a finding was insufficient and required that the question of active efforts, and their success or failure, be specifically addressed in the trial court decision.¹⁶¹

5. *Confusion over the Degree of Cooperation.* The Alaska Supreme Court has taken a dim view of parents who fail to cooperate with their case plans and then argue a lack of active efforts.¹⁶² A parent’s unwillingness to cooperate with a case plan reduces the Department’s duty to continue to provide such efforts.¹⁶³ By contrast, the parent’s willingness to cooperate and to prepare for the

156. 36 P.3d 663 (Alaska 2001).

157. *Id.* at 673.

158. *Id.* at 666.

159. *Id.* at 673 nn.53 & 54 (citing *A.A. v. State, Div. of Family & Youth Servs.*, 982 P.2d 256, 261 (Alaska 1999) and *A.M. I*, 891 P.2d 815, 827 (Alaska 1995)).

160. *Id.*

161. *Id.*

162. *See, e.g., N.A. v. State*, 19 P.3d 597, 603 (Alaska 2001) (citing earlier cases).

163. *A.M. I*, 891 P.2d at 827 (citing earlier cases).

return of the child are factors indicating that negative parental conduct is less likely to continue.¹⁶⁴

However, the court has sent contrasting signals about cooperation and its relationship to the active efforts requirement. In *A.H. v. State, Dep't of Health and Social Services*¹⁶⁵ the father asserted on appeal that although the Department had made active efforts, those efforts were not reasonable because the programs offered were so stressful and intense that they caused the parents increasingly to “isolate themselves . . . from the services available to them.”¹⁶⁶ Although prior decisions imply that if a parent concedes the larger question of active efforts, he or she will automatically lose on the narrower question of reasonable efforts, the supreme court in *A.H.* did not mention such a relationship between the two standards. Rather, the court recognized that the “reasonable efforts” issue was also present and required resolution.¹⁶⁷

In *A.H.* at least fourteen different organizations offered to help the parents before the children were removed, and the parents received additional help after removal.¹⁶⁸ The father argued on appeal that the large array of services was very stressful and that “the intensity of [the family’s] program schedule was not reasonable.”¹⁶⁹ DFYS and other agencies had provided services to the father in the areas where there was some concern about his “parenting, domestic violence, and mental health.”¹⁷⁰ The agencies coordinated their efforts so that all services occurred during three days each week.¹⁷¹ The court’s opinion implies that this level of intensity is not so stressful as to excuse participation in the Department’s active efforts. The court concluded that this level of services, in relation to the father’s willingness to accept them, was sufficient to demonstrate both reasonable and active efforts.¹⁷²

By itself, the *A.H.* ruling is unremarkable. But *A.H.* appears to have implicitly overruled earlier case law. In *A.M. v. State* (“*A.M. II*”), the court wrote, “We have never suggested that the scope of the State’s duty to make active remedial efforts should be affected by a parent’s motivation or prognosis before remedial ef-

164. *C.J. v. State, Dep't of Health & Soc. Servs.*, 18 P.3d 1214, 1218-19 (Alaska 2001).

165. 10 P.3d 1156 (Alaska 2000).

166. *Id.* at 1164.

167. *Id.* at 1160.

168. *Id.* at 1164.

169. *Id.*

170. *Id.* at 1164-65.

171. *Id.* at 1165.

172. *Id.*

forts have commenced.”¹⁷³ *A.H.* purported to rely on *A.M. II*, but in *A.H.* the court dropped the initial phrase, “[w]e have never suggested,”¹⁷⁴ from the above-quoted statement. The omission of the opening phrase reversed the meaning of the quote, which then read as follows: “the scope of the State’s duty to make active remedial efforts should be affected by a parent’s motivation or prognosis before remedial efforts have commenced.”¹⁷⁵ It seems likely, however, that *A.H.*’s omission of part of the quote is an error. The Alaska Supreme Court has consistently recognized the duty of active efforts and has not excused such efforts in the absence of some attempt at reunification. *A.M. I* held, for example, that

to vary the scope of the State’s ICWA duty based on subjective, pre-intervention criteria such as a parent’s motivation or treatment prognosis might defeat the purpose of the active remedial efforts requirement, for it would enable the State to argue, in all doubtful and difficult cases, that it had no duty to make active remedial efforts.¹⁷⁶

