STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ASHTYN JASMIN ROE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

THERESA FINFROCK,

Respondent-Appellant,

and

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Intervening Respondent-Appellee.

FOR PUBLICATION
September 25, 2008
9:00 a.m.

No. 283642
Chippewa Circuit Court
Family Division
LC No. 07-013621-NA
Advance Sheets Version

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

WHITBECK, J.

In this case involving the termination of parental right to an Indian child, respondent Theresa Finfrock appeals as of right the trial court order terminating her parental rights to her daughter Ashtyn Jasmin Roe. The trial court terminated Finfrock's rights after finding that her rights to another child had been terminated because of physical abuse and that prior attempts to rehabilitate her had been unsuccessful.[1] As the Indian Child Welfare Act (the ICWA) requires,[2] the trial court further found that continued custody by Finfrock was likely to result in serious emotional or physical damage to the child.[3] On appeal, Finfrock argues that the trial court erred by failing to require petitioner Department of Human Services (the Department) to prove that it

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[1] MCL 712A.19b(3)(i).

[2] 25 USC 1901 *et seq*.

[3] See 25 USC 1912(f).

made "active efforts" to provide the remedial services and rehabilitative programs that the ICWA required.[4] Finfrock further argues that the trial court clearly erred when it found that Finfrock's continued custody was likely to result in serious emotional or physical damage to the child. We conclude that the ICWA requires the trial court to make findings regarding whether the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and regarding whether those efforts proved unsuccessful. Because the trial court did not make these findings, we vacate its order terminating Finfrock's parental rights and remand the case for further proceedings consistent with this opinion.

I. Basic Facts and Procedural History

Ashtyn Roe was born to Finfrock and Samuel Roe in October 2007. Ashtyn Roe was Finfrock's third child. Finfrock's first child, Daniel Finfrock, was born in April 1997. Finfrock's second child, Aliyah Bertrand, was born in August 2000.

Daniel Finfrock had several developmental handicaps and required considerable care. In January 2005, he died from intracranial trauma. Finfrock and her then-boyfriend, Steven Perrault, were Daniel Finfrock's only caregivers on the day that he sustained his injuries. Daniel Finfrock's death was later ruled a homicide.

After Daniel Finfrock's death, the Department sought the termination of Finfrock's parental rights to Aliyah Bertrand. And in July 2005, a tribal court terminated Finfrock's rights to Aliyah Bertrand after Finfrock failed to comply with her service plan.

Shortly after Ashtyn Roe's birth, the Department petitioned the Chippewa Circuit Court, Family Division, to terminate Finfrock's parental rights to this child. In the petition, the Department alleged that Daniel Finfrock died from intracranial trauma that was later ruled a homicide. It further alleged that Finfrock and Perrault told tribal police and the FBI that they were the only caregivers for Daniel Finfrock on the day he was injured. The petition noted that the criminal investigation into Daniel Finfrock's death remained unresolved. The petition also alleged that Finfrock's parental rights to Aliyah Bertrand had been terminated in July 2005 and that Finfrock had failed to comply with the service plan put in place for her at that time. Finally, the petition alleged that Samuel Roe was convicted of attempted fourth-degree criminal sexual conduct with a 14-year-old in 1996 and that he and Finfrock still resided together. On the basis of these allegations, the Department asked the trial court to terminate Finfrock's parental rights to Ashtyn Roe under MCL 712A.19b(3)(i). At a December 2007 hearing, Finfrock admitted these allegations and agreed to the trial court's jurisdiction.

The trial court held a termination trial in January 2008. At the trial, Robyn Hill, who was the foster care worker assigned to Finfrock's case in 2005, testified that the tribal court had terminated Finfrock's parental rights to her older daughter, Aliyah Bertrand. Hill also testified about her work with Finfrock. Hill noted that Finfrock had a history of choosing relationships

[4] See 25 USC 1912(d).

with men that had histories of domestic violence. Hill expressed concern about Finfrock's new relationship with a man who had a criminal sexual conduct conviction.

