**V. THE INDIAN CHILD WELFARE ACT AND ACTIVE EFFORTS**

The Indian Child Welfare Act (“the ICWA”), federal legislation passed in 1978, establishes a different standard for the child protection agency when Indian children are the subject of child protection proceedings and seeks to keep Indian children with Indian families, if possible.[[1]](#footnote-1) Because of unique historical issues which impacted Indian families, Congress concluded that removal of Indian children required additional efforts by the state to prevent removal.[[2]](#footnote-2)  During the federal legislative hearings which led to passage of the ICWA, Congress heard overwhelming testimony that state social workers often removed Indian children from their homes without applying any legal standards for removal.[[3]](#footnote-3)  Congress stated the policy of the ICWA as follows:

[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.[[4]](#footnote-4)

The ICWA requires that before removal or termination of parental rights of an Indian child, the state must prove to 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.”[[5]](#footnote-5) “Active efforts” has a “distinctly Indian character” and involves a greater expenditure of resources by the state than those required by the reasonable efforts standard.[[6]](#footnote-6) These efforts must demonstrate proactive casework and active engagement with the family including more frequent contact with the family and tribe.[[7]](#footnote-7) Moreover, active efforts must be culturally appropriate. This should be accomplished by involving and using the available resources of the extended family, the tribe, Indian social service agencies, and individual Indian caregivers.[[8]](#footnote-8) The active efforts standard must be applied by the court regardless of whether the child’s tribe has intervened in the proceedings.[[9]](#footnote-9)

1. **THE STATUTE AND FEDERAL REGULATIONS**

The ICWA originally did not define active efforts, thus a judge had to make a determination on a case-by-case basis.[[10]](#footnote-10) Nevertheless, agreement exists throughout the country that active efforts require a higher level of services than reasonable efforts.[[11]](#footnote-11) The Federal regulations issued in 2016 give a definition of active efforts. That definition is reproduced in Appendix K. This regulation focuses on the requirement that “active efforts” include input and assistance from tribal resources.[[12]](#footnote-12) The federal law specifies that child welfare must provide “active efforts” prior to foster care placement and prior to termination of parental rights.[[13]](#footnote-13) Most state courts address the issue at the same hearings as they would address the reasonable efforts issue, at the shelter care hearing, the dispositional hearing, the permanency planning hearing, and the termination of parental rights hearing.

1. **COMPLIANCE WITH THE ICWA AND ICWA COURTS**

Thirteen jurisdictions around the country have created a special ICWA division of the local juvenile court. These courts have been started in the following jurisdictions: Spokane Co., WA, Sacramento Co., CA Los Angeles Co., CA, Maricopa Co., AZ Pima Co., AZ, Missoula Co., MT Yellowstone Co., MT Adams Co., CO, Denver Co., CO, Bernalillo Co., NM, St. Louis Co., MN, Ramsey Co., MN Hennepin Co., MN Erie Co., NY, Tulsa Co., OK. Other ICWA courts are currently in the planning stage.

A study was conducted in a number of ICWA court sites in Montana, Minnesota, and Colorado by the ICWA Baseline Measures Project (BMP). The study revealed that the active efforts findings were made at least once in 85% of the cases studied.[[14]](#footnote-14) In 35% of the cases the court order described what active efforts were. Active efforts were most likely to be made at the review hearing (80%) and the plea (admit/deny) hearing (77%).[[15]](#footnote-15) The study also found that children were returned home sooner than in non-ICWA courts.[[16]](#footnote-16)

1. **CASE LAW AND ACTIVE EFFORTS**

Numerous appellate decisions address “active efforts” pursuant to the ICWA. Most of these decisions are listed in Appendix A under each state’s appellate decisions.[[17]](#footnote-17) The general themes involve (1) whether the agency exercised “active efforts” to prevent removal of an Indian child or to prevent the need for termination of parental rights; (2) whether lack of parental cooperation excused failures by the agency to provide “active efforts;” (3) the definition of “active efforts;” (4) whether the state produced an Indian expert witness at trial as required by the ICWA; and (5) whether the trial court used the correct standard of proof in determining if “active efforts” had been provided.[[18]](#footnote-18)

In several cases the appellate court wrote that “active efforts” implies heightened

responsibility compared to passive efforts. “"Passive effortsare 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 the plan be performed on its own."[[19]](#footnote-19)