By contrast, the revised quote from *A.H.* implies that the adequacy of active efforts can be determined before such efforts begin. *A.H.* would stand alone in Alaska law if it created such a doctrine. Thus, it is highly likely that *A.M. I* still represents the court’s thinking on its refusal to define the scope of active efforts without first offering the parent the opportunity to cooperate.¹⁷⁷

B. “Reasonable Efforts” Becomes Part of the Legal Landscape

1. *The Adoption Assistance and Child Welfare Act of 1980.* Much of today’s child dependency law took shape in 1980 with the passage of the Adoption Assistance and Child Welfare Act of 1980 (“AACWA”).¹⁷⁸ The AACWA created both the goal of reunification of non-Indian children with the family and the “reasonable efforts” requirement:

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides

173. 945 P.2d at 304 (quoting *A.M. I*, 891 P.2d 815, 827 (Alaska 1995)).

174. *Id.*

175. *A.H.*, 10 P.3d at 1164 n.25.

176. *A.M. I*, 891 P.2d at 827.

177. The court later relied on *A.M. I* when describing a petitioner’s duty to the parent in private adoption cases. *D.J. v. P.C.*, 36 P.3d 663, 678, n.54 (Alaska 2001). The court’s use of *A.M. I* further suggests that while incarceration affects the feasibility of different kinds of active efforts, a presumed lack of success, by itself, cannot reduce the scope of such efforts.

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

that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.¹⁷⁹

Federal funds could be used to design and operate a program to “help children remain with their families and where appropriate help children return to their families.”¹⁸⁰ AACWA required that the case plan include “a plan of services which will be provided in order to improve family conditions and facilitate returning the child to his home.”¹⁸¹

2. *AACWA Leaves the Active Efforts Requirements Untouched.* Although AACWA created a second “efforts” test, it did not affect the existing test under the ICWA.¹⁸² In fact, AACWA made no reference to the ICWA. Thus, the two parallel “efforts” tests began. The absence of cross-references makes the two more difficult to compare but also makes clear that they are separate; one does not modify the other.¹⁸³

Additionally, the only provision of AACWA that affected Indian parents was a later amendment that effectively strengthened the ICWA requirements.¹⁸⁴ In 1994, Congress amended AACWA to require that state plans for child welfare services “contain a description, developed after consultation with tribal organizations . . . in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act.”¹⁸⁵ The amendments did not alter the substantive requirements of the ICWA.

Furthermore, if a conflict existed between the requirements of these two child welfare laws, rules of statutory construction require that the ICWA would govern because, in the absence of some statement of congressional intent, a specific statute controls a gen-

179. *Id.* § 101, 94 Stat. 501-03 (current version at 42 U.S.C. § 671(a)(15)(Supp. 1999)).

180. S. REP. NO. 96-336, at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1453.

181. H.R. CONF. REP. NO. 96-900, at 46 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1561, 1566.

182. DAVID SIMMONS & JACK TROPE, NAT’L INDIAN WELFARE ASS’N, INC., P.L. 105-89 ADOPTION AND SAFE FAMILIES ACT OF 1997: ISSUES FOR TRIBES AND STATES SERVING INDIAN CHILDREN 10-12, *available at* <http://www.muskie.usm.maine.edu/helpkids/newpub.html> (last visited Feb. 27, 2002).

183. For this analysis, I am indebted to the work of the National Indian Child Welfare Association (“NICWA”). This comparison of ICWA and AACWA tracks NICWA’s commentary on this issue. *See id.*

184. *See* Adoption Assistance and Child Welfare Act, Pub. L. No. 103-437, § 204, 108 Stat. 4398, 4456 (1994) (amended at 42 U.S.C. § 622(b) (Supp. 1999)).