David Babcock testified that he was a protective services worker for the Department. He stated that he was concerned about Finfrock's new relationship and by her recent conviction for furnishing alcohol to a minor. Babcock indicated that Daniel Finfrock's death was a serious concern because Finfrock may have had a direct role in his death or, at the very least, contributed to it through her relationship with a man that she knew was abusive. Babcock opined that Finfrock's newest relationship was another poor choice and reflected a continuing pattern of behavior that placed her children at risk. Babcock testified that Finfrock minimized the risks posed by her relationships. Babcock also expressed concern that, although she was able to reiterate the things that were taught to her in her parenting and substance abuse classes, Finfrock did not seem to be able to incorporate those concepts into her day-to-day living.

Lori Tomkinson, the foster worker assigned to this case, testified that Finfrock stated that she did not really know why her parental rights to her older daughter were terminated, but later admitted that she did not comply with the plan's requirement that she leave Perrault. Tomkinson stated that Finfrock also admitted that she left her handicapped son with a man who was abusive towards her.

Martha Snyder testified as an expert on Indian child law. She stated that Finfrock's conduct was definitely not within the parental norms of the tribal community. She testified that Finfrock appeared to put her own needs first and that she doubted that Finfrock could ever place her children's needs ahead of her own. Snyder opined that, if returned to her mother, Ashtyn Roe would be in danger of serious emotional, physical, and mental harm. She also indicated that she believed that the Department had met the reasonable requirements to keep the family intact, given Finfrock's knowledge of or involvement in Daniel Finfrock's death.

In addition to this testimony, there was testimony that established that Finfrock had obtained some mental health services and had successfully participated in a drug court program. Indeed, Finfrock's therapist testified that Finfrock had been discharged from therapy and that she had begun to realize that she did not need another person to make her whole. Further, Finfrock's mother testified that Finfrock had changed her lifestyle and that she was not making the same choices that she used to make. She also stated that she knew Samuel Roe and that he did not exhibit the controlling and violent behavior that Perrault did. Finally, Finfrock herself testified about the changes she had made for herself. Finfrock stated that she had worked on the issues that had plagued her in the past and that she would now live her life in a good way.

In February 2008, the trial court issued its opinion from the bench. The trial court found that the provisions of MCL 712A.19b(3)(i) had been proved beyond a reasonable doubt, stating, "There had been a case service plan. There had been a death of one child, neglect of the other, and efforts to rehabilitate the [mother] were unsuccessful, resulting in termination . . . so that part of the statute has been complied with beyond a reasonable doubt." The trial court then turned to the ICWA's requirements. After summarizing the record evidence, the trial court concluded that "the evidence establishes beyond a reasonable doubt . . . that the custody of this child by the respondent mother is likely to result in serious emotional or physical damage to the child." For

this reason, the trial court terminated Finfrock's parental rights to Ashtyn Roe. Finfrock now appeals as of right.

II. The ICWA

A. Standard of Review

Finfrock argues that the trial court erred when it terminated her parental rights to Ashtyn Roe without requiring the Department to prove beyond a reasonable doubt that it made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of her Indian family and that these efforts proved unsuccessful.[5] More specifically, Finfrock alleges three specific errors in this regard. First, she contends that the trial court failed to make specific findings regarding whether active efforts were made and had proven unsuccessful before it proceeded with the termination. Second, she argues that the efforts the Department provided as part of a prior termination case will not satisfy the requirements of § 1912(d) of the ICWA. Rather, she argues, the Department must provide new efforts for each case, which the Department did not do in this case. Third, she argues that the evidence the Department presented at trial was insufficient to prove beyond a reasonable doubt that the efforts the Department actually provided were unsuccessful. Each of these errors, Finfrock contends, warrants reversal of the trial court's decision to terminate her parental rights.

This Court reviews for clear error a trial court's decision terminating parental rights.[6] "A circuit court's decision to terminate parental rights is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made."[7] However, this Court reviews de novo questions of law, such as the proper interpretation of the ICWA.[8]

B. The ICWA Requirements

Congress enacted the ICWA in response to evidence of abusive child welfare practices in the states that resulted in the separation of large numbers of Indian children from their families and tribes.[9] The ICWA does not entirely displace the application of state child custody laws to proceedings involving Indian children. But it does impose certain mandatory procedural and substantive safeguards.[10] Thus, although due process normally only requires that a state prove a

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[5] See 25 USC 1912(d).

