Administrative Office of the Courts
Family & Youth Justice Programs

WA Guide on Reasonable & Active Efforts

Created March 2022

This guide has not been updated to include the below 2022 WA Supreme Court Decisions:

- In re Dependency of J.M.W: Establishes the responsibility of the State to make active efforts prior to the Shelter Care Hearing to prevent the breakup of an Indian family.
- In the Matter of the Dependency of L.C.S: Provides guidance to assist courts in applying the reasonable efforts standard given the lack of decisions in our state defining the term.

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REASONABLE EFFORTS:

WHAT MUST COURTS CONSIDER WHEN MAKING FINDINGS

The term "reasonable efforts" appears in many places in Washington State's dependency statute. The purpose of this section is to provide judicial officers with sources of legal authority to draw on when making determinations about whether a petitioner in a dependency case has made "reasonable efforts."

Reasonable efforts determinations can have significant consequences. For example, at both shelter care and dispositional hearings, in order to place a child out of home, the petitioner is required to show and the court is required to find that reasonable efforts were made to prevent or eliminate the need for removal. Further, in some instances when a child has been placed out of home for twelve months federal funding is contingent on a finding of reasonable efforts to finalize the permanent plan. Finally, some references to reasonable efforts direct the petitioner to provide notice of the case and shelter care hearings to the parents, thereby protecting due process.

This section aims to collect sources of guidance that should inform these determinations as well as guidance about what the impact is, if any, if reasonable efforts have not been made.

FEDERAL GUIDANCE FOR REASONABLE EFFORTS

8.3C.4 TITLE IV-E, FOSTER CARE MAINTENANCE PAYMENTS PROGRAM, STATE PLAN/PROCEDURAL REQUIREMENTS, REASONABLE EFFORTS

We have not, nor do we intend to define "reasonable efforts." To do so would be a direct contradiction of the intent of the law. The statute requires that reasonable efforts determinations be made on a case-by-case basis. We think any definition would either limit the courts' ability to make determinations on a case-by-case basis or be so broad as to be ineffective. In the absence of a definition, courts may entertain actions such as the following in determining whether reasonable efforts were made:

(1) Would the child's health or safety have been compromised had the agency attempted to maintain him or her at home?

(2) Was the service plan customized to the individual needs of the family or was it a standard package of services?

(3) Did the agency provide services to ameliorate factors present in the child or parent, i.e., physical, emotional, or psychological, that would inhibit a parent's ability to maintain the child safely at home?

(4) Do limitations exist with respect to service availability, including transportation issues? If so, what efforts did the agency undertake to overcome these obstacles?

(5) Are the State agency's activities associated with making and finalizing an alternate permanent placement consistent with the permanency goal? For example, if the

permanency goal is adoption, has the agency filed for termination of parental rights, listed the child on State and national adoption exchanges, or implemented child-specific recruitment activities?

Administration for Children and Families, Child Welfare Policy Manual, Section 8.3C.4 Title IV-E. Foster Care Maintenance Payments Program, State Plan/Procedural Requirements, Reasonable Efforts

45 CFR § 1355.25 - PRINCIPLES OF CHILD AND FAMILY SERVICES.[1]

The following principles, most often identified by practitioners and others as helping to assure effective services for children, youth, and families, should guide the States and Indian Tribes in developing, operating, and improving the continuum of child and family services.

(a) The safety and well-being of children and of all family members is paramount. When safety can be assured, strengthening and preserving families is seen as the best way to promote the healthy development of children. One important way to keep children safe is to stop violence in the family including violence against their mothers.

(b) Services are focused on the family as a whole; service providers work with families as partners in identifying and meeting individual and family needs; family strengths are identified, enhanced, respected, and mobilized to help families solve the problems which compromise their functioning and well-being.

(c) Services promote the healthy development of children and youth, promote permanency for all children and help prepare youth emancipating from the foster care system for self-sufficiency and independent living.

(d) Services may focus on prevention, protection, or other short or long-term interventions to meet the needs of the family and the best interests and need of the individual(s) who may be placed in out-of-home care.

(e) Services are timely, flexible, coordinated, and accessible to families and individuals, principally delivered in the home or the community, and are delivered in a manner that is respectful of and builds on the strengths of the community and cultural groups.

(f) Services are organized as a continuum, designed to achieve measurable outcomes, and are linked to a wide variety of supports and services which can be crucial to meeting

[1] *See also* 42 U.S. Code § 629a (definition of family preservation services); 45 CFR § 1356.21 Foster care maintenance payments program implementation requirements. [61 FR 58654, NOV. 18, 1996]

families' and children's needs, for example, housing, substance abuse treatment, mental health, health, education, job training, child care, and informal support networks.

(g) Most child and family services are community-based, involve community organizations, parents and residents in their design and delivery, and are accountable to the community and the client's needs.

(h) Services are intensive enough and of sufficient duration to keep children safe and meet family needs. The actual level of intensity and length of time needed to ensure safety and assist the family may vary greatly between preventive (family support) and crisis intervention services (family preservation), based on the changing needs of children and families at various times in their lives. A family or an individual does not need to be in crisis **i**n order to receive services.

REASONABLE EFFORTS TO PREVENT OR ELIMINATE THE NEED FOR REMOVAL

A FINDING IS MANDATORY AT SHELTER CARE AND DISPOSITION

At a **shelter care hearing** and at a **dispositional hearing**, per state law, courts are required to determine whether the petitioner made reasonable efforts to prevent removal, RCW 13.34.065(5)(a)(i) (inquiry by the court required); RCW 13.34.130(6). Reasonable efforts are required unless one of the circumstances at section 471 (a)(15)(D) of the Social Security Act (the Act) exists. To satisfy this requirement, a court must do more than "check the box" in a pattern form.