185. 42 U.S.C. § 622(b)(ii) (Supp. 1999).

eral statute, regardless of which is enacted first.¹⁸⁶ Here, AACWA and its amendments deal with all children who are in state custody, regardless of ethnicity. The ICWA deals with Indian children specifically. Additionally, statutes intended for the benefit of Indians are liberally construed to accomplish that purpose.¹⁸⁷

3. “Reasonable Efforts” in Alaska Law from 1980 to 1998. The phrase “reasonable efforts” was slow to appear in Alaska law. A comprehensive revision of the CINA Rules included the term for the first time only in 1987.¹⁸⁸ The first express reference to AACWA did not appear in the CINA Rules until a rule regarding temporary custody was amended in 1989.¹⁸⁹ The requirements of AACWA were not thoroughly woven into the CINA Rules until 1990, when the Alaska Supreme Court amended four rules to include reasonable efforts findings.¹⁹⁰

Opinions after the 1990 rule change underscored the court’s continued caution with the “reasonable efforts” requirement. Although the court has felt free to disapprove of departmental practices, the court has yet to overturn a judgment that found a failure to make reasonable efforts. This result contrasts with the court’s review of “active efforts,” where the court has overturned an order based on the Department’s failure to make active efforts to reunify the family under the ICWA.¹⁹¹

The first opinion issued after the 1990 rule change held only that the trial court must make the findings required by the rule. In *J.L.F. v. State*,¹⁹² the mother appealed a superior court decision terminating her parental rights, arguing that the Department’s reunification plan was unreasonable.¹⁹³ The trial court, however, had not made any findings on whether the Department plan was reasonable, leaving no substantive issue for appellate review.¹⁹⁴ Thus, the supreme court noted that reunification efforts must be reason-

186. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

187. *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); *John v. Baker*, 982 P.2d 738, 752 (Alaska 1999).

188. Alaska Supreme Court Order 845 (eff. Aug. 15, 1987).

189. Alaska Supreme Court Order 914 (eff. Jan. 15, 1989).

190. Alaska Supreme Court Order 1010 (eff. Jan. 15, 1990).

191. *See C.J. v. State, Dep’t of Health & Soc. Servs.*, 18 P.3d 1214 (Alaska 2001).

192. 828 P.2d 166 (Alaska 1992), *overruled on other grounds by In re S.A.*, 912 P.2d 1235 (1996).

193. *Id.* at 167, 171.

194. *See id.* at 172.

able and that the trial court must affirmatively find them as such; the court then remanded the case for a resolution of this issue.¹⁹⁵

In *F.T. v. State, Dep't of Health and Social Services*¹⁹⁶ the supreme court addressed the implications of seemingly conflicting trial court findings on whether the State had met the “reasonable efforts” standard.¹⁹⁷ The trial court originally compared the Department’s actions to the reasonable efforts requirements of former CINA Rule 15(g), which required such findings at the time of the child’s removal from the home, and found that reasonable efforts had not been made.¹⁹⁸ Given the absence of a reasonable reunification plan, the trial court held that it could not reach the next question: whether the parent’s harmful conduct was likely to continue.¹⁹⁹ The inference drawn by the trial court—that the absence of reunification efforts prevented a finding on the issue of likely future parental conduct—was not tested on appeal. However, the trial court ruling was sensible: the absence of Departmental efforts made it impossible to know what the parents would have done in the presence of such efforts. The trial court ordered that the Department work with the father on visitation and counseling.²⁰⁰ Later, however, the trial court made the affirmative finding of reasonable efforts by the Department.²⁰¹ The supreme court upheld this finding and stated that “[t]here was no inconsistency between the orders because [the second] order can be read to reflect the State’s efforts at promoting visitation in the wake of [the first] order.”²⁰²

4. *The Adoption and Safe Families Act of 1997.* The Adoption and Safe Families Act of 1997 (“ASFA”)²⁰³ amended two titles of the Social Security Act and created the current federal framework for administration of child dependency cases. As in the case of AACWA, ASFA does not directly impose a duty of reasonable efforts, but rather the “reasonable efforts” requirement remains a precondition for federal funding. ASFA extensively changed the

195. *Id.* In later cases, the court held that the requirement to make findings was met so long as the trial court directly addressed and resolved the issue. *See, e.g., R.R. v. State*, 919 P.2d 754, 755-56 (Alaska 1996); *In re T.W.R.*, 887 P.2d 941, 944-45 (Alaska 1994).

196. 922 P.2d 277 (Alaska 1996).

197. *Id.* at 281.

198. *Id.* at 279.

