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evidence that Fick engaged in sexual contact with C.S. after her seizure on or about October 6, 2008, and that during the course of that sexual contact, Fick determined that, in his own words, C.S. "was not her normal self, but still in a wake-up stage." The State adduced evidence that nonetheless, 2 days later, when Fick was checking on C.S. within approximately 2 hours after she had a seizure, Fick again had sexual contact with C.S. The State presented sufficient evidence from which the jury could make a determination about whether C.S. was capable of consenting to sexual contact and about whether Fick knew or should have known whether C.S. was capable of consenting. This assertion of error is meritless.

V. CONCLUSION

We find no merit to Fick's assertions of error on appeal. We affirm.

AFFIRMED.

IN RE INTEREST OF JAMYIA M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. JAMISON M., APPELLEE AND CROSS-APPELLANT, AND SHINAI S., APPELLANT.

791 N.W.2d 343

Filed November 30, 2010. No. A-10-208.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Judgments: Appeal and Error.** In reviewing questions of law, an appellate court reaches conclusions independent of the lower court's ruling.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
4. **Indian Child Welfare Act: Parental Rights: Proof.** The Indian Child Welfare Act requirement of "active efforts" requires more than the "reasonable efforts" standard applicable in non-Indian Child Welfare Act cases, and at least some of the efforts should be culturally relevant.
5. ____: ____: ____. There is no precise formula for what constitutes "active efforts" under Neb. Rev. Stat. § 43-1505(4) (Reissue 2008); instead, a

determination as to what constitutes "active efforts" must be made on a case-by-case basis.

6. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
7. ____. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
8. **Indian Child Welfare Act: Parental Rights: Proof.** The exceptions found in Neb. Rev. Stat. § 43-283.01 (Reissue 2008) which relieve the State from its obligation to provide reasonable efforts when aggravating circumstances are present do not extend to the State's obligation to provide "active efforts" pursuant to Neb. Rev. Stat. § 43-1505 (Reissue 2008).

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Reversed and remanded for further proceedings.

Kim D. Erwin-Loncke, of Loncke Law Office, and Jeremy Muckey-Shirk for appellant.

Donald W. Kleine, Douglas County Attorney, and Amy Schuchman for appellee State of Nebraska.

Thomas C. Riley, Douglas County Public Defender, and Christine D. Kellogg for appellee Jamison M.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

This case involves the termination of the parental rights of the parents of an Indian child, Jamyia M., following the child's removal from the home at 2 months of age after what doctors described as a nonaccidental injury resulting in serious physical and developmental delays to the child. Shinai S., the natural mother, has appealed and Jamison M., the natural father, has cross-appealed the termination of their parental rights. Because we find that there is no exemption to the "active efforts" requirement of the Nebraska Indian Child Welfare Act (NICWA), which is based on the federal Indian Child Welfare Act (ICWA), and that the juvenile court erred in finding "active efforts" were made in this case, we reverse the court's order terminating the parental rights of Shinai and Jamison to their daughter, Jamyia, and remand the cause for further proceedings.

STATEMENT OF FACTS

On September 30, 2008, 2-month-old Jamyia was admitted to a hospital with a posterior occipital subdural hemorrhage and either a subarachnoid hemorrhage or cerebral contusion, which injuries doctors concluded were intentionally inflicted and were consistent with shaken baby syndrome. Although Jamyia had been in the care of one or both of her parents, neither parent could provide a reasonable explanation consistent with Jamyia's injuries. As a result, on October 3, the State filed an adjudication petition alleging that Jamyia was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the natural parents' placing Jamyia in a situation which was dangerous to her life or limb or injurious to her health or morals.

Later in October 2008, the State filed a second amended petition adding allegations that Jamyia, who was enrolled or was eligible for tribal enrollment in the Navajo Nation, came within the meaning of Neb. Rev. Stat. § 43-292(2), (8), (9), and (10)(d) (Reissue 2008); that reasonable efforts were not required and, in the alternative, that "active efforts" were provided and proved unsuccessful; and that termination of parental rights was in Jamyia's best interests. On January 23, 2009, the juvenile court ordered that NICWA requirements applied to this case.

Adjudication and dispositional hearings were held over the course of several days spanning from February 2009 to January 2010. A protection and safety worker from the Department of Health and Human Services (DHHS) testified that the parents were offered a comprehensive family assessment and that DHHS performed an early developmental network referral and provided a clothing voucher for Jamyia.