Case Law

In re Dependency of H., 71 Wn. App. 524, 529, 859 P.2d 1258, 1261 (1993)
checking an 'X' on the pre-printed form containing a standardized finding, the court completely failed to make a finding that DSHS made reasonable efforts to prevent removal of the children.

Research shows that the more robust the hearing, the better the outcome for children. Summers, Alicia, Sophia I. Gatowski, and Melissa Gueller, "Examining hearing quality in child abuse and neglect cases: The relationship between breadth of discussion and case outcomes." *Children and Youth Services Review* 82 (2017): 490-498

Services

RCW 13.34.130(b)(6) The court must determine what **services were provided to the family to prevent or eliminate the need for removal of the child from the child's home**. RCW 13.34.065 and RCW 13.34.130. At disposition the statute specifies that the finding

turns on whether "prevention services have been offered or provided and have failed to prevent the need for out-of-home placement."

WHAT IS A SERVICE?

RCW 13.34.025(2)(a) "Remedial services" are "those services defined in the Federal Adoption and Safe Families Act as family reunification services that facilitate the reunification of the child safely and appropriately within a timely fashion. Remedial services include individual, group, and family counseling; substance abuse treatment services; mental health services; assistance to address domestic violence; services designed to provide temporary child care and therapeutic services for families; and transportation to or from any of the above services and activities." [2]

Case Guidance

Matter of Dependency of A.L.K., 196 Wn.2d 686, 708, 478 P.3d 63, 73-74 (2020) (J. Montoya-Lewis, concurring)

"I recognize that at an early stage of a dependency, knowing what 'appropriate services' might be takes time. But it is incorrect to describe requirements parents must engage in order to avoid dependency as services. Services are intended to resolve the issues that gave rise to the dependency. Evaluations, visitation observations, and other requirements are not equivalent to services to remedy the parental deficiencies identified by the evaluations. Rather, they are assessments of the parent to determine whether a family should remain intact. Those of us who have worked in the dependency arena understand (or should understand) that the standard evaluations like the ones ordered in this case require the parent to undergo personal and invasive testing and observation. While that may be unavoidable in order to determine services necessary to either keep a family intact or reunify a family, I would argue that calling those intensive observations services to the parent is disingenuous, at best."

PREVENTION SERVICES

RCW 74.14C.005 "Reasonable efforts by the department to shorten out-of-home placement or avoid it altogether **should be a major focus** of the child welfare system. It is intended that providing up-front services decrease the number of children entering out-of-home care and have the effect of eventually lowering foster care expenditures and strengthening the family unit."

[2] *See also* 42 USC § 629a(a)(7)(A) (definition of "family reunification services").

RCW 74.14C.005(4) "Nothing in RCW 74.14C.010 through 74.14C.100 shall be construed to create an entitlement to services nor to create judicial authority to order the provision of preservation services to any person or family if the services are unavailable or unsuitable or that the child or family are not eligible for such services."

INVOLVING INCARCERATED PARENTS

RCW 13.34.136(2)(b)(i)(A) "The department's plan shall specify what services the parents will be offered to enable them to resume custody, what requirements the parents must meet to resume custody, and a time limit for each service plan and parental requirement….If the parent is incarcerated, the plan must address how the parent will participate in the case conference and permanency planning meetings and, where possible, must include treatment that reflects the resources available at the facility where the parent is confined. The plan must provide for visitation opportunities, unless visitation is not in the best interests of the child."

Do you know what family preservation services are available in your jurisdiction?

Housing

RCW 13.34.065(4)(d): "If the dependency petition or other information before the court alleges that experiencing homelessness or the lack of suitable housing was a significant factor contributing to the removal of the child, **the court shall inquire as to whether housing assistance was provided to the family** to prevent or eliminate the need for removal of the child or children"

RCW 13.34.130(6): "An order for out-of-home placement may be made only if the court finds that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home, **specifying the services, including housing assistance**, that have been provided to the child and the child's parent, guardian, or legal custodian, and that prevention services have been offered or provided and have failed to prevent the need for out-of-home placement, unless the health, safety, and welfare of the child cannot be protected adequately in the home."

RCW 13.34.030(15) "Housing assistance" means appropriate referrals by the department or other agencies to federal, state, local, or private agencies or organizations, assistance with forms, applications, or financial subsidies or other monetary assistance for housing. For purposes of this chapter, "housing assistance" is not a remedial service or family reunification service as described in RCW 13.34.025(2).

Case Guidance

Matter of Dependency of A.L.K., 196 Wn.2d 686, 706, 478 P.3d 63, 73 (2020) (J. Montoya-Lewis, concurring)

"it appears that the legislature intended that the Department actively engage in assisting a family in finding safe and stable housing to preserve the family unit, regardless of whether the family is an Indian family."

Case Law

Washington State Coal. for the Homeless v. Dep't of Soc. & Health Servs., 133 Wn.2d 894, 923–24, 949 P.2d 1291, 1306–07 (1997):

"Under RCW 13.34, the juvenile court is given the responsibility for determining whether DSHS has made reasonable efforts to prevent or to end foster placements of dependent children. The court is required to approve the Department's service plans, purporting to be based on reasonable efforts, and to incorporate those plans in court orders. As in all matters dealing with the welfare of children, the court must additionally act in the best interests of the child. **The court is able to perform its duties under the statute only if the statute is interpreted to authorize the court to order DSHS to make reasonable efforts to provide services in the area of need that is the primary reason for the foster placement.** *See, e.g., State v. Hayden,* 72 Wash. App. 27, 30–31, 863 P.2d 129 (1993) (holding that the general structure and purpose of the Juvenile Justice Act of 1977 granted implied authority to the juvenile court to modify the terms of a juvenile offender's disposition). **We hold that a juvenile court hearing a dependency proceeding has authority to order DSHS to provide the family with some form of assistance in securing adequate housing in those cases where homelessness or lack of safe and adequate housing is the primary reason for the foster placement or the primary reason for its continuation**."