199. *Id.*

200. *Id.*

201. *Id.* at 279, 281.

202. *Id.* at 281.

203. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

wording of the reasonable efforts requirement and clarified several issues left unanswered by AACWA:

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—

provides that—

(A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, in making such reasonable efforts, the child’s health and safety shall be the paramount concern;

(B) . . . reasonable efforts shall be made to preserve and reunify families—

(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and

(ii) to make it possible for a child to safely return to the child’s home.²⁰⁴

As noted, “reasonable efforts” was not defined by AACWA in 1980, and federal law has not defined it since. The United States Department of Health and Human Services has issued a set of principles to help the states and Indian tribes develop services to children and families. Many of these principles are similar to the definition of “family support services” that appeared in the 1998 revision of the Alaska statutes.²⁰⁵ These rules are only guidelines. In Alaska the substantive content of “reasonable efforts” finds its source entirely in state law. As in the case of AACWA in 1980, the ASFA is silent regarding the ICWA.

5. *1998 Revision of the Alaska Statutes.* Defining a reasonable efforts standard in Alaska has clearly posed a challenge. In 1996, the Alaska Judicial Council noted the difficulty of drafting a uniform standard for reasonable efforts: “[a] reasonable efforts finding necessarily depends upon resources available in a community, and other variables that militate against a universal standard for the findings.”²⁰⁶ Despite the size and complexity of this problem, Congress, the state legislature and the Alaska judiciary have created a discernible pattern of how the “efforts” requirements will be interpreted and what the requirements are intended to accomplish. Among other things, the 1998 Alaska law revisions require services

204. 42 U.S.C. § 671(a)(15) (Supp. 1999).

205. Compare 45 C.F.R. §§ 1355, 1356 (2000), with ALASKA STAT. § 47.10.990(9) (Michie 2000).

206. TERESA W. CARNS ET AL., IMPROVING THE COURT PROCESS FOR ALASKA’S CHILDREN IN NEED OF AID 98 (1999), available at <http://www.ajc.state.ak.us/Reports/cina96.pdf> (citations omitted) (last visited Feb. 27, 2002).

to be provided in each individual community,²⁰⁷ a provision which goes a long way toward adapting the standard to a state with diverse communities.

In response to ASFA, the 1998 Alaska State Legislature substantially redrafted the state's child welfare and juvenile delinquency laws.²⁰⁸ These amendments addressed many questions left unanswered in federal law. The 1998 revisions were so extensive that today there is much less disparity between departmental duties when the child in custody is an Indian and when the child is a non-Indian. The new duties under Alaska law are worded very differently from those in the ICWA, but the net effect is to move the standard of "reasonable efforts" much closer to that of "active efforts."

With the revisions, the statute now states:

[With certain exceptions] the department shall make timely, reasonable efforts to provide family support services to the child and to the parents or guardian of the child that are designed to prevent out-of-home placement of the child or to enable the safe return of the child to the family home, when appropriate The department's duty to make reasonable efforts under this subsection includes the duty to

- (1) identify family support services that will assist the parent or guardian in remedying the conduct or conditions in the home that made the child a child in need of aid;
- (2) actively offer the parent or guardian, and refer the parent or guardian to, the services identified under (1) of this subsection; the department shall refer the parent or guardian to community-based family support services whenever community-based services are available and desired by the parent or guardian; and
- (3) document the department's actions that are taken under (1) and (2) of this subsection.²⁰⁹

Within this broader duty, the statute further refines the individual terms:

"[R]easonable efforts" means, with respect to family support services required under [Alaska Statutes section] 47.10.086, consistent attempts made during a reasonable time period and time-limited services.²¹⁰

"[R]easonable time" means a period of time that serves the best interests of the child, taking in account the affected child's

207. ALASKA STAT. § 47.10.990(9) (Michie 2000).

208. 1998 Alaska Sess. Laws ch. 99.