The State also adduced testimony from Evelyn Labode, who has worked in the ICWA field since 1993. Labode has trained DHHS employees and social workers with the Ponca and Omaha Tribes on ICWA regulations, and she has been affiliated with the "Through the Eyes of the Child Initiative" and the "Douglas County 1184 Treatment Team." Labode testified that in determining whether the State had provided "active efforts" to the family, she reviewed, among other things, information

from the hospital, a visitation plan, and information regarding services that had been offered to the parents. Labode testified that the services offered to the parents included transportation and grocery vouchers for Shinai, proposed visitation services, and classes in CPR, first aid, and parenting. Labode testified that the State had provided "active efforts."

The evidence established that Jamyia receives occupational, physical, and speech therapy. She has significant cognitive motor delays, language delays in all areas, visual impairment due to severe retinal hemorrhages to both eyes, seizures, and neurological problems—including problems with swallowing which require a "G-tube" to supplement her daily oral feedings consisting of "'pureed table food' or 'baby food' with some texture." Jamyia's hands and feet are curled when not in splints; she currently wears splints several hours per day to teach her to straighten her hands and feet and is placed in a "'stander'" twice a day to strengthen her leg muscles. Jamyia was still unable to walk or talk at 17 months old.

On December 2, 2009, the juvenile court found that Jamyia was a child within the meaning of §§ 43-247(3)(a) and 43-292(2), (8), and (9) regarding both parents. The court also found that "active efforts" had been made to provide remedial services designed to prevent the breakup of the family and that such efforts proved unsuccessful. The juvenile court took under advisement the allegations of whether termination was in Jamyia's best interests and whether reasonable efforts to preserve and reunify the family were required under Neb. Rev. Stat. § 43-283.01 (Reissue 2008). A dispositional hearing was set for January 11, 2010, so that the juvenile court could be updated on information or recommendations in support of, or in opposition to, the State's request for termination.

An updated DHHS court report received into evidence during the January 11, 2010, hearing noted that although Jamyia's parents had not been allowed any visits with Jamyia since she was placed in foster care as ordered by the court, the parents have been able to stay somewhat connected to their daughter through video recordings that the team from Early Development Network (EDN) prepared for them to watch and from written updates provided by Jamyia's foster parent.

The caseworker's report noted that since Jamyia's removal, Jamyia's parents

> have remained very interested and committed to doing everything that they can to have the opportunity to regain custody of their daughter. They both have: received CPR and first aid certification and plan on updating that as it is about to expire (financed by [D]HHS); successfully completed parenting classes through Heartland Family Services (financed by [D]HHS); attended every court hearing without fail; attended all of the educational meetings for Jamyia and work with her EDN service coordinator to keep up on her progress and her needs; provided gifts for her on every holiday and birthday; cooperated with every request that was made by the court and/or [D]HHS; take the initiative to research all of their daughter's diagnos[e]s and what she may need in the future as the result of them.

The caseworker also noted that it was her understanding that both parents were paying child support as ordered by the court and were up to date on their obligation. The caseworker recommended that the parents be allowed supervised visitation to occur in the foster parent's home and noted that the foster parent was willing to supervise those visits or was willing to have the visits supervised by someone else in her home. The foster parent reported to Jamyia's guardian ad litem that the parents continually and consistently provide Jamyia with "'toys, clothes and baby stuff.'"

In February 2010, the juvenile court filed an order terminating the parental rights of both natural parents after finding that termination was in Jamyia's best interests. The court also found that reasonable efforts were not required pursuant to § 43-283.01 as to both parents because Jamyia was subjected to aggravating circumstances, including, but not limited to, abandonment, chronic abuse, torture, or sexual abuse.

ASSIGNMENTS OF ERROR

Both Shinai and Jamison contend the juvenile court erred in finding that the State made "active efforts" to provide remedial services and rehabilitative programs designed to prevent

the breakup of their Indian family and that those efforts were unsuccessful, as required by Neb. Rev. Stat. § 43-1505(4) (Reissue 2008), and in finding, beyond a reasonable doubt, that returning custody of Jamyia to them would result in serious emotional or physical damage to her. Shinai also contends that the juvenile court erred in deferring the Navajo Nation from intervening until the dispositional portion of the juvenile proceedings. Jamison also claims that the juvenile court erred in finding there was sufficient evidence to terminate his parental rights pursuant to § 43-292(2), (8), and (9) and that the juvenile court violated his due process rights by failing to conduct the juvenile proceedings in a fair and impartial manner.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010); *In re Interest of Dakota M.*, 279 Neb. 802, 781 N.W.2d 612 (2010). In reviewing questions of law, an appellate court reaches conclusions independent of the lower court's ruling. *In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009).