The comparison with “passive efforts” is most unfortunate. That term does not appear in the statutory law. It seems to have been created by Mr. Craig Dorsey.[[20]](#footnote-20) It is true that in the dictionary “passive” is the opposite of “active,” but there is no legislative support for using the term. Moreover, it is clear that “passive efforts” is not the same as “reasonable efforts.” As numerous state appellate decisions have written, “Family reunification services are not ‘reasonable” if they consist of nothing more than handing the client a list of services and then putting the entire responsibility on the client to find and complete the services. When the agency writes up a case plan and encourages the parent to follow it, an Alaskan appellate court that such action is insufficient to meet the active efforts requirement.[[21]](#footnote-21)

Another set of cases focused on the difference between “reasonable efforts” and “active efforts.”[[22]](#footnote-22) Several cases affirmed agency “active efforts” based upon a lack of parental cooperation with the service providers.[[23]](#footnote-23) Some appellate decisions reverse trial court findings because the trial court terminated parental rights illegally by its failure to follow the ICWA.[[24]](#footnote-24)

A number of Native American judges have been critical of state court judges’ application of active efforts. As Justice William Thorne (retired Utah Appellate Court Justice) has said: “’active efforts’ means the social worker should treat the child as you would your own child and do whatever it takes.” Judge April Attebury of the Karuk Tribal Court tells social workers they “should hold the client’s hand from start to finish.”[[25]](#footnote-25) Justice Thorne has written the most comprehensive description of what active efforts means and how it differs from reasonable efforts.

Reasonable efforts at its best is the equivalent of “what kind of efforts would give a parent or care-giver a reasonable chance of success.”  At its worst, reasonable efforts is limited by budgets, time limits, cooperation, adequacy of appropriately understanding the problem and becomes, with all those limitations, “what is reasonable to do for the parent and family– what is required of us.”  In other words, what is the minimally acceptable level of effort.  Too often reasonable has become synonymous with ‘business as usual.’  Whatever ‘is done’ is by definition reasonable.  This is particularly the case when reasonable efforts are tied to a perception that the finding is necessary to keep federal dollars flowing into the local or state child welfare agency.  A judge who makes a no reasonable efforts finding risks reducing funds to an already resource starved agency. A rubber stamp of ‘reasonable’ keeps the federal spigot turned on.  The practice today has ignored the original mandate in the federal law of establishing a minimum level of professionalism and competence in preventing the breakup of families.  Today, almost anything can be passed off as reasonable…not unlike previous standards used to judge reasonableness of police conduct within the context of whose lives matter.  It takes a significant amount of intellectual integrity to even consider holding an agency or worker to a real ‘reasonable efforts’ standard.

Active efforts, on the other hand, by its own terms implies actually doing something to alleviate the problem.  Active efforts can range from “doing everything possible” to doing “our best” to doing what “works.”  At one end of the spectrum is “what would I do for my own family?”  The equivalent of the medical example of exhausting all available means to save a life. What would you do if someone close to you was diagnosed with a deadly disease?  Would you simply say, “oh well, we tried?” Or would you research all the options?  The tried and true as well as the experimental?  Would you leave any stone unturned?  Would you say, “you had your chance and it didn’t work out?” Or would you try everything and look for still more options if none of those methods succeeded?

At the other end of this spectrum is identifying the problems and seeking solutions that are best fitted to solving the particular problems that jeopardize a particular family. [In other words, not a generic or hypothetical or as lawyers like to use as a reference lodestone…a ‘reasonable’ family standard.] If we were to look at simply trying to decide which service would be enough, obviously context is necessary to judge a particular set of actions.  In rural and poor areas, medical hospitals have technology and expertise [including training and experience with specialty issues] and capabilities far inferior to large metropolitan areas.  Conversely, this might be balanced in those communities with greater knowledge of particular families and communities, as well as a higher likelihood of creating a personal connection between helper and family member.  Once again, context is important.  And not just the context of labeling the “problem,” but including a context of cataloguing the strengths, capabilities, and resources that the extended family can bring to bear to ensure safety for the child.