[6] MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

[7] *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

[8] *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005).

[9] 25 USC 1901; *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989).

[10] *Mississippi Band of Choctaw Indians*, *supra* at 36; *In re Elliott*, 218 Mich App 196, 201; 554 NW2d 32 (1996).

ground for termination by clear and convincing evidence,[11] under the ICWA, "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[12] Additionally, under the ICWA:

> 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.[13]

It is undisputed that the provisions of the ICWA apply to this case involving an Indian parent and her child.[14]

C. The Trial Court's Factual Findings on Active Efforts

As stated, under the plain language of § 1912(d) of the ICWA, the Department had the burden of proving that "active efforts have been made" to prevent the breakup of Finfrock's family and "that these efforts have proved unsuccessful." Further, because the Department must "satisfy" the trial court that the active efforts were made and were unsuccessful in order "to effect" the termination, the trial court had to find specifically that the Department had made active efforts and that these efforts were unsuccessful before it could proceed with the termination of Finfrock's parental rights.[15]

Contrary to the contentions of the Department, the child's guardian ad litem, and the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe), the trial court did not make the findings required under § 1912(d) of the ICWA. The Department and the Tribe correctly note that the trial court mentioned that there "had been a case service plan" and that "efforts to rehabilitate the [mother] were unsuccessful." But the trial court did not make these statements as part of findings concerning the requirements of § 1912(d) of the ICWA. Rather, the trial court made

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[11] *Santosky v Kramer*, 455 US 745, 747-748; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

[12] 25 USC 1912(f).

[13] 25 USC 1912(d) (emphasis added).

[14] See 25 USC 1903.

[15] *In re SD*, 236 Mich App 240, 244-245; 599 NW2d 772 (1999) (noting that active efforts are normally required before termination of parental rights, but concluding that § 1912[d] did not apply to the facts of the case because termination would not breakup an Indian family). See also *In re Walter W*, 274 Neb 859, 862-863; 744 NW2d 55 (2008) (noting that, in addition to the state elements required to terminate parental rights, the ICWA imposes two additional elements: the active efforts element and the serious emotional or physical damage element); *In re JS*, 177 P3d 590, 591 (Okla Civ App, 2008) (noting that the active efforts requirement is a predicate finding that the trial court must make before a termination case may proceed).

these remarks in the context of its finding that the Department had proved the statutory grounds for termination under MCL 712A.19b(3)(i). Indeed, there is nothing in the trial court's opinion that even suggests that it was aware that it had to make findings under § 1912(d) of the ICWA. Manifestly, therefore, the trial court failed to make the requisite findings under § 1912(d) of the ICWA.

Because the trial court did not make the requisite findings under § 1912(d) of the ICWA, it lacked the authority to proceed with the termination of Finfrock's parental rights.[16] Therefore, we reverse the trial court's decision to terminate Finfrock's parental rights to Ashtyn Roe and remand this case to the trial court for the necessary factual findings under § 1912(d) of the ICWA.

Given our resolution of this issue, we decline to address Finfrock's contention that the trial court clearly erred when it found that her continued custody of Ashtyn Roe would likely result in serious emotional or physical damage. On remand, the trial court will again have the opportunity to consider the facts and make a finding concerning the likelihood of serious emotional or physical damage.[17] However, because the parties disagree about the nature of the findings required by § 1912(d) of the ICWA and the proper burden of proof, and because those disagreements are likely to reoccur on remand, we address the parties' remaining arguments on the proper application of § 1912(d) of the ICWA.

D. The Applicable Standard of Proof

The parties disagree about the standard of proof applicable to the trial court's findings under § 1912(d) of the ICWA. Finfrock contends that the requirements of § 1912(d) must be proven beyond a reasonable doubt. In contrast, the Tribe and the child's guardian ad litem contend that the Department's burden under § 1912(d) need only be proven by clear and convincing evidence and that this Court's previous applications of a beyond a reasonable doubt standard were incorrect.[18]

We note that this Court, in *In re Morgan*, simply adopted the beyond a reasonable doubt standard applied by the South Dakota Supreme Court in *In re SR* without actually analyzing whether that was the proper standard.[19] In that case, the South Dakota Supreme Court noted that Congress did not specify a standard of proof for determinations made under § 1912(d) of the ICWA.[20] Nevertheless, without engaging in any analysis, the court stated that it "assume[d] that the same burden required to prove serious emotional or physical harm under § 1912(f), beyond a

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[16] *In re SD*, *supra* at 244.