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

ANALYSIS

We first address the parents' claim the juvenile court erred in finding that the State made "active efforts," as required by § 43-1505(4), to provide remedial services and rehabilitative programs designed to prevent the breakup of their Indian family and that those efforts were unsuccessful.

[4,5] Pursuant to NICWA,

> 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.

§ 43-1505(4). It is well established that the "active efforts" standard requires more than the "reasonable efforts" standard applicable in non-ICWA cases, and at least some of the efforts should be "culturally relevant." See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). However, there is no precise formula for what constitutes "active efforts"; instead, a determination as to what constitutes "active efforts" must be made on a case-by-case basis. See *id*. Further, there has been no real guidance on what "culturally relevant" efforts are sufficient, but the Nebraska Supreme Court has found that a cultural plan discussed by a case manager with a foster parent, without further elaboration regarding the details of such, constituted a sufficient "active effort" to support termination. See *id*.

"Active efforts" have been shown where the Indian family was provided with utility and housing assistance; psychological evaluations, assessments, and followup; therapy; chemical dependency evaluations and drug screenings; access to the Specialized Treatment and Recovery Court; bus tickets; and supervised visitation. "Active efforts" have also been shown where the children were provided with foster care placement, tutoring, and medical services; early education services; and speech therapy. See *In re Interest of Louis S. et al., supra*. "Active efforts" have also been shown where the Indian family was provided information regarding inpatient and outpatient chemical dependency treatment programs and was encouraged to apply to and attend said programs; provided information regarding community resources to assist with job skill development on multiple occasions; provided information on community resources to obtain a psychiatric evaluation and received a referral to a psychologist for a psychological evaluation; provided vouchers for rent, clothing, an electric bill, drug testing, and bus tickets; provided visitation; provided transportation of the child for visitation and foster care; provided medical care for the child; had a discussion of a cultural plan with the foster parent; and received assistance with obtaining housing. See *In re Interest of Walter W., supra.*

In the instant case, during the 17 months that this case was pending, the services offered to the parents included a comprehensive family assessment, an early developmental network referral, a clothing voucher for Jamyia, transportation and grocery vouchers for Shinai, and classes in CPR, first aid, and parenting, which classes both parents completed. Pursuant to the court's order, the parents were not allowed any contact with Jamyia following her removal in September 2008, despite DHHS' recommendation that they be allowed supervised visitation. Further, there were no "culturally relevant" efforts made in this case.

Throughout the 17 months the parents were not allowed contact with Jamyia, they have attempted to stay connected to Jamyia by watching video recordings and through written updates, and they have paid child support and remained current on that obligation. The caseworker's report noted that Jamyia's parents

> have remained very interested and committed to doing everything that they can to have the opportunity to regain custody of their daughter. They both have: received CPR and first aid certification and plan on updating that as it is about to expire (financed by [D]HHS); successfully completed parenting classes through Heartland Family Services (financed by [D]HHS); attended every court hearing without fail; attended all of the educational meetings for Jamyia and work with her EDN service coordinator to keep up on her progress and her needs; provided gifts for her on every holiday and birthday; cooperated with every request that was made by the court and/or [D]HHS; take the initiative to research all of their daughter's diagnos[e]s and what she may need in the future as the result of them.

It appears from DHHS' own evidence that not only were the few services provided by DHHS successful, but that it was the parents themselves who took the initiative to attempt to remain involved in their daughter's life. Therefore, we find the State did not provide by clear and convincing evidence that it made "active efforts," as required by § 43-1505(4), to provide remedial services and rehabilitative programs designed to

prevent the breakup of the Indian family and that those efforts were unsuccessful.

Although we have found that the State did not provide "active efforts" to prevent the breakup of the Indian family, the State argues that the exception relieving the State from its obligation to provide reasonable efforts when aggravating circumstances are present should be extended to the "active efforts" requirement, thereby relieving the State from its obligation in this case.

Nebraska's statute excusing the State from providing reasonable efforts when aggravating or other specific circumstances are present provides, in pertinent part:

> Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that:
>
> (a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse;
>
> (b) The parent of the juvenile has (i) committed first or second degree murder to another child of the parent, (ii) committed voluntary manslaughter to another child of the parent, (iii) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (iv) committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent; or
>
> (c) The parental rights of the parent to a sibling of the juvenile have been terminated involuntarily.