RCW 13.34.138(4) "The court's authority to order housing assistance under this chapter is: (a) Limited to cases in which a parent's experiencing homelessness or lack of suitable housing is a significant factor delaying permanency for the child and housing assistance would aid the parent in providing an appropriate home for the child; and (b) subject to the availability of funds appropriated for this specific purpose. Nothing in this chapter shall be construed to create an entitlement to housing assistance nor to create judicial authority to order the provision of such assistance to any person or family if the assistance or funding are unavailable or the child or family are not eligible for such assistance."

Do you know what funds are appropriated for this purpose in your jurisdiction?

REASONABLE EFFORTS TO FINALIZE THE PERMANENCY PLAN

Services

RCW 13.34.136(1) "Whenever a child is ordered to be removed from the home, a permanency plan shall be developed no later than 60 days from the time the department assumes responsibility for providing services, including placing the child, or at the time of a hearing under RCW 13.34.130, whichever occurs first. The permanency planning process continues until a permanency planning goal is achieved or dependency is dismissed. **The planning process shall include reasonable efforts to return the child to the parent's home."**

RCW 13.34.136(2)(b)(i) "**The department's plan shall specify what services the parents will be offered to enable them to resume custody, what requirements the parents must meet to resume custody**, and a time limit for each service plan and parental requirement."

At a review hearing, RCW 13.34.138(2)(c) "If the child is not returned home, the court shall establish in writing: (i) Whether the department is making reasonable efforts to provide services to the family and eliminate the need for placement of the child."

RCW 13.34.025(2)(d) "This section does not create an entitlement to services and does not create judicial authority to order the provision of services except for the specific purpose of making reasonable efforts to remedy parental deficiencies identified in a dependency proceeding under this chapter."

RCW 13.34.130(1)(a) "In determining the disposition, the court should choose services to assist the parents in maintaining the child in the home, including housing assistance, if appropriate, that least interfere with family autonomy and are adequate to protect the child."

PARENTS WITH DEVELOPMENTAL DISABILITIES[3]

RCW 13.34.136(2)(b)(i)(B) "If a parent has a developmental disability according to the definition provided in RCW 71A.10.020, and that individual is eligible for services provided by the department of social and health services developmental disabilities administration, the department shall make reasonable efforts to consult with the

[3] *Matter of I.M.-M.*, 196 Wn. App. 914, 921, 385 P.3d 268 (2016). DCYF must tailor the services offered to the individual's needs to prove DCYF offered "all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future" in a termination of parental rights proceeding.

department of social and health services developmental disabilities administration to create an appropriate plan for services. For individuals who meet the definition of developmental disability provided in RCW 71A.10.020 and who are eligible for services through the developmental disabilities administration, the plan for services must be tailored to correct the parental deficiency taking into consideration the parent's disability and the department shall also determine an appropriate method to offer those services based on the parent's disability."

Case Law

In re M.A.S.C., 197 Wn.2d 685, 689, 486 P.3d 886, 889 (2021)
"Where DCYF has reason to believe that a parent may have an intellectual disability, it must make reasonable efforts to ascertain whether the parent does in fact have a disability and, if so, how the disability could interfere with the parent's capacity to understand DCYF's offer of services. DCYF must then tailor its offer of services in accordance with current professional guidelines to ensure that the offer is reasonably understandable to the parent."

U.S. DOJ and HHS, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, available at: https://www.hhs.gov/sites/default/files/disability.pdf

Individualized Treatment: "Individuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence. Persons with disabilities may not be treated on the basis of generalizations or stereotypes. Individuals with disabilities must be provided opportunities to benefit from or participate in child welfare programs, services, and activities that are equal to those extended to individuals without disabilities. For example, prohibited treatment would include the removal of a child from a parent with a disability based on the stereotypical belief, unsupported by an individual assessment, that people with disabilities are unable to safely parent their children."

Full and equal opportunity. "Individuals with disabilities must be provided opportunities to benefit from or participate in child welfare programs, services, and activities that are equal to those extended to individuals without disabilities. For example, prohibited treatment would include the removal of a child from a parent with a disability based on the stereotypical belief, unsupported by an individual assessment, that people with disabilities are unable to safely parent their children. Another example would be denying a person with a disability the opportunity to

become a foster or adoptive parent based on stereotypical beliefs about how the disability may affect the individual's ability to provide appropriate care for a child. This principle can require the provision of aids, benefits, and services different from those provided to other parents and prospective parents where necessary to ensure an equal opportunity to obtain the same result or gain the same benefit, such as family reunification."

Family Time/Visitation

The Washington State Legislature has said that the failure to provide court-ordered visitation is a basis to make a finding of no reasonable efforts to finalize the permanency plan. RCW 13.34.136(b)(ii)(F); RCW 13.34.138(6). "The court shall advise the petitioner that the failure to provide court-ordered visitation may result in a finding that the petitioner failed to make reasonable efforts to finalize the permanency plan. The lack of sufficient contracted visitation providers will not excuse the failure to provide court-ordered visitation."

SIBLING VISITATION

42 U.S.C. 671(31)(B) reasonable efforts shall be made "in the case of siblings removed from their home who are not so jointly placed, to provide for frequent visitation or other ongoing interaction between the siblings, unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the sibling."

Housing

RCW 13.34.138(1)(c)(i) "If additional services, including housing assistance, are needed to facilitate the return of the child to the child's parents, the court shall order that reasonable services be offered specifying such services."

