

MEMORANDUM

TO: ICWA Attorneys
FROM: Indigenous Law and Policy Center
DATE: January 20, 2019
RE: Active Efforts for Incarcerated Parents

I. QUESTION PRESENTED

For the purposes of parents who are incarcerated, what consists of “remedial services and rehabilitative programs designed to prevent the breakup of the Indian family” or “active efforts” under 25 U.S.C. § 1912(d)?

II. BRIEF ANSWER

In general, the moving party must provide active efforts to prevent the breakup of an Indian family where a parent is incarcerated. However, the scope of those active efforts and the state child welfare agency’s responsibility may be limited or reduced.

III. DISCUSSION

ICWA requires that any party seeking to place an Indian child in foster care or terminate parental rights make active efforts to prevent the breakup of the Indian family. 25 U.S.C. § 1912(d) (2012). Additionally, the party must show that these efforts have proved unsuccessful.

Id. Currently, the federal regulations define active efforts as:

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

25 C.F.R. § 23.2 (2016).

A. Incarceration limits the scope of active efforts the moving party must provide to prevent the breakup of the Indian family.

“A parent’s incarceration significantly affects the scope of the active efforts that the State must make to satisfy the statutory requirement.” *A.A. v. State, Dept. of Family & Youth Services*, 982 P.2d 256, 261 (Alaska 1999). In *A.A.*, the Supreme Court of Alaska held that although the parent was incarcerated, the state still had a duty to provide active efforts—where a parent’s incarceration remained “a significant factor in [the court’s] evaluation of the adequacy of the State’s efforts in this case.” *Id.* The parent was incarcerated for a lengthy prison term. *Id.* at 258. After prevailing on his first criminal appeal and receiving a new trial, he moved to appeal the decision to terminate his parental rights citing the state had not provided active efforts to prevent the breakup of the Indian family. *Id.* at 258-59. Ultimately, the Supreme Court of Alaska held that in spite of the state’s attempt to make active efforts, the parent did not comply with the state’s plan. *Id.* at 263. His violent behavior during his incarceration, the length of the parent’s prison term, and his initial refusal to acknowledge paternity led the Supreme Court of Alaska to conclude that the state’s active efforts were sufficient. *Id.* at 263.

A parent’s incarceration may limit a state’s active efforts to prevent the breakup of the Indian family. *In re D.S.B.*, 300 P.3d 702, 705 (Mont. 2013). In *D.S.B.*, the state removed the children from their parent after significant abuse, and the parent was subsequently arrested. *Id.* at 703-04. Because the parent never objected to the state’s treatment plan, the Supreme Court of Montana refused to decide whether the plan was sufficient for this case. *Id.* at 704. However, the court held that the parent’s failure to cooperate with the treatment plan both before and after he was incarcerated could lead a reasonable fact finder to conclude that though the state made active efforts, termination was appropriate. *Id.* at 705.

Additionally, a parent's lack of cooperation while incarcerated may limit the scope of active efforts the moving party must provide. In *Ben M. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 204 P.3d 1013, 1016 (Alaska 2009), the child was removed, returned, and removed a second time from her parents after the parents stopped following their case plan, missed urinalysis appointments, and their caseworker could not maintain contact with them. In the two years prior to terminating the parents' rights, the state's active efforts included: setting up visitation; discussing case plans with the parents; providing referrals to substance abuse assessments; referring the father to anger management and parenting classes; referring him to a housing program; and attempting to locate the parents. *Id.* at 1022. During that period, the father disappeared frequently, sometimes for periods of incarceration, and without leaving contact information. *Id.* Each time the state lost contact with him, the state took active steps to locate him and re-establish contact. *Id.* On appeal for the termination of his parental rights, the Supreme Court of Alaska held that the state's efforts were unsuccessful because of the father's lack of cooperation and there was no reason to believe additional efforts would have helped prevent the breakup of the Indian family. *Id.*

Similarly, a father's refusal to acknowledge paternity, and then disappearing before a blood test could be administered, delayed the state's attempted active efforts in *T.F. v. State, Dep't of Health & Soc. Servs.*, 26 P.3d 1089, 1090 (Alaska 2001). The Alaska Supreme Court held that the state owes no active efforts to a parent until paternity is established. *Id.* at 1094. State services were active efforts even though the state actions occurred during the short time period between the establishment of paternity and the hearing where the father's parental rights were terminated. *Id.* The court noted that the state was not required to do more when the father's level of cooperation was "passive at best, and resistant at worst." *Id.* at 1095. State active efforts during that short period of time included: provision of three supervised visits between father and

his twins; a meeting with the father and his attorney to prepare a case plan; and confirming that the father completed courses provided by the jail for substance abuse, a six-week parenting class, courses on fetal alcohol syndrome, and an eight to ten-week inmate alcohol and substance abuse program. *Id.* at 1091. Ultimately, the court held that although the parent's incarceration limited the required active efforts, the state had successfully fulfilled its burden when it attempted to provide services to the parent even when he was incarcerated. *Id.* at 1096.