§ 43-283.01(4). See, also, 42 U.S.C. § 671(a)(15) (2006).

These exceptions were not included in the NICWA statute mandating "active efforts" which provides:

> 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.

§ 43-1505(4). See, also, 25 U.S.C. § 1912(d) (2006). The question of whether the aggravating circumstances exception found in the reasonable efforts statute should be extended to excuse the State from having to fulfill NICWA's requirement to provide "active efforts" to prevent the breakup of Indian families is an issue of first impression in Nebraska, and our research has uncovered only three cases considering this issue nationwide.

The two polestar cases regarding whether an exception exists to ICWA's "active efforts" requirement were decided by the Alaska Supreme Court and the South Dakota Supreme Court, 3 years apart, with the courts reaching opposite conclusions.

In the earlier case, *J.S. v. State*, 50 P.3d 388 (Alaska 2002), the Alaska Supreme Court upheld the termination of a father's parental rights to his three Indian children, after he was convicted of sexually abusing them, by finding that "active efforts" were not required under ICWA in cases of sexual abuse by a parent. The court acknowledged that the case was not governed by the federal Adoption and Safe Families Act of 1997 (ASFA). However, the court relied on a provision contained in ASFA which releases the State from the reasonable efforts requirement when aggravating circumstances are present in making its determination that "active efforts" were not required under ICWA in its case. The Alaska Supreme Court clearly relied on policy grounds placing the greater importance on "a child's fundamental right to safety" rather than relying on strict statutory construction. 50 P.3d at 392.

The South Dakota Supreme Court, in *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611 (S.D. 2005), rejected the Alaska Supreme Court's public policy reasoning, finding that ASFA did not supersede ICWA. The South Dakota Supreme Court specifically stated, "[W]e do not think Congress intended that ASFA's 'aggravated circumstances' should undo the State's burden of providing 'active efforts' under ICWA." 691 N.W.2d at 619. The South Dakota Supreme Court then identified three rules of statutory construction supporting this determination: (1) ICWA does not offer any exception to its "active efforts" requirement, ASFA does not mention ICWA, and ASFA does not purport to modify ICWA, much less explicitly state that ASFA's

exceptions to "reasonable efforts" should apply to ICWA's "active efforts"; (2) ICWA is a more specific set of statutes than ASFA, and the rules of statutory construction require that the more specific statute controls; and (3) when interpreting a statute pertaining to Indians,

> "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. . . ." . . . As Congress found when it enacted ICWA, it is to the benefit of Indian children to remain within their families and only after "active efforts" to reunite those families have proven unsuccessful should the children be removed.

691 N.W.2d at 619 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985)).

In a third case addressing this issue, Michigan's Supreme Court, similarly to South Dakota's, held that neither ASFA nor its corresponding state laws relieve the state from ICWA's "active efforts" requirement. See *In re JL*, 483 Mich. 300, 770 N.W.2d 853 (2009).

[6,7] In considering the language of our Nebraska statutes, statutory language is to be given its plain and ordinary meaning. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Id.*

Our "active efforts" statute, § 43-1505(4), like its federal counterpart, does not contain any exceptions to the State's obligation to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. There is no conflict between the lack of any exceptions in the "active efforts" statute and the presence of exceptions in the "reasonable efforts" statutes, because statutes are separate and distinct. *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009) (ICWA's "active efforts" provision is separate and distinct from "reasonable efforts" provision requiring State to plead active efforts by State to prevent breakup of Indian family). However, even if conflict could be read between the two statutes, the more specific NICWA statutory provisions would be controlling. See *R & D Properties v. Altech Constr. Co.*, 279

Neb. 74, 776 N.W.2d 493 (2009) (to extent there is conflict between two statutes on same subject, specific statute controls over general statute).

[8] In sum, we hold that the exceptions found in § 43-283.01 which relieve the State from its obligation to provide reasonable efforts when aggravating circumstances are present do not extend to the State's obligation to provide "active efforts" pursuant to § 43-1505. Since there were no exceptions relieving the State of its obligation to provide "active efforts" in this case and we have found that it did not provide those "active efforts," the order of termination is reversed, and this cause is remanded for further proceedings.

CONCLUSION

Having found that "active efforts" were required in this case and were not provided, we need not address the remaining assignments of error raised by the parents. The juvenile court's order of termination is reversed, and this cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.