RCW 13.34.030(15) "Housing assistance" means appropriate referrals by the department or other agencies to federal, state, local, or private agencies or organizations, assistance with forms, applications, or financial subsidies or other monetary assistance for housing. For purposes of this chapter, "housing assistance" is not a remedial service or family reunification service as described in RCW 13.34.025(2).

Case Guidance

Matter of Dependency of A.L.K., 196 Wn.2d 686, 706, 478 P.3d 63, 73 (2020) (J. Montoya-Lewis, concurring)

"It appears that the legislature intended that the Department actively engage in assisting a family in finding safe and stable housing to preserve the family unit, regardless of whether the family is an Indian family."

Case Law

Washington State Coal. for the Homeless v. Dep't of Soc. & Health Servs., 133 Wn.2d 894, 923–24 (1997): "Under RCW 13.34, the juvenile court is given the responsibility for determining whether DSHS has made reasonable efforts to prevent or to end foster placements of dependent children. The court is required to approve the Department's service plans, purporting to be based on reasonable efforts, and to incorporate those plans in court orders. As in all matters dealing with the welfare of children, the court must additionally act in the best interests of the child. The court is able to perform its duties under the statute only if the statute is interpreted to authorize the court to order DSHS to make reasonable efforts to provide services in the area of need that is the primary reason for the foster placement. See, e.g., State v. Hayden, 72 Wash. App. 27, 30–31, 863 P.2d 129 (1993) (holding that the general structure and purpose of the Juvenile Justice Act of 1977 granted implied authority to the juvenile court to modify the terms of a juvenile offender's disposition).We hold that a juvenile court hearing a dependency proceeding has authority to order DSHS to provide the family with some form of assistance in securing adequate housing in those cases where homelessness or lack of safe and adequate housing is the primary reason for the foster placement or the primary reason for its continuation."

RCW 13.34.138(4) "The court's authority to order housing assistance under this chapter is: (a) Limited to cases in which a parent's experiencing homelessness or lack of suitable housing is a significant factor delaying permanency for the child and housing assistance would aid the parent in providing an appropriate home for the child; and (b) subject to the availability of funds appropriated for this specific purpose. Nothing in this chapter shall be construed to create an entitlement to housing assistance nor to create judicial authority to order the provision of such assistance to any person or family if the assistance or funding are unavailable or the child or family are not eligible for such assistance."

Do you know what funds are appropriated for this purpose in your jurisdiction?

FEDERAL FUNDING IS TIED TO TWO DIFFERENT REASONABLE EFFORTS FINDINGS

1. Reasonable efforts to prevent removal. This is found in 2.6 in the pattern court form for shelter care hearings.

[ ] DCYF did **not** make reasonable efforts to prevent or eliminate the need for removal of the child from the child's home.
[ ] This finding is based on the following:

_____
_____
_____

Per the IV-E policy manual, these determinations must be "explicit, and made on a case-by-case basis," taking into consideration "the individual circumstances of each child before the court."

This judicial determination (that RE were made or were not required) to prevent a child's removal from the home must be made no later than 60 days from the date the child was removed from the home. If this finding is not made, the child can never become eligible for title IV-E funding for that entire foster care episode because there is no opportunity to establish eligibility at a later date. (But see note in blue box below)

In Washington, this is a non-issue. Reasonable efforts is an element required to remove a child at a shelter care hearing (RCW 13.34.065), so **there is no possibility the state will be denied federal funds on this basis because a child cannot be removed unless a reasonable efforts finding is made.** Likewise, at disposition, although a finding of RE to prevent removal is required, there are no federal funding implications. However, unless there is a finding of RE the child cannot be removed.

2. Reasonable efforts to finalize the permanency plan – the Court makes this determination at IPR/DR/PPH hearings.

2.9 The court advised the petitioner that failure to provide court-ordered visitation may result in a finding that the petitioner failed to make reasonable efforts to finalize the permanency plan.

DCYF [ ] has [ ] has not made reasonable efforts to implement and finalize the permanent plan for the child.
[ ] This finding is based upon the following:

_____
_____
_____

Per the IV-E policy manual, this judicial determination (reasonable efforts to finalize/achieve a permanency plan) must be obtained **no later than 12 months from the date the child is removed and every 12 months thereafter** while the child is in foster care. If not, the child becomes ineligible under title IV-E at the end of the month in which the judicial determination was required to have been made and remains ineligible until such a determination is made. If the reasonable efforts determination is subsequently made later for an otherwise eligible child, DCYF can claim federal funds starting the beginning of the month in which the judicial determination was made.

Why should courts care about federal funding?

Congress intended for these findings to serve as an incentive for state agencies. Courts can and should make findings of "no reasonable efforts to finalize the permanency plan" when those findings are appropriate. The state can return to court to ask to have those findings reversed when efforts have been made. These funds are part of the larger pool of funds the state draws down from the federal government – the dependent child is not impacted. C.F.R. § 1356.21(b)(1)-(2).

"Tying these findings to federal funding in the form of eligibility for title IV-E reimbursement was intended to underscore the significance of keeping families together and preventing unnecessarily long stays in foster care. Unfortunately, tying the findings to funding often leads to the common practice of invoking standard language, checking boxes, and findings in words only, for fear of a determination leading to financial ineligibility for federal reimbursement for part or all of a child welfare episode.