To illustrate what active efforts might look like I facilitated a group of state social workers and invited them to talk about the actions they were most proud of.  What activities were “out of the box?”  What they did for their favorite client?  To no one’s surprise these activities did not involve referrals to other agencies, or referrals to ‘services’ or even refences to compliant clients who accepted and followed the case plan that the worker devised for them.  Instead they almost universally focused on what they did as a human being to assist another in time of need, whether that be physical, emotional or spiritual [spiritual not being the same as religious] need.  They created a relationship with a human being and then “assisted” them, not ordered them.  They found a way to help, not demand compliance or face sanction.  They said “I believe in you” and then acted like they really did.  They did what was needed to HELP.  These efforts ranged from the extraordinary such as when learning a wildfire was in the area, driving to the home and helping the family evacuate to another worker who texted or used social media several times a day to check in and encourage a client who was struggling to another who made time to listen, really listen to the parent.

This conversation made me realize that active efforts was not a measure of “services,” but instead a different attitude or approach to “helping” a parent or family succeed. Not judging, but healing.  Not compliance focused, but oriented to assisting the parent and family.  Not creating a parenting plan, but instead walking and working beside the parent and family.  Active efforts is about doing things differently, not just more or increased amounts of the same things we have already been doing.  It is about investing in the success of the family.  It is about connecting them to healing.  It is about walking beside them and lending them our strength when they need it.  It is what we would do if they were our families.  It is what we would do if their lives really “mattered.” All families matter…and we should act like it.[[26]](#footnote-26)

1. **A NATIVE AMERICAN SOCIAL WORKER’S PERSPECTIVE**

For non-Native American social workers, it is difficult to cross cultural barriers and understand how to work with a Native American client. The following suggestions by Vida Castaneda, a Native American social worker, are a model of what a social worker can do to work effectively with a Native American client.

As a social worker working with a Native American, what do you want to know about your client?

* + There are many things to know when working with a Native American child/youth and their family.  As a social worker, you must start with the basic inquiry information of: What tribe(s) is the child from? Is it a federally recognized tribe or not? Are they enrolled in that tribe? Is the parent with Indian ancestry enrolled? If they are not enrolled in a federally recognized tribe, but do have California Indian ancestry, you will need to find out if their family is listed on the California Judgement Roll.  Here is a link to the background of how/why this roll was created: <https://historyhub.history.gov/community/american-indian-records/blog/2017/07/07/california-enrollments-background>  The Native Americans on this roll can trace their tribal ancestry prior to 1852 and may be able to utilize local tribal resources such as Tribal TANF, health/wellness and education resources due to their connection to this roll.  The last time this roll was taken was in 1972, so if they are born after that date, then a connection to ancestors can suffice in obtaining services.  Here is a great self-help type of resource that the California Indian Legal Services organization created that can assist families in finding more information on their tribal ancestry: <https://www.calindian.org/wp-content/uploads/2015/09/SelfHelpTracingCAIndianAncestry.pdf>  Are they receiving tribal services? If so, where are the services and what type of services? Tip: Even if you don’t know if they are enrolled or from a tribe, asking where the family is receiving services (*ie*, healthcare, dental, wellness etc.) can be a clue as to whether or not a family could have Native American ancestry. \*\*\*\*You should include in this area of discussion, the issue of historical trauma, which when interfacing with the system can include: interacting with governmental systems, generational trauma/issues that tie back to historical trauma and individual journey through healing historical trauma can vary person to person even within the same family….I can expand on these issues around historical trauma if you would like.