[17] See 25 USC 1912(f).

[18] See *In re Kreft*, 148 Mich App 682, 693; 384 NW2d 843 (1986); *In re Morgan*, 140 Mich App 594, 604; 364 NW2d 754 (1985).

[19] *In re Morgan*, *supra* at 604, citing *In re SR*, 323 NW2d 885 (SD, 1982).

[20] *In re SR*, *supra* at 887.

reasonable doubt, would also be required to prove active efforts by the party seeking termination."[21] Other states, however, have rejected application of that standard.[22] For example, in *In re Walter W*, the Nebraska Supreme Court rejected application of a beyond a reasonable doubt standard to determinations under § 1912(d), explaining:

> Congress did not intend in 25 USC § 1912 to create a wholesale substitution of state juvenile proceedings for Indian children. Instead, in § 1912, Congress created additional elements that must be satisfied for some actions but did not require a uniform standard of proof for the separate elements. As discussed, Congress imposed a "beyond a reasonable doubt" standard for the "serious emotional [or] physical damage" element in parental rights termination cases under § 1912(f). Congress also imposed a "clear and convincing" standard of proof for the "serious emotional or physical damage" element in foster care placements under § 1912(e). The specified standards of proof in subsections § 1912(e) and (f) illustrate that if Congress had intended to impose a heightened standard of proof for the active efforts element in § 1912(d), it would have done so.[23]

Because Congress did not provide a heightened standard of proof for § 1912(d) of the ICWA, the Nebraska Supreme Court declined to read the beyond a reasonable doubt standard into the statute.[24] Instead, the court determined that the default standard of proof for all termination of parental rights cases applied.[25]

We agree with the Nebraska Supreme Court's analysis: Congress clearly demonstrated its ability to impose a particular standard of proof for the elements required under ICWA. But Congress chose *not* to do so for the § 1912(d) "active efforts" determinations. Therefore, we conclude that this Court in *In re Morgan* and in *In re Kreft* incorrectly adopted a beyond a reasonable doubt standard of proof for these determinations. This Court issued both of these decisions before November 1, 1990, and there are no published decisions after that date applying the beyond a reasonable doubt standard to determinations under § 1912(d) of the ICWA. Therefore, we are not bound by precedent to apply this standard of proof.[26] We hold that the proper standard of proof for determinations under § 1912(d) of the ICWA is the default standard

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[21] *Id*.

[22] See *In re Walter W*, *supra* at 864 n 9, 864-865 (listing jurisdictions that have rejected the beyond a reasonable doubt standard for determinations made under § 1912[d] and joining that group). See also *In re Michael G*, 63 Cal App 4th 700, 709-712; 74 Cal Rptr 2d 642 (1998) (rejecting the line of authorities that impose a heightened burden of proof on determinations under § 1912[d]).

[23] *In re Walter W*, *supra* at 864-865.

[24] *Id*. at 865.

[25] *Id*.

[26] MCR 7.215(J)(1).

applicable to all Michigan cases involving the termination of parental rights. That standard is proof by clear and convincing evidence.[27]

E. The "Active" Efforts Requirement

The parties also disagree about whether the active efforts must be part of a service plan offered in connection with *current* proceedings. We conclude that formal or informal services provided *before* the current proceeding may meet the "active efforts" requirement of § 1912(d) of the ICWA. Further, we conclude that, where there is clear and convincing evidence that the provision of additional services would be futile, that finding can meet the requirements of § 1912(d).