***For the child welfare system to become one that respects the integrity of the parent-child relationship and seeks to minimize trauma, attorneys must use the tools the law provides and judges must make meaningful judicial determinations**."*

David Kelly and Jerry Milner, *Reasonable Efforts as Prevention*, available at: https://www.courts.ca.gov/documents/Articles_on_CAC.pdf

REASONABLE EFFORTS IN RCW 13.34

Stage of Case & Issue	Statute	Practice Notes	Implications of RE findings
Initial Shelter Care (reasonable efforts to provide notice)* * Note that the reasonable efforts requirements regarding notice mentioned here will be elevated to "diligent efforts" once HB 1227 takes effect in 2023.	RCW 13.34.062 (1)(a) Whenever a child is taken into custody …child protective services shall make reasonable efforts to inform the parent, guardian, or legal custodian of the fact that the child has been taken into custody, the reasons why the child was taken into custody, and their legal rights under this title, including the right to a shelter care hearing, as soon as possible. Notice must be provided in an understandable manner and take into consideration the parent's, guardian's, or legal custodian's primary language, level of education, and cultural issues **(2)(a)** …If the initial notification is provided by a means other than writing, child protective services shall make reasonable efforts to also provide written notification. RCW 13.34.065(4) (a) …The court shall make an express finding as to whether the notice required under RCW 13.34.062 was given to the parent, guardian, or legal custodian. If actual notice was not given to the parent, guardian, or legal custodian and the whereabouts of such person is known or can be ascertained, the court shall order the department to make reasonable efforts to advise the parent, guardian, or legal custodian of the status of the case, including the date and time of any subsequent hearings, and their rights under RCW 13.34.090	Note that the statute requires a shelter care hearing "as soon as possible" – although the outer limit is 72 hours, that is a limit not a target. At a shelter care hearing the Court is *required* to make a finding about whether the parent has received proper notice. "Reasonable efforts to advise and to give notice, as required in this section, shall include, at a minimum, investigation of the whereabouts of the parent, guardian, or legal custodian." RCW 13.34.062(4)	There are no federal funding implications for the failure to provide reasonable efforts to notify a parent. Note however, that notice is a core aspect of due process. Proper service of process (which is not required by the time of a shelter care hearing but is required prior to a finding of dependency) is jurisdictional.
Initial Shelter Care (placement)	**RCW 13.34.065** **(4)(d)…** At a minimum, the court shall inquire into the following:… What services were provided to the family to prevent or eliminate the need for removal of the child from the child's home. If the	At every shelter care hearing the court is *required* to conduct an inquiry into what services were provided to the family to prevent removal.	In practice, there are no federal funding implications associated with this finding. In theory, if a court removed a child *and* made a finding at the initial removal that the state failed to make reasonable efforts, then the state would lose federal funding for

	dependency petition or other information before the court alleges that experiencing homelessness or the lack of suitable housing was a significant factor contributing to the removal of the child, the court shall inquire as to whether housing assistance was provided to the family to prevent or eliminate the need for removal of the child or children; **(5)(a)** The court shall release a child alleged to be dependent to the care, custody, and control of the child's parent, guardian, or legal custodian unless the court finds there is reasonable cause to believe that: **(i)** After consideration of the specific services that have been provided, reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home; and **(ii)(A)** The child has no parent, guardian, or legal custodian to provide supervision and care for such child; or (B) The release of such child would present a serious threat of substantial harm to such child, notwithstanding an order entered pursuant to RCW 26.44.063; or (C) The parent, guardian, or custodian to whom the child could be released has been charged with violating RCW 9A.40.060 or 9A.40.070.		the life of the case. However, the Washington statute is structured in such a way that can never happen because the RE finding is an element of removal. There are two elements the state must prove a shelter care to remove a child 1) risk of harm to the child and 2) whether the petitioner made reasonable efforts to prevent or eliminate the need for removal. RCW 13.34.065. *Both* elements are required by state law. Therefore, if the court finds the state failed to make reasonable efforts the court cannot remove the child. If the child is not removed, there is no federal funding issue.
Initial Shelter Care (Relative Placement) * Will change in 2023 when HB 1227 takes effect.	RCW 13.34.065(5)(c) ("If the child was not initially placed with a relative or other suitable person, and the court does not release the child to his or her parent, guardian, or legal custodian, the department shall make reasonable efforts to locate a relative or other suitable person pursuant to RCW 13.34.060(1))"		There are no federal funding implications tied to this finding. However, the court will be required to assess reasonable efforts again at later stages in the case and may choose to consider this requirement.

Dependency	Reasonable Efforts is not an issue when determining dependency		There are no federal funding implications.
Disposition (placement)	RCW 13.34.130 (6)(" …An order for out-of-home placement may be made only if the court finds that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home, specifying the services, including housing assistance, that have been provided to the child and the child's parent, guardian, or legal custodian, and that prevention services have been offered or provided and have failed to prevent the need for out-of-home placement, unless the health, safety, and welfare of the child cannot be protected adequately in the home…")	RCW 13.34.110 ("In making this determination, (2) The court in a fact-finding hearing may consider the history of past involvement of child protective services or law enforcement agencies with the family for the purpose of establishing a pattern of conduct, behavior, or inaction with regard to the health, safety, or welfare of the child on the part of the child's parent, guardian, or legal custodian…")	There are no federal funding implications related to this finding. However, the Court cannot place a child out of home at disposition without making a finding that the state made reasonable efforts. Reasonable efforts is an element the state must establish before removing a child at disposition. **Note effective July 1, 2023 there will be additional guidance about this finding contained in the law per HB 1227:* ("Placement moves while a child is in shelter care will be considered when determining whether reasonable efforts have been made by the department during a hearing under RCW 13.34.110").
Reasonable efforts to return a child home	RCW 13.34.136 (Whenever a child is ordered to be removed from the home, a permanency plan shall be developed no later than 60 days from the time the department assumes responsibility for providing services, including placing the child, or at the time of a hearing under RCW 13.34.130, whichever occurs first. The permanency planning process continues until a permanency planning goal is achieved or dependency is dismissed. The planning process shall include reasonable efforts to return the child to the parent's home.	Return home must be a permanency plan, at least initially, unless the court makes a finding that aggravated circumstances apply.	There are no federal funding implications that turn on the state's failure to make reasonable efforts to return a child home, unless return home is the permanency plan, and the court makes a finding of no reasonable efforts to finalize the permanency plan, after the child has been in out of home care for 12 months.
Permanency Planning and Review Hearings	RCW 13.34.136(2)(b)(i) "The department's plan shall specify what services the parents will be offered to enable them to resume custody, what requirements the parents must meet to resume custody, and a time limit for each service plan and parental requirement."	RCW 13.34.136(b)(ii)(F) /RCW 13.34.138(6) The court shall advise the petitioner that the failure to provide court-ordered visitation may result in a finding that the petitioner	Per the IV-E policy manual, this judicial determination (reasonable efforts to finalize/achieve a permanency plan) must be obtained no later than 12 months from the date the child is removed and every 12 months thereafter while the child is in foster care. If not, the child