* + Here are some ICWA job aids to refer to with this section: <https://www.courts.ca.gov/documents/ICWA-Familyfillable_tree.pdf> , <https://www.courts.ca.gov/documents/Tribal-FollowSpiritICWA.pdf>, <https://www.courts.ca.gov/documents/ICWA-SSDRequirements.pdf>,  <https://www.courts.ca.gov/documents/Tribal-ReasonsNotBACAIRSF2010.pdf>, <https://www.courts.ca.gov/documents/ICWANoticingIssues.pdf>, <https://www.courts.ca.gov/documents/ICWA-Delinquency-factsheet.pdf>
* What information do you need to be effective in providing services and support?
  + What services currently in place that are or aren’t working
  + What services are missing that are needed based on the issues they may be enduring?
  + What does the tribal social worker recommend for their case plan?
  + Determining whether they are enrolled in a federally recognized tribe or on the California Judgment Roll will determine what type of tribal resources they are eligible for.  Some resources just ask to self-identify and a roll number of any kind is necessarily needed!
  + What resources are available in the area?
  + Are their nearby resources outside of the county that serve tribal youth in neighboring counties?
  + Allowance of the child/youth to attend cultural events or tribal ceremonies
  + Does the tribe have local or on-line tribal language classes? These are very empowering cultural connections to learning one’s own ancestral language! It can also serve as a great safe visitation alternative.  See a resource in California called: Breath of Life….it’s a language restoration program that meets annually: [https://aicls.org/](https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Faicls.org%2F&data=02%7C01%7CVida.Castaneda%40jud.ca.gov%7C7d3a3b21e8634506a84708d8510c79f6%7C10cfa08a5b174e8fa245139062e839dc%7C0%7C0%7C637348461475960984&sdata=A%2FlM%2BwldBXDcW%2B9fIvwObN3r%2FP1pD%2Ffd4M9%2BPeM%2BBaQ%3D&reserved=0)
  + Does a local tribal resource agency or the tribe itself offer other cultural classes on-line or in-person like basket making or cooking or support groups etc
  + Does the child/youth want to attend college? There are many Native American college recruiters that would be happy to provide guidance and support during the information gathering or application process
  + If you are working with a youth that is close to age 18 or a youth in the AB12 age group, will they be receiving per capita income from their tribe soon? If so, you will need to work with their attorney to ensure the age of distribution or if a trust is needing to be established for the youth, the attorney will need to assist with that item
  + Also, good to find out if the tribe will send the child/youth boxes with cultural items…such as language books or regalia or prayer items etc…some out of state tribes will mail the child/youth items to help them learn about their tribe, traditions and keep them connected with a strong sense of where they come from and belonging;
  + Here are the resource handouts that may be useful: <https://www.courts.ca.gov/documents/ICWA-Act-for-Kin-Caregivers.pdf>, <https://www.courts.ca.gov/documents/ICWA-active-efforts.pdf>, <https://www.courts.ca.gov/documents/STEPS_Child_Welfare_AB12_212.pdf>, <https://www.courts.ca.gov/documents/Tribal-CrossoverIWCA.pdf>,
* As a social worker working with Native Americans, what is the maximum number of cases you should have in order to do a good job with each client?
  + I would say it is dependent on the social worker and the types of cases the social worker has on their caseload.  When I was a social worker, I had a specialized caseload, so we usually had less than 20 because many of our individual cases counted as two because they were often very complex, monthly visitation necessary to monitor the children’s care and appearances in court were often;
  + Staff shortages also impact the amount of cases a worker has on their caseload as well;
  + Some counties have specific American Indian Units where they may carry a case from ER to Adoptions in vertical case management, so their caseloads will be lower since it’s a specialized unit
  + A great resource from SF County: <https://www.courts.ca.gov/documents/sf_ICWA_social_worker_manual.pdf>
* What do you lose when you have too many cases or when you do not have the information you need to be useful and effective for each client?
  + You lose the ability to provide the family with the time to establish connection and trust if your time is limited in what you can avail a family with;
  + If you don’t have the proper or enough information, the child and family may lose out on opportunities to connect closer to the tribe or tribal resources or to local tribal events/ceremonies or they may miss out on the ICWA designation if there is not enough information to determine if it’s an Indian child or not
* And how does all of this fit into your obligation to provide active efforts to prevent removal and facilitate reunification?
  + I have said for years that case plans/active efforts are an opportunity for healing.  So much has been taken or lost or hidden from Native Americans since first contact and governmental projects to insist tribal communities assimilate into American culture/ways.  Our families have been separated by the U.S. government as a means to eliminate tribal identity and traditions.  We as those who work within the system that has oppressed our communities have a duty and obligation to ensure that we can repair what has been damaged.  We heal these soul wounds by enrollment in the tribe, keeping families together, utilizing tribal resources, the ability to attend ceremonies and local tribal events, the ability to learn tribal language and the ability to openly be Native American without harm or repercussion.  It is important that those who work within the system don’t assume that the way the system has been set up to help families is THE way, that systems, policies, legislation and ways in which families are treated can be changed for better outcomes for Native American families.  Our tribal communities have functioned very well for thousands of years, which indicates that those ways worked just fine, but the ways imposed on our communities haven’t necessarily worked for tribes or even the general public.  As we continue to heal our historical trauma and issues in the present, that it’s important to work together with tribes and come up with ways to work with families that involve listening, being open to new perspectives, new ways of healing, traditions that have kept tribes strong for generations and that anyone who doesn’t understand tribes or traditions, that they seek training and information to help provide understanding without judgment.[[27]](#footnote-27)