Subsection 1912(d) of the ICWA clearly places the burden on the party seeking termination to satisfy the trial court that active efforts to provide the required services have been made and that they were unsuccessful. But the statute does not provide guidance concerning the nature or extent of the active efforts necessary to satisfy the requirement or the timing within which those efforts must be made.[28] The statute merely requires proof that "active efforts have been made to provide remedial services or rehabilitative programs" to prevent the breakup of the Indian family at some point before termination and that the efforts "proved unsuccessful."[29] Hence, there is no precise formula for determining what constitutes sufficient "active efforts."

Our colleague in her thoughtful dissent concludes that the term "active efforts" "embodies a temporal component" and should be interpreted as requiring current, or contemporaneous, rehabilitation efforts.[30] We respectfully disagree. We acknowledge that the term "active" may be "characterized by current activity, participation, or use."[31] However, because a Michigan court has not yet interpreted the term "active efforts," we may look to other jurisdictions for guidance.[32] In keeping with the majority of jurisdictions that have previously addressed this issue, we hold that the Department need not show temporally concurrent "active" efforts with each proceeding under the ICWA.

Most notably, in *In re KD*, the Colorado Court of Appeals explicitly concluded that the "'active efforts' required by § 1912(d) of the ICWA need not be part of a treatment plan offered

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[27] See *In re Trejo Minors*, *supra* at 356-357.

[28] See *In re Walter W*, *supra* at 865 (noting that the language "sets out praiseworthy but vague goals for the courts to enforce," which fail to give guidance "in determining whether the Department's efforts were sufficient to meet ICWA's mandates").

[29] 25 USC 1912(d).

[30] *Post* at 9.

[31] *Random House Webster's College Dictionary* (1997) (citing as examples, "active member" and "active account").

[32] *People v Rogers*, 438 Mich 602, 609; 475 NW2d 717 (1991).

as part of the current dependency proceedings."[33] Accordingly, the court held that, because of the extensive, but unsuccessful, services that the social services department provided to the father during two previous dependency cases, it would be an "'exercise in futility'" to offer another treatment plan.[34]

Several other jurisdictions have also held that, although § 1912(d) of the ICWA requires "active efforts," it does not require a social services department to "'persist with futile efforts.'"[35] For example, in *EA v Alaska Div of Family & Youth Services*, the Alaska Supreme Court held that where parental rights have already been terminated with respect to one or more children, the court "may consider the degree of the state's efforts to prevent the breakup of the entire family in assessing whether that effort was sufficient under ICWA."[36] The court noted that the Division of Family and Youth Services (DFYS) had "expended substantial efforts over the last decade to prevent the breakup of [the] family, without success."[37] The court further stated that, therefore, "[t]here [was] no reason to think that either an additional psychological evaluation or an additional seven months of intervention would have prevented" the termination.[38]

Similarly, in *Letitia V v Superior Court of Orange Co*, the California Court of Appeals addressed "whether 'active efforts' within the meaning of ICWA require reunification services be provided for each individual child or, put another way, whether the state is free to consider what it defines as recent but unsuccessful reunification efforts with the same parent but a different child sufficient to satisfy the mandate of [25 USC 1912(d)] with regard to a sibling."[39] Stating that "[t]he law does not require the performance of idle acts," and noting the drain on

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[33] *In re KD*, 155 P3d 634, 637 (Colo App, 2007).

[34] *Id*. (stating that "the court may terminate parental rights without offering additional services when a social services department has expended substantial, but unsuccessful, efforts over several years to prevent the breakup of the family, and there is no reason to believe additional treatment would prevent the termination of parental rights.").

[35] *Id*., quoting *In re JSB*, 691 NW2d 611, 621 (SD, 2005), and citing *In re PB*, 371 NW2d 366, 372 (SD, 1985) (stating that a social services department is not charged with "the duty of persisting in efforts that can only be destined for failure"). See also *In re Nicole B*, 175 Md App 450, 472; 927 A2d 1194 (2007) ("[T]he requirement of "active efforts" does not require "futile efforts.").

[36] *EA v Div of Family & Youth Services*, 46 P3d 986, 991 (Alas, 2002).

[37] *Id*.