	At a review hearing, RCW 13.34.138(2)(c) "If the child is not returned home, the court shall establish in writing: (i) Whether the department is making reasonable efforts to provide services to the family and eliminate the need for placement of the child." RCW 13.34.025(2)(d)(" This section does not create an entitlement to services and does not create judicial authority to order the provision of services except for the specific purpose of making reasonable efforts to remedy parental deficiencies identified in a dependency proceeding under this chapter.") RCW 13.34.136(2)(b)(i)(B) ("If a parent has a developmental disability according to the definition provided in RCW 71A.10.020, and that individual is eligible for services provided by the department of social and health services developmental disabilities administration, the department shall make reasonable efforts to consult with the department of social and health services developmental disabilities administration to create an appropriate plan for services. For individuals who meet the definition of developmental disability provided in RCW 71A.10.020 and who are eligible for services through the developmental disabilities administration, the plan for services must be tailored to correct the parental deficiency taking into consideration the parent's disability and the department shall also determine an appropriate method to offer those services based on the parent's disability.")	failed to make reasonable efforts to finalize the permanency plan. The lack of sufficient contracted visitation providers will not excuse the failure to provide court-ordered visitation. RCW 13.34.138(1)(c)(i) ("If additional services, including housing assistance, are needed to facilitate the return of the child to the child's parents, the court shall order that reasonable services be offered specifying such services."	becomes ineligible under title IV-E at the end of the month in which the judicial determination was required to have been made and remains ineligible until such a determination is made. If the reasonable efforts determination is subsequently made later for an otherwise eligible child, DCYF can claim federal funds starting the beginning of the month in which the judicial determination was made. Congress intended for these findings to serve as an incentive for state agencies. Courts can and should make findings of "no reasonable efforts to finalize the permanency plan" when those findings are appropriate. The state can return to court to ask to have those findings reversed when efforts have been made. These funds are part of the larger pool of funds the state draws down from the federal government – the child's dependency case is not impacted.

Termination of Parental Rights	RCW 13.34.132: A court may order that a petition seeking termination of the parent and child relationship be filed if the following requirements are met: (1) The court has removed the child from his or her home pursuant to RCW **13.34.130**; (2) Termination is recommended by the department; (3) Termination is in the best interests of the child; and (4) Because of the existence of aggravated circumstances, reasonable efforts to unify the family are not required. Notwithstanding the existence of aggravated circumstances, reasonable efforts may be required if the court or department determines it is in the best interests of the child. In determining whether aggravated circumstances exist by clear, cogent, and convincing evidence, the court shall consider one or more of the following: RCW 13.34.180(1)(f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. If the parent is incarcerated, the court shall consider whether a parent maintains a meaningful role in his or her child's life based on factors identified in RCW **13.34.145**(5)(b); whether the department made reasonable efforts as defined in this chapter; and whether particular barriers existed as described in RCW **13.34.145**(5)(b) including, but not limited to, delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.	Reasonable efforts are not an element at termination except as the statute describes aggravated circumstances and the obligations to certain incarcerated parents. The state is however, required to show, by a clear cogent and convincing evidence burden that all necessary services were offered or provided: RCW 13.34.180(1)(d): ("services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided").	There are no federal funding implications for a finding that the state failed to make reasonable efforts at termination.

QUESTIONS FOR REFLECTION

1. At what stage in your shelter care hearings do you inquire about whether notice was proper?

2. Under what circumstances would it be reasonable to make *no* efforts to prevent or eliminate removal?

3. Is holding a meeting (such as an FTDM) providing a service?

4. By what evidentiary burden must the state show reasonable efforts at disposition?

5. What funds have been appropriated for housing services in your jurisdiction? For what types of cases should you order housing assistance?

6. How can you use the finding of reasonable efforts to finalize the permanency plan to create incentives for high quality casework and family preservation?

7. In what way are parents in your court informed about the requirements they must meet to resume custody, per RCW 13.34.136(2)(b)(i)?

8. In what way is the Department held accountable in your courtroom for making reasonable efforts to return a child home?

ACTIVE EFFORTS:

WHAT MUST COURTS CONSIDER WHEN MAKING FINDINGS

INDIAN STATUS – DOES ICWA APPLY?

There are two components to the question of a child's "Indian status": Who is an Indian child, and how does a court make that determination?

COMPONENT #1: WHO IS AN INDIAN CHILD?

25 USC § 1903(4); *see also* 25 CFR § 23.2 (definition of Indian child). ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

RCW 13.38.040(12) WICWA defines an "Indian child" as "an unmarried and unemancipated Indian person who is under eighteen years of age and is either: (a) A member of an Indian tribe; or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. RCW 13.38.040(7) WICWA defines "member" and "membership" as "a determination by an Indian tribe that a person is a member or eligible for membership in that Indian tribe." "A determination of eligibility is an express determination of membership under WICWA." Matter of Dependency of Z.J.G., 196 Wn.2d 152, 184, 471 P.3d 853, 869 (2020).