Ms. Castaneda’s observations are intended to educate judges, attorneys, social workers, and others in the child welfare system about best practices when working with a Native American client who is involved in the child welfare system. The comments are consistent with the definition of Active Efforts contained in the Federal Regulations. (see Appendix K)

It also is clear from the appellate case law that the so-called heightened level of social worker actions in the law is not taking place in social worker practice. “Active efforts” does not seem to mean much in the real world of child welfare cases. Social worker practice should reflect the higher standard of social worker involvement with the family in ICWA cases. After reading what Justice Thorne and Vida Castaneda have written (above), it is clear that what they envision as the meaning of active efforts is much greater than what occurs in practice. It is time for everyone in the child welfare system (judges, attorneys, and social workers) to address active efforts as something more than current practice. One way of increasing the quality of representation in child welfare ICWA proceedings is for the judicial officer to appoint an attorney for the tribe. Many tribes do not have the resources to pay for that attorney. The juvenile court judge can make the appointment and ensure that the attorney is reimbursed. Bringing an experienced attorney into the proceedings, one who is an expert in the ICWA will assist the other attorneys and the judge make accurate findings.

Judges must become conversant in the requirements of the ICWA. The judge should enquire of all parents and relatives appearing in juvenile dependency proceedings whether they have any Indian heritage, regardless of whether any party raises the issue. Often the parents will not know of Indian heritage, but their parents and relatives may. The judge should also instruct the social worker to question the parents’ relatives about possible Indian heritage. If there is a possibility that the child could be Native American, the judge should order the social worker to provide legal notice to any possible tribes and to the Bureau of Indian Affairs as to the legal proceedings and thereby give the tribe an opportunity to participate in the proceedings. Failure to do so may result in a reversal of all of the court orders and a return to the beginning of the proceedings.[[28]](#footnote-28) Once it has been determined that the case involves an Indian child, judges must be prepared to hold the agency to the “active efforts” standard, one that is higher and more demanding than “reasonable efforts.” The judge and attorneys may also wish to ask questions of the social worker on each particular case to see if any of the suggestions in Ms. Castaneda’s statements about the best practice for social workers are helpful in the case before the court.