209. ALASKA STAT. § 47.10.086(a) (Michie 2000).

210. *Id.* § 47.10.990(22).

age, emotional and developmental needs, and ability to form and maintain lasting attachments.²¹¹

“[F]amily support services” means the services and activities provided to children and their families, including those provided by the community, a church, or other service organization, both to prevent removal of a child from the parental home and to facilitate the child’s safe return to the family; “family support services” may include counseling, substance abuse treatment, mental health services, assistance to address domestic violence, visitation with family members, parenting classes, in-home services, temporary child care services, and transportation.²¹²

For the parent, the exercise of these rights requires a line-by-line and word-by-word analysis of the text of the statute. Have the efforts been consistent? Are the services community-based? Are the time periods reasonable in relation to what the Department expects the parent to accomplish?²¹³ The inventory of services echoes the hypothetical list of services that the Alaska Supreme Court offered in *In re S.D., Jr.* in 1976, the first opinion to suggest that there might be such a thing as reasonable efforts and what the standard might be.²¹⁴

The Alaska Supreme Court amended the CINA Rules in 1999 to reflect the 1998 legislative changes; almost every rule was affected. As noted above, the trial court findings of reasonable efforts are required throughout the custody proceeding.²¹⁵ The 1998 statute revolutionized the nature of the affirmative duties owed to the parents. Twenty years earlier, the mere existence of case plans with duties to the parents was a rarity. Today the case plan itself is mandatory, and it is much clearer when the Department’s duties arise and what they must specifically include.

6. *The Alaska Supreme Court and Reasonable Efforts Since 1998.* Since 1998, the Alaska Supreme Court’s analysis continues to be what it has been: a straightforward comparison of the language of the statute with the actions of the Department. However, the legal context has changed dramatically. Where nothing existed before by which to evaluate the action of the Department, there is

211. *Id.* § 47.10.990(23).

212. *Id.* § 47.10.990(9).

213. For more information pertaining to this question, see Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: the 1998 Changes to Alaska’s Child in Need Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, in this edition of the Alaska Law Review.

214. 549 P.2d 1190, 1199 n.29 (Alaska 1976).

215. *See supra* note 14 and accompanying text.

now a comprehensive set of duties that the Department owes the parent and child. The court's opinions have reflected that change.

In each of the cases since 1998, the parent's lack of cooperation with the Department's efforts was virtually dispositive of the question of reasonable efforts. This response to a lack of cooperation fits the overall principle of straightforward comparison, as the parent's unwillingness to change his or her behavior demonstrates, as clearly as any evidence could, the unlikelihood that this parent will ever help create a reasonably stable household. Whatever the duty of "reasonable efforts" might include, a parent's challenge on appeal of the Department's actions will not survive the parent's refusal to cooperate.

In *A.B. v. State, Dep't of Health and Social Services*²¹⁶ the trial court found that reasonable efforts had been made, and the supreme court affirmed.²¹⁷ The court cited "DFYS's efforts in creating the case plan and offering [the mother] services that would help her achieve the objectives of that plan."²¹⁸ The opinion lists the specific help the Department offered: help with filling out housing applications, creating a case plan, arranging visitation and designing a treatment plan for substance abuse and mental health problems.²¹⁹ The mother either refused such help or failed to follow up on it.²²⁰

The mother argued that her failure to participate was based on a justifiable cause. She argued that "her failure to comply with her case plan was not fully voluntary because the failure was caused by her poverty and her homelessness."²²¹ The mother refused help in finding housing and did not offer evidence to show that it was her poverty that caused her to refuse housing.²²² The supreme court acknowledged that the mother was "extremely poor" during the relevant time period but also noted that the Department and other organizations gave the mother an opportunity for a stable lifestyle and that the mother declined those opportunities.²²³

When the parent fails to contact anyone connected with his child's case, the Department's efforts are reasonable when they consist of attempts to locate the parent, even if substantive services are not offered. The court has reviewed two such cases recently in

216. 7 P.3d 946 (Alaska 2000).

217. *Id.* at 953.

218. *Id.*

219. *Id.* at 952-53.

220. *Id.* at 953.

221. *Id.* at 952.