B. Active efforts for incarcerated parents may be different than active efforts provided to prevent the breakup of the Indian family where parents are not incarcerated.

Active efforts are services provided to the non-incarcerated parent and children, in addition to services provided to the incarcerated parent. *In re D.S.B.*, 300 P.3d at 706. Prior to his incarceration, the parent in *D.S.B.* refused to “avail himself of” services stemming from two court-ordered treatment plans. *Id.* The state's active efforts to the incarcerated parent included: assistance of a child protection specialist (CPS); supervised visitation; drug testing; chemical dependency treatment; counseling; referrals to treatment providers; in-home services; and parenting coaching. *Id.* Despite efforts by the CPS to help the father keep in contact with his children, he sent one letter to his children. *Id.* Active efforts to the un-incarcerated parent and children included: individual counseling to the children; implementation of a trial home visit with the birth mother; and attempts to place the children with Indian family members. *Id.*

Sometimes, the attendant circumstances of a case limit the active efforts a state can provide. In *People in Interest of S.H.E.*, 824 N.W. 2d 420, 426-27 (S.D. 2012), the state could have provided more services to the incarcerated father, but the South Dakota Supreme Court found the state's services were sufficient. Primarily, these services were sufficient because the state also provided services to the children, as well as the two birth mothers involved. *Id.* While

the incarcerated parent took some voluntary steps to participate in services in prison, state caseworkers provided no assistance to work on the parenting packet, nor did any caseworkers visit him while he was at the penitentiary. *Id.* Here, the state had to provide active efforts to the two birth mothers including: urinalysis testing, professional referrals, medical services, gas and clothing vouchers, bus passes, and transportation to family therapy and family visits. *Id.* When one mother was incarcerated, active efforts provided to the nonincarcerated mother included: arrangement of two parental home studies, psychological evaluations, mental health referrals, foster care services, and residential placement for the children. *Id.* at 427-28. Other services provided to entire family included: provision of postage-paid envelopes; updates on all the children; facilitated visits in person and by letter; completion of initial family assessments and protective capacity assessments and evaluations; concurrent planning meetings; family locator services; kinship home studies; and interstate compact home studies. *Id.* at 428.

In some cases, the state's active efforts to keep the child with non-incarcerated parent were sufficient because the incarceration limited the level of services that could be provided to a parent. *Dashiell R. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 222 P.3d 841, 851 (Alaska 2009). The state's active efforts to keep the children with their mother during the father's incarceration included: hiring a therapist for the children; ordering psychological evaluations for the children; and, finding specialized foster care providers for children with special needs. *Id.* at 844-45. Services to the incarcerated father included: giving recognition to the father's participation in programming provided by the Department of Corrections consisting of classes in parenting, anger management, domestic violence, and therapeutic counseling; communicating to the father about his children's status; communicating with the father and prison staff about programs for the father; arranging letters and telephone visits between the father and his children. *Id.* at 849-50. Even though the service period was short, the totality of

state services provided to the entire family satisfied the active efforts threshold. *Id.* at 851. *See, e.g., Josh L. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 276 P.3d 457 (Alaska 2012) (stating incarcerated father's 99-year sentence as reason for state agency to focus active efforts on the nonincarcerated mother who voluntarily terminated her parental rights).

Additionally, active efforts may be measured by state efforts provided over the length of the entire case. *Jon S. v. State, Dep't of Health & Social Servs., Office of Children's Servs.*, 212 P.3d 756, 766 (Alaska 2009) (holding state active efforts were sufficient when measured over the entirety of the case, even where there was a temporary decline in state efforts during a parent's incarceration). In *Jon S.*, active efforts included: payment and coordination of the father's paternity test; advocating for financial and housing assistance for the parents; vouchers for diapers, clothes, medicine, and other supplies for the child; payment and arranging for parents to visit their child who was living in a different city; conducting monthly home visits; providing referral services to an infant learning program; facilitating an evaluation for the child and parenting education for the father; establishing a case plan for the father that included a referral for a substance abuse assessment; establishing and updating a case plan; coordinating with a guardian ad litem to help the parents relocate to be near their child and find jobs; helping parents get into temporary shelter and finding day care for their child; helping the father get bus passes; instructing the father regarding visitations with his child; setting up urinalysis appointment; working with parents and child's tribe to find long-term placement for the child that complied with ICWA; searching for the father when he disappeared; referring the child to doctors for medical and psychological evaluations; traveling to different communities to meet with child's mother; contacting family members for possible placement; preparing an Interstate Compact on the Placement of Children packet for placement of child; and arranging for the child to visit her father in jail. *Id.* at 764-65.