1. P.L. 95-608; 25 U.S.C. §§1901 et.seq. West, 2013. [↑](#footnote-ref-1)
2. *Id.* Congressional Findings at §1901; Hazeltine, S., “Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska’s Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act, 19 Alaska L. Rev. 57 (2002) [↑](#footnote-ref-2)
3. One report described it as the “wholesale separation of Indian children from their families….” *Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for other Purposes,*  H R Rep. 95-1368, at 9 (July 24, 1978); See also *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30, 32; 109 S. Ct. 1597; 104 L. Ed. 2d 29 (1989); See alsoH.R. Report No. 1386, 95th Cong., 2d Sess. 23 (1978), reprinted in U.S. Code Cong. & Admin. News  7530. [↑](#footnote-ref-3)
4. 25 U.S.C. § 1902. [↑](#footnote-ref-4)
5. *Id.* At §1911(d) and §1912(d). In California the state must prove it as provided active efforts by clear and convincing evidence. *In re Michael G.*, 63 Cal. App. 4th 700 (Cal. App. 1998) [↑](#footnote-ref-5)
6. Andrews, M., “The ‘active efforts’ standard requires more effort than a ‘reasonable efforts’ standard does.” “’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,” 19 *Alaska L. Rev.* 85 (2002) at p. 87; *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007). “The term active efforts by definition, implies heightened responsibility compared to passive efforts.”  *In the Matter of A.N. and M.N.,* 325 Mont. 379, 384, 106 P.3d 556, 560 (Montana Supreme Court, 2005); *C.J. v State Dep’t of Health & Social Services*, 18 P.3d 1214 (Alaska 2001); [*Sandy B. v. State, Dept. of Health & Social Services, Office of Children's Services,* 216 P.3d 1180 (Alaska 2009)](http://www.lexis.com/research/buttonTFLink?_m=c32acf5d3f917b8c9cd9ea671679da0d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b61%20A.L.R.6th%20521%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=109&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b216%20P.3d%201180%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=8&_startdoc=1&wchp=dGLbVzB-zSkAb&_md5=f7e779e921e62b813cf4a01770338fea); *M.W.*, 20 P.3d 1146 (Alaska Supreme Court, note 18), 2001; 44 Fed. Reg. 67,584 at D. 2(Nov. 26, 1979); DHS Social Services Manual XIII-3559; *In re J.S.*, 2008 Ok. Civ. App. 15, 177 P.3d 590 (Okla. Civ. App. 2008); Crandall, C., [“Moving Forward from the Scoop Era: Providing Active Efforts Under the Indian Child Welfare Act in Illinois,” 40 N. Ill. U. L. Rev. 100](https://advance.lexis.com/api/document/collection/analytical-materials/id/5YFP-7BV1-JFKM-61FK-00000-00?cite=40%20N.%20Ill.%20U.%20L.%20Rev.%20100&context=1000516) [↑](#footnote-ref-6)
7. Judge April Attebury of the Karuk Tribal Court in Siskiyou and Humboldt Counties, California, tells social workers they should hold the client’s hand from start to finish of the case; (author’s conversation with Judge Attebury). Justice William Thorne (ret.) told the author that the social worker should treat the client as you would your own child and do whatever it takes. (author’s conversation with Justice Thorne). “Active Efforts Principles and Expectations,” Oregon Judicial Department, Citizens Review Board, Salem; Wisconsin statutes state that it is the agency’s responsibility to meet the standard defined as “an ongoing, vigorous, and concerted level of case work…made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child’s tribe and that utilizes the available resources of the Indian child’s tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers. Wis. Stat. §48.028(4)(g)(1). [↑](#footnote-ref-7)
8. 25 U.S.C.§ 1912(d) [↑](#footnote-ref-8)
9. *In re Jonathon S.*, 28 Cal. Rptr. 3d 495 (Cal. Ct. App. 2005) [↑](#footnote-ref-9)
10. *Wilson W. v. State*, 184 P.3d 94, 101 (Alaska 2008). [↑](#footnote-ref-10)
11. Goldsmith, D. “Preserving the Indian Child’s Family: Active vs. Reasonable Efforts,” *The Judge’s Page*, National CASA, July, 2010, p. 11. *A.M. v State*, 945 P.2d 296 (Alaska 1997); However, commentator Mark Andrews disagrees, writing that, at least in Alaska, the state Supreme Court has used the same standard for both reasonable efforts and active efforts. Andrews, M., “’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,” *op. cit.*, footnote 97; Fletcher, M. “The Origins of the Indian Child Welfare Act: A Survey of the Legislative History,” *Legal Studies Research Paper Series,* Research Paper No. 07-06, Michigan State University College of Law. [↑](#footnote-ref-11)