222. *Id.*

223. *Id.*

*M.W. v. State, Dep’t of Health and Social Services*²²⁴ and *C.W. v. State, Dep’t of Health and Social Services*.²²⁵

In *M.W.*, the father met with the social worker and discussed the case plan, including the need for the parents to visit the child.²²⁶ The father said that he understood the plan.²²⁷ He later objected to not getting a copy of the plan, but then admitted that receiving a copy might not have made a difference.²²⁸ The father then made himself unavailable for one year by neither visiting nor speaking with the child.²²⁹ The social worker testified concerning her extensive efforts to locate and contact the father during this time.²³⁰ The supreme court found these efforts reasonable and held that when making a reasonable efforts finding, the trial court may consider the father’s unwillingness to participate in his case plan.²³¹

In *C.W.*, the social worker located the parent and met with him to discuss the case plan.²³² The father then moved, losing contact for over three years with both the social worker and his own lawyer.²³³ His parental rights were subsequently terminated.²³⁴ The father argued on appeal that the Department had failed to make reasonable efforts to accommodate his learning disability and his alcohol abuse in order to enable him to be reunited with his child.²³⁵ The father also argued that the Department had failed to make reasonable efforts under the Americans with Disabilities Act of 1990 (“ADA”) to avoid excluding him from the “services, programs, or activities of a public entity.”²³⁶

The court found that the father’s long absence undermined his arguments about reasonable efforts to provide services.²³⁷ In determining whether the Department was diligent in its continuing attempts to locate the father, the court focused on whether the efforts to contact the father were reasonable and found that they

224. 20 P.3d 1141 (Alaska 2001).

225. 23 P.3d 52 (Alaska 2001).

226. *M.W.*, 20 P.3d at 1143.

227. *Id.* at 1146.

228. *Id.*

229. *Id.* at 1143.

230. *Id.* at 1146.

231. *Id.* (citing *A.M. II*, 945 P.2d 296, 305-06 (Alaska 1997), which was decided under the ICWA).

232. *C.W. v. State, Dep’t of Health & Soc. Servs.*, 23 P.3d 52, 53 (Alaska 2001).

233. *Id.* at 54.

234. *Id.*

235. *Id.*

236. 42 U.S.C. § 12,132 (2000); *C.W.*, 23 P.3d at 55 n.10.

237. *C.W.*, 23 P.3d at 56.

were.²³⁸ Therefore, no further need existed to address the question of whether providing certain substantive services would have been reasonable.²³⁹ As for the ADA claim, the court found that the father had failed to draw a connection between his learning disability and his abandonment of the children.²⁴⁰ The disability claim had “no logical bearing” on the abandonment findings.²⁴¹ Moreover, the father had also failed to challenge the adequacy of the case plan at the first meeting with the social worker.²⁴² Thus, the court’s determination that the Department had met its burden of making reasonable efforts to reunify the family despite its not having provided substantive services was influenced greatly by the father’s absence and lack of cooperation in the proceedings.

V. CONCLUSION

On first review, the decisions of the Alaska Supreme Court that address the “efforts” requirements of the ICWA and of Alaska state law appear to be a fact-specific jumble of cases, virtually unrelated to each other. Generally, the court seems to be reinventing the wheel on each review of a CINA case. In fact, however, aside from *T.F. v. State, Dep’t of Health and Social Services*,²⁴³ the Alaska Supreme Court has applied a single standard fairly consistently over the past quarter century: have the efforts of the Department objectively demonstrated an ongoing failure on the part of the parent to provide basic care that reflects unwillingness to serve as a parent? The court’s failure to succinctly articulate that standard has created an appearance of uncertainty where it does not exist.

Such a test would address each of the major questions that come before the trial court. The ICWA requires the testimony of an expert witness in order to terminate parental rights.²⁴⁴ Is the expert testimony sufficient to show an “objective” failure by this parent, or is the testimony merely a collection of generalities or based on information exclusively from one source? Another question the trial court must consider is whether the history of parental conduct is sufficient to show an “ongoing” failure, or whether the period of time covered by the testimony is too brief to allow a reliable pre-

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *See id.* at 53.

243. 26 P.3d 1089 (Alaska 2001).

244. 25 U.S.C. § 1912(f) (2000).

diction of the future? These questions are relevant for every case.

For the future, the ruling in *T.F.*, in which the court did not consider the parent's overall cooperation and participation to as great an extent as it did in the other cases discussed, calls for clarification or reversal. The ruling interrupts a body of law that worked well to permit termination of parental rights when the facts so required, but also assured that accurate information about the parent would be put before the court.