In *Thomas H. v. State., Dep't of Health & Soc. Servs., Office of Children's Servs.*, 184 P.3d 9, 17-18 (Alaska 2008), the totality of services provided to the incarcerated father and his family over five years constituted active efforts even though the state failed to make a referral to the father to obtain a mental health assessment as required in his case plan. Active efforts included: creation of a safety plan allowing the first child's return to her parents; removal of the child for placement with relatives while creating multiple case plans for the parents with treatment recommendations for substance abuse, parenting skills classes, and mental health therapy. *Id.* at 12. The state began active efforts three days after the birth of the second child when the child was removed by meeting with the parents to discuss their case plan, which included substance abuse treatment, parenting classes, and mental health assessments. *Id.* When the family entered a family court program, active efforts included the treatment plans provided by the program. *Id.* Active efforts were made by creating a new case plan in 2006 for the father even though, in six months, a hearing to terminate his parental rights was scheduled and he faced a pending incarceration. *Id.* at 13, 16. Finally, the state's scope of active efforts was reduced by the father's history of being in and out of jail 12 times since 2001, and refusing treatment or failing to return for treatment as recommended in various case plans. *Id.* at 18.

Further, some state courts consider active efforts sufficient as to an incarcerated parent when state agencies—such as the Department of Corrections, the parent's parole officers, and therapeutic courts—direct the parent to a course of rehabilitative action. See *Jon S.*, 212 P.3d 765-66 (considering substance abuse assessment program and treatment directed by a parent's parole officer an active effort). In *Jude M. v. State Dep't of Health & Soc. Servs., Office of Children's Servs.*, 394 P.3d 543, 556 (Alaska 2017), active efforts included intensive sex offender rehabilitation treatment provided over several years by an out-of-state federal medical center to a father as part of parent's 60-month prison sentence. *Id.* at 557. The center's active

efforts included: provision of parenting and anger management classes; and, helping the father send gifts, letters and make regular telephone calls with his child. *Id.* Active efforts did not require in-person visitation between the incarcerated parent and child so long as telephonic visits were provided. *Id.* However, the court noted that active efforts may require “sending a child across the country to visit an incarcerated parent.” *Id.* Even though the state contact with the incarcerated father was minimal, it was not required to duplicate the active efforts provided by the other entities. *Id.* at 557-58; *see also In re Cari B.*, 763 N.E. 2d 917, 924 (Ill. App. Ct. 2002) (finding reduced role of Illinois social service agency to provide active efforts to a father incarcerated out-of-state so long as active efforts were provided by the Missouri Department of Corrections where father incarcerated).

Prior to *Jude M.*, the Alaska Supreme Court held that the active efforts a child welfare agency must provide can be reduced when another state agency, such as the Department of Corrections (DOC) provided services to the parent. *A.M. v. State*, 945 P.2d 296, 307 (Alaska 1997). DOC’s efforts consisted of services best suited to the incarcerated father’s needs for remediation and rehabilitation, including: the state’s decision to place the father in an institution with available programs to address his needs; enrolling him in the institution’s sexual offender and substance abuse treatment programs; and keeping him in treatment until he stopped cooperating. *Id.* at 305-06. In addition to DOC’s efforts, the state child welfare agency provided minimal services to ensure contact between parent and child while he was in treatment; encouraging his treatment efforts; and assisting in visitation arrangements with his children. *Id.* at 307.

The length of a parent’s prison sentence may also determine the type of efforts the state provides and the sufficiency of the state’s active efforts. *See, e.g., People ex rel. D.G.*, 679 N.W.2d 497, 503 (S.D. 2004) (stating circumstances of a lengthy incarceration that narrow a

state's available options to prepare the parent for the return of a child). In *Idaho Dep't of Health & Welfare v. Doe*, 275 P.3d 23, 32-33 (Idaho Ct. App. 2012), the father's lengthy prison term reduced the scope of active efforts that the state was required to provide even where the state failed to provide him with information on how to complete treatment assessments and evaluations. The Idaho Court of Appeals held that sufficient active efforts to an incarcerated father serving a 15-year sentence included: setting up a family group decision-making meeting with the father while he was in jail; caseworker meetings on two different occasions with the father to discuss his charges and parental rights; facilitating telephone conversations between the father and mother, and father and children; providing monthly notices to the father to keep him informed and involved with his children and their needs; and placing the children with family members. *Id.* at 32-33.

IV. Conclusion

While incarcerated parents are still entitled to active efforts, incarceration limits what active efforts a court considers sufficient to meet ICWA's standards. Additionally, other state agencies, such as the Department of Corrections, may direct the services provided to the incarcerated parent, lessening the responsibility on the child welfare agency.