An "Indian tribe" is "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43." 25 USC § 1903(8); RCW 13.38.040(11). The complete listing of federally recognized tribes is published in the federal register. The most recent publication can be found at 87 Fed. Reg. 4636 (Jan. 28, 2022) or online at https://www.govinfo.gov/content/pkg/FR-2022-01-28/pdf/2022-01789.pdf.

RCW 13.38.070(3)(a)-(b) "The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe . . . . The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe." 25 CFR §

23.108(b). A Tribe's written determination or testimony that a child is or is not a member or eligible for membership "shall be conclusive."

Case Law

United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979).

Tribal membership and tribal enrollment are not interchangeable terms. Congress chose the term "member" specifically intending to extend application of the ICWA to children who are not "formally enrolled" as members of an Indian tribe. H.R. Rep. No. 1386, at 16 (1978). Enrollment is the common means of establishing Indian status, but it is not the only means, nor is it necessarily determinative.

COMPONENT #2: HOW DOES A COURT DETERMINE WHETHER THERE IS REASON TO KNOW A CHILD IS OR MAY BE AN INDIAN CHILD?

Case Law

Matter of Dependency of Z.J.G., 196 Wn.2d 175, 471 P.3d 853 (2020)

"We hold that a court has a 'reason to know' that a child is an Indian child when any participant in the proceeding indicates that the child has tribal heritage."

"If the court has 'reason to know' the child is or may be an Indian child the court must treat the child as an Indian child until it is determined on the record that the child does not meet the definition." (citing 25 CFR § 23.107(b)(2)).

"[T]he history of abusive removals without notice to tribes and the historical failure of state courts to provide proper due process to Native families means that tribal members may not have knowledge of their political affiliation with a tribe."

At the commencement of every dependency, RCW 13.36 or RCW 11.130.215 guardianship, and termination of parental rights proceeding, the court must inquire of the participants whether there is "reason to know" a child is an Indian child. 25 CFR § 23.107(a). Participants include, at minimum, attorneys, DCYF representatives, parents, Indian custodians, and the guardian ad litem or court appointed special advocate, and may also include the child, relatives, and witnesses. *See* 81 Fed. Reg. 38803 (June 14, 2016). This inquiry must be conducted in an RCW 13.36 or RCW 11.130.215 guardianship and termination of parental rights proceeding even though the inquiry was conducted in the underlying dependency proceeding.

Upon conducting the inquiry, the court has a "reason to know" that a child is or may be an Indian child when **any participant in the proceeding indicates that the child has tribal heritage** and/or:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

The court must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is or may be an Indian child. 25 CFR § 23.107(a).

THE ACTIVE EFFORTS ELEMENT

If the court has "reason to know" a child is or may be an Indian child, the court must treat the child as an Indian child until or unless it determines the child does not meet the definition of an Indian child. Matter of Dependency of Z.J.G., 196 Wn.2d 152, 175, 471 P.3d 853, 865 (2020) (citing 25 CFR § 107(b)(2)).

For an excellent resource on Active Efforts check out the

Lummi Nation Comprehensive Guide to Active Efforts

WHEN DOES THE ACTIVE EFFORTS ELEMENT APPLY?

The active efforts element may apply in a variety of different proceedings.[4] The information provided in this section pertains to the type of proceedings in which DCYF is or may be the petitioner. In such cases, the court must be satisfied that "active efforts have been made to provide remedial services and rehabilitative programs designed to

[4] *See, e.g., Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 383 P.3d 492 (2016)

prevent the breakup of the Indian family and these efforts have proved unsuccessful" when:

- Placing a child out-of-home at disposition (even if the order is agreed) and each order thereafter that maintains the child's out-of-home placement;
- Establishing an RCW 13.36 or RCW 11.130.215 guardianship (even if the order is agreed); and
- Granting a petition to involuntarily terminate parental rights

Whether this element must be proven to place or maintain a child in shelter care is currently pending before the Washington State Supreme Court in *In re the Welfare of J.M.W.*, 99481-1 (argued Jan. 11, 2022). Even if this element is not a condition precedent for placing or maintaining a child in shelter care, during this phase of the proceeding the court can inquire as to what active efforts have been initiated thus far and may order the Department of Children, Youth, and Families ("the Department" or "DCYF") to perform additional efforts.

WHAT DOES THE ACTIVE EFFORTS ELEMENT REQUIRE?

ICWA's regulations define "active efforts" as "**affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.** Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

> (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
>
> (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
>
> (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring."

25 CFR § 23.2.

RCW 13.38.040(1)(a) WICWA defines "active efforts" as "timely and diligent efforts to provide or procure such services, including engaging the parent or parents or Indian custodian in reasonably available and culturally appropriate preventative, remedial, or rehabilitative services. This shall include those services offered by tribes and Indian organizations whenever possible."

THE DEPARTMENT'S DUTY TO PROVIDE AND DOCUMENT ACTIVE EFFORTS

In order to comply with ICWA and WICWA, the Department has the burden to provide 'active efforts' that are—*at a minimum*—thorough, timely, consistent, and culturally appropriate.

Case Law

Matter of Dependency of G.J.A., 197 Wn.2d 868, 489 P.3d 631 (2021).

"[N]ot only must the State provide higher levels of engagement [with the family], it must also incorporate the varying culture and social norms of Indian tribes and Indian families, rather than employ the same techniques that are otherwise provided in non-ICWA proceedings."

Regarding thoroughness, "[t]he Department's actions must be thorough to 'help[] the parents to overcome barriers, including actively assisting the parents in obtaining such services,' and the Department must 'monitor [the parents'] progress and participation in services." 25 C.F.R. § 23.2(2), (9)). "[T]he Department must act diligently to address a parent's particular needs." The Department is also tasked with 'helping the parents to overcome barriers.' This is not limited to court-ordered services, and must necessarily encompass *all* barriers to reunification."