12. For example, the Bureau of Indian Affairs wrote that the meaning of “active efforts” included a search for help from within the Indian culture; “Guidelines for State Courts; Indian Child Custody Proceedings,” 44 *Fed .Reg.* 67,584 (Nov. 26, 1979). Oregon has developed a common understanding and consensus around the active efforts definition. Convening tribal representatives with Citizen Review Boards resulted in the development of Oregon’s *Active Efforts Principles and Expectations*. The California legislature defines “active efforts” as efforts that “takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child’s tribe. Active efforts shall utilize the available resources of the Indian child’s extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.” Cal. Welfare & Institutions Code § 361.7, and California Rule of Court 5.484(c). Michigan requires caseworkers to “take a proactive approach with clients and actively support them in complying with the service plan rather than requiring the service plan to be completed by the client alone.” “Indian Child Welfare Case Management,” State of Michigan Department of Human Services, Native American Affairs 205 (3/1/2010) [↑](#footnote-ref-12)
13. 25 U.S.C. §1912(d) [↑](#footnote-ref-13)
14. Capacity Building Center for Courts, *ICWA Baseline Measures, Project Findings Report*, 2020 (found online at ICWA Baseline Measures. [↑](#footnote-ref-14)
15. *Id.* at p. 2. [↑](#footnote-ref-15)
16. ICWA Baseline Measurement Project, Casey Family Programs, 2020. [↑](#footnote-ref-16)
17. They are also collected in this article. Edwards, L., “[Defining Active Efforts in the Indian Child Welfare Act](http://judgeleonardedwards.com/docs/guardian_2019_v41n01-icwa.pdf),”  
    Jan/Feb 2019, Vol 41 No 01, *The Guardian*, National Association of Counsel for Children [↑](#footnote-ref-17)
18. For example, in the case of *In re Michael G.*, 63 Cal.App.4th 700, 74 Cal. Rptr. 2d 642 (Cal. App. 1998) involving interpretation of the ICWA, the appellate court reversed a termination of parental rights finding that clear and convincing evidence is the standard of proof in California for a determination under the ICWA that active efforts have been made to prevent breakup of an Indian family and have been unsuccessful. For an exhaustive list of cases involving the ICWA, see Kemper, K., “Construction and Application by State Courts of Indian Child Welfare Act of 1978 Requirement of Active Efforts to Provide Remedial Services, 61 *A.L.R.6th* 521; In a recent case, the Alaska Supreme Court found that the qualifications of an Indian expert witness were inadequate and reversed a termination of parental rights decision by a trial court. See Oliver N. v. State, 444 P.3d 171, 2019. [↑](#footnote-ref-18)
19. [*A. A. v. State, Dept. of Family & Youth Services,* 982 P. d 256 (Alaska 1999](http://www.lexis.com/research/buttonTFLink?_m=c32acf5d3f917b8c9cd9ea671679da0d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b61%20A.L.R.6th%20521%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=147&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b982%20P.2d%20256%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=8&_startdoc=1&wchp=dGLbVzB-zSkAb&_md5=11069a24d890f067db2616c72c1d3e2f) ); *In re A.N.*, 325 Mont. 379, 106 P.3d 556 (Montana, 2005). The appellate court does not explain how the term “passive efforts” appears in the case law. “Passive efforts” is certainly not synonymous with “reasonable efforts.” Social workers in whatever context should not be permitted to provide only “passive efforts.” [↑](#footnote-ref-19)
20. Dorsay, Craig, “The Indian Child Welfare Act and Laws Affecting Indian Juveniles,” Legal Services Corporation, Window Rock, Arizona, Native American Rights Fund, 1984, at pp. 157-158. 45. S [↑](#footnote-ref-20)
21. *A.M.I*., 891 P.2d at 826-7 [↑](#footnote-ref-21)
22. *A.M. v. State*, 945 P.2d 296 (Alaska 1995); *appeal after remand*, 945 P.2d 296 (Alaska 1997); *N.A. v State*, 19 P.3d 597, 603 (Alaska, 2008); *State ex rel. C.D.*, 200 P.3d 194, 2008 UT App. 477 (Utah Ct. App. 2008); and see Edwards, L., “[Defining Active Efforts in the Indian Child Welfare Act](http://judgeleonardedwards.com/docs/guardian_2019_v41n01-icwa.pdf),” *op. cit.* footnote 108. [↑](#footnote-ref-22)
23. *In re William G.*, 89 Cal. App. 4th 423 (Cal. Ct. App. 2001); *T.F. v State Dep’t of Health and Social Services*, 26 P.3d 1089 (Alaska 2001). [↑](#footnote-ref-23)
24. *In re Nicole B. and Max B.*, 175 Md. App. 450, 927 A.2d 1194 (Court of Special Appeals of Maryland, 2007) [↑](#footnote-ref-24)
25. These statements were made to the author through emails which are available from the author. [↑](#footnote-ref-25)
26. A copy of Justice Thorne’s comments is available from the author. [↑](#footnote-ref-26)
27. Comments from Vida Castaneda, a Native American social worker with the San Francisco Department of Social Services, now a Native American Specialist working at the Center for Families, Children and the Courts, a part of the California Judicial Council. A copy is available from the author. [↑](#footnote-ref-27)
28. See *In re Nicole B.*, o*p. cit.* footnote 115. [↑](#footnote-ref-28)