[38] *Id*., citing *NA v Div of Family & Youth Services*, 19 P3d 597, 603-604 (Alas, 2001) (stating that there is no reason to think that the DFYS's failure to enroll the parent in yet another residential dual-treatment program would have resulted in a more successful outcome), and *KN v Alaska*, 856 P2d 468, 477 (Alas, 1993) (noting that "[a]lthough . . . DFYS might have done more, it is unlikely that further efforts by DFYS would have been effective in light of [the parent's] attitude").

[39] *Letitia V v Superior Court of Orange Co*, 81 Cal App 4th 1009, 1016; 97 Cal Rptr 2d 303 (2000).

resources that the provision of further services would put on an already strained dependency system, the court held that additional services were not necessary where the service provider had already spent years providing unsuccessful services that did not benefit the parent.[40]

In keeping with these jurisdictions, we conclude that the ICWA does not require *current* active efforts "'if it is clear that past efforts have met with no success.'"[41] Thus, where a parent has consistently demonstrated an inability to benefit from the Department's provision of remedial and rehabilitative services, or has otherwise clearly indicated that he or she will not cooperate with the provision of the services,[42] a trial court's finding that additional attempts to provide services would be futile will satisfy the requirements of § 1912(d) of the ICWA. Nothing in § 1912(d) precludes the Department from seeking termination of parental rights where active efforts to reunite the family have proven unsuccessful in the past.[43] "'A child should not be required to wait for parents to acquire parenting skills that may never develop.'"[44]

Thus, we conclude that nothing within § 1912(d) of the ICWA requires the Department to provide duplicative remedial or rehabilitative services.[45] Subsection 1912(d) does not specify the time within which the active efforts must have been made. Rather, it only requires that the

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[40] *Id*., citing *AA v Div of Family & Youth Services*, 982 P2d 256, 262 (Alas, 1999) (additional services not required where parent demonstrates "lack of commitment to treatment"); *AM v Alaska*, 945 P2d 296, 305 (Alas, 1997) (in determining sufficiency of remedial efforts, court may consider a parent's demonstrated lack of willingness to participate in treatment); *In re Annette P*, 589 A2d 924, 928-929 (Me, 1991) (finding prior remedial efforts sufficient where parents failed to cooperate with case worker or demonstrate interest in reunification); *In re ARP*, 519 NW2d 56, 60-62 (SD, 1994) (finding that the efforts made in siblings' cases were sufficient to justify the termination of parental rights without the provision of additional remedial services); *In re SR*, *supra* at 887 (finding active efforts within the meaning of the ICWA after repeated but unsuccessful steps were taken to encourage the mother to take advantage of available treatment programs); *CEH v LMW*, 837 SW2d 947, 957 (Mo App, 1992) (additional remedial programs not required where prior "efforts became futile and proved unsuccessful"); *State ex rel Juvenile Dep't of Multnomah Co v Woodruff*, 108 Ore App 352, 357; 816 P2d 623 (1991) (additional services not required by ICWA where parents with long history of alcohol and drug abuse had received prior services).

[41] *In re KD*, *supra* at 637, quoting *In re Adoption of Hannah S*, 142 Cal App 4th 988, 998; 48 Cal Rptr 3d 605 (2006).

[42] See *Wilson W v Office of Children's Services*, 185 P3d 94, 101-103 (Alas, 2008) (holding that the Office of Children's Services was not required to keep trying to provide services to a violent and uncooperative parent once it became clear that the attempts would be futile).

[43] See *In re Romano*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 1998 (Docket No. 207482). Although nonbinding, we find this statement from this opinion persuasive. MCR 7.215(C)(1); *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

[44] *In re ARP*, *supra* at 62 (internal quotation marks and citation omitted).

[45] See *Letitia V*, *supra* at 1016.

trial court be satisfied that the Department, in fact, made such active efforts before the trial court may proceed. Construed in context, § 1912(d) only requires "that timely and affirmative steps be taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services designed to remedy the problems which might lead to severance of the parent-child relationship."[46] For these reasons, the fact that the Department provided particular services in connection with a *prior* proceeding does not necessarily preclude such services from meeting the "active efforts" requirement in a *current* proceeding. Rather, the Department "may engage in 'active efforts' by providing formal or informal efforts to remedy a parent's deficiencies before dependency proceedings begin."[47] Whether the prior services were timely and sufficient will depend on the facts specific to the case.[48]

Accordingly, we decline to employ a definition of "active" that stresses a temporal requirement. In the context of the ICWA, we read the term "active" as being "marked by or disposed to direct involvement or practical action."[49] In other words, we read the "active efforts" requirement as imposing an obligation on the Department to take an involved, rather than a passive, approach when providing remedial services and rehabilitative programs to an Indian family. We note that in *AA v Div of Family & Youth Services* the Alaska Supreme Court specifically adopted this active versus passive interpretation, stating:

> 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.[50]

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[46] *Id*.