"The timeliness requirement for the Department's actions is not limited to referrals for court-ordered services but must encompass all services necessary to reunite the Indian family. The Department must also be consistent in its provision of active efforts throughout the dependency, and it is not relieved of its duty to provide active efforts simply because it made sufficient efforts at another time during the dependency."

Finally, active efforts "must be culturally appropriate to support the Native family's cultural roots." The Department is "required to provide culturally appropriate services in accordance with the tribe or the children's extended Native family members." Inherent in the obligation to "engage the Indian family in a culturally appropriate manner is the requirement that it be cognizant of Indian families' mistrust of government actors due to centuries of abuse."

Case Guidance

Matter of Dependency of A.L.K., 196 Wn.2d 686, 706, 478 P.3d 63, 73 (2020) (J. Montoya-Lewis, concurring)

"I recognize that at an early stage of a dependency, knowing what 'appropriate services' might be takes time. But it is incorrect to describe requirements parents must engage in order to avoid dependency as services. Services are intended to resolve the issues that gave rise to the dependency. Evaluations, visitation observations, and other requirements are not equivalent to services to remedy the parental deficiencies identified by the evaluations. Rather, they are assessments of the parent to determine whether a family should remain intact. Those of us who have worked in the

dependency arena understand (or should understand) that the standard evaluations like the ones ordered in this case require the parent to undergo personal and invasive testing and observation. While that may be unavoidable in order to determine services necessary to either keep a family intact or reunify a family, I would argue that calling those intensive observations services to the parent is disingenuous, at best."

Case Law

Matter of Dependency of G.J.A., 197 Wn.2d 868, 489 P.3d 631 (2021).

"[T]he Department must document its provision of active efforts in the record. This includes, but is not limited to, information regarding

- The issues the family is facing that the State agency is targeting with the active efforts (these should be the same issues that are threatening the breakup of the Indian family or preventing reunification);
- A list of active efforts the State agency determines would best address the issues and the reasoning for choosing those specific active efforts;
- Dates, persons contacted, and other details evidencing how the State agency provided active efforts;
- Results of the active efforts provided and, where the results were less than satisfactory, whether the State agency adjusted the active efforts to better address the issues.

It is the Department's responsibility to clearly document its actions in the record to enable the court to reach an informed conclusion about the Department's provision of active efforts."

THE JUVENILE COURT'S ROLE IN EVALUATING AND DOCUMENTING ACTIVE EFFORTS

Case Law

Matter of Dependency of G.J.A., 197 Wn.2d 868, 489 P.3d 631 (2021).

"ICWA and WICWA require the dependency court to regularly inquire about and evaluate the Department's provision of active efforts." This evaluation must also be "**documented in detail in the record."** Although the Department bears the burden of demonstrating active efforts, "the dependency court has the responsibility to evaluate those efforts at every dependency proceeding where the child is placed out of the home. If the Department's actions are not sufficient, the court must direct the Department to do more before the case may proceed to termination."

"[B]ecause the dependency court must evaluate whether the Department made active efforts on the record at every hearing where the child is in out-of-home placement, a

preprinted checkbox [in the court order] is not dispositive and does not relieve the Department or the court of their burdens. The boilerplate language contained in the orders alone cannot meet the standard of a finding of active efforts." A parent's "counsel's signature on an order where the preprinted active efforts box is checked does not waive a parent's right to challenge the active efforts finding." Instead, "[a]s part of its duty to meaningfully evaluate the Department's efforts, the dependency court must make a clear record of those efforts underlying such a finding. "

ACTIVE EFFORTS CANNOT BE DETERMINED TO BE FUTILE

Case Law

Matter of Dependency of G.J.A., 197 Wn.2d 868, 489 P.3d 631 (2021).

The futility doctrine does not apply to cases governed by ICWA and WICWA. The active efforts element requires the Department prove active efforts and that "its efforts were *in fact* unsuccessful before it can be relieved of its duty."

"A parent's lack of engagement is relevant only insofar as the Department's burden to prove its efforts were unsuccessful. It does not excuse the Department from providing active efforts in the first place."

WHAT IS THE REMEDY IF THE ACTIVE EFFORTS ELEMENT APPLIES BUT IS NOT SATISFIED?

At the disposition hearing and hearings thereafter where the child is placed out-of-home, if the court is not satisfied that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful," the remedy is to return the child home unless doing so "would subject the child to a substantial and immediate danger or threat of such danger." 25 USC § 1920; RCW 13.38.160.

Case Law

Matter of Dependency of A.L.K., 196 Wn.2d 686, 703-04, 478 P.3d 63, 71-72 (2020).

A finding that the Department has not made active efforts does not affect the determination that the child is dependent.

Case Law

In cases like *Matter of Dependency of G.J.A.*, 197 Wn.2d 868, 489 P.3d 631 (2021).

Where the only issue is whether the Department has met the active efforts requirement during the course of an ongoing dependency and the parent agrees they are unable to safely take placement of the child, if "the Department has not provided active efforts, the dependency court must direct the Department to provide adequate active efforts

and give the parent additional time to complete services." 197 Wn.2d at 911-12. "A parent must have the opportunity to engage in and benefit from active efforts, and a termination petition cannot proceed until active efforts have been accomplished."

Case Law

Matter of Welfare of A.L.C., 8 Wn. App. 2d 864, 877, 439 P.3d 694, 701.

When a parent challenges whether removal of the child continues to be proper, the remedy for a failure to perform active efforts to prevent the breakup of the Indian family is to return the child home unless the court makes a new determination pursuant to 25 USC 1920 and RCW 13.38.160 that returning the child "would subject the child to substantial and immediate danger or threat of danger.