[47] *In re KD*, *supra* at 637.

[48] *Wilson W*, *supra* at 101; *In re Walter W*, *supra* at 865.

[49] *Random House Webster's College Dictionary* p 13 (citing as example, "active support").

[50] *AA*, *supra* at 261 (internal quotation marks and citation omitted). See also *In re AN*, 325 Mont 379, 384; 106 P3d 556 (2005) ("The term active efforts, by definition, implies heightened responsibility compared to passive efforts. Giving the parent a treatment plan and waiting for him to complete it would constitute passive efforts.").

Similarly, in *In re JS*, the Oklahoma Court of Civil Appeals explained as follows:

> Used in § 1912(d) as an adjective modifying "effort," the common and ordinary meaning of "active" means "characterized by action rather than contemplation or speculation" or "participating," *Webster Third New International Dictionary* 22 (1986), and "causing action or change," "effective," or "active efforts for improvement," *The American Heritage Dictionary* 7 (1986). As the Alaska Supreme Court in *A.A. v. State of Alaska* recognized, the opposite or antonym of "active" is "passive." *See The New Webster Encyclopedic Dictionary of the English Language* (1980).[51]

Stated another way, "active efforts" requires more than simply pointing the parent in the right direction, it "requires 'leading the horse to water.'"[52]

We further note that the majority of jurisdictions interpret "active efforts" as imposing a higher burden than various states' "reasonable efforts" requirement,[53] and that numerous courts have required that the service provider "provide *culturally relevant* remedial and rehabilitative services to prevent the breakup of the family."[54]

In sum, on remand, the trial court must determine whether there was clear and convincing evidence that the Department met its burden under § 1912(d) of the ICWA. In doing so, the trial court should consider the adequacy of the past provisions of remedial services to Finfrock, taking into account the extent of the Department's efforts and their cultural relevance. The trial court may also consider evidence that the provision of additional services to Finfrock would be futile.

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[51] *In re JS*, *supra* at 593.

[52] *Id*. at 594.

[53] *In re Nicole B*, *supra* at 471 ("The majority of courts that have considered the 'active efforts' requirement . . . have determined that it sets a higher standard for social services departments than the 'reasonable efforts' required by state statutes."). See also *Winston J v Dep't of Health & Social Services*, 134 P3d 343, 347 n 18 (Alas, 2006); *MW v Dep't of Health & Social Services*, 20 P3d 1141, 1146 n 18 (Alas, 2001); *In re Walter W*, *supra* at 865; *In re JS*, *supra* at 593.

[54] *Carson P ex rel Foreman v Heineman*, 240 FRD 456, 474, 500 (D Neb, 2006) (emphasis added). See also *In re Walter W*, *supra* at 865 ("[A]t least some efforts should be 'culturally relevant.'"); *In re Michael G*, *supra* at 714 (stating that "the court should take into account "the prevailing social and cultural conditions and way of life of the Indian child's tribe," and that remedial services should "involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers") (quotation marks and citation omitted); *In re Welfare of Children of SW*, 727 NW2d 144, 150 (Minn App, 2007) (stating that "active efforts" are "thorough, careful, and culturally appropriate efforts") (quotation marks and citation omitted).

III. Conclusion

Because the trial court failed to make the factual findings required by 25 USC 1912(d), it could not proceed to terminate Finfrock's parental rights to Ashtyn Roe. Consequently, we reverse the trial court's decision, vacate the termination order of February 1, 2008, and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Markey, P.J., concurred.

/s/ William C. Whitbeck
/s/ Jane E. Markey