In re Dependency of G.M.W., ___ P.3d ___, 2022 WL 16548962 (Wash. Ct. App. Div. 1 Oct. 31, 2022)

- **Holdings:** The right to appointed counsel under ICWA does not arise until a parent appears in the child custody proceeding, requests counsel appointment, and establishes indigency; and the superior court's findings at several hearings that the state department satisfied federal and state law active-efforts requirement were supported by substantial evidence.
- **Summary:** In a lengthy decision, a divided three-judge court of appeals panel upheld a superior court's denial of a father's motion to vacate a default order of a child's dependency. Several issues, including two governed by the Indian Child Welfare Act and its Washington State counterpart, were presented: (1) whether the father had been properly served with notice of the dependency proceeding; (2) whether the father was entitled to appointed counsel at the proceeding's commencement; and (3) whether the trial court's findings that the department of children, youth and family had provided active efforts were supported by substantial evidence. The dissenting panel member parted ways with the majority on the first and third issues.

  In brief, the involved Indian child was born in January 2021 and tested positive for amphetamines and heroin resulting from the mother's drug use. The responsible social workers attempted without success to contact the father prior to a shelter care hearing eight days after birth during which the superior court held that the department has provided adequate hearing notice under Washington law and "that the Department had made reasonable efforts to prevent or eliminate the need for removal of the child from the child's home." On the same day but after the hearing, a social worker left a copy of the dependency petition, the summons and other pleadings with the child's maternal grandmother and mailed the same documents to the father at several addresses. Approximately a month later, the court conducted a dependency fact-finding hearing attended by neither parent after their having been advised that it would be held. It entered a default order of dependency following testimony concerning attempts to contact the father, including a successful one earlier in February during a non-court case conference, and the lack of any contact by the parents with the child. The court additionally found that the department has engaged in active efforts to prevent the family's breakup. A dispositional hearing took place in early March at which the court again found that adequate active efforts to prevent breakup had been made. In May, a dependency review hearing occurred where the father, now in custody for an alleged criminal offense, appeared and requested counsel appointment. He thereafter filed through counsel a motion to set aside the default order of dependency on the ground of insufficient service. The court denied the motion, finding the service compliant with the state statute because it had been made at "one of the father's usual abodes."

  The father appealed and raised the three issues identified above, the latter two of which had not been presented to the superior court. The first issue was resolved on the basis of Rev. Code Wash. § 4.28.080(16) that provides for substituted service and presented no Indian law-related question. As for the right to appointed counsel, the panel relied upon its reading on 25 U.S.C. § 1912(b) under which "[i]n any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding" where the court finds "that such appointment is in the best interest of the child." The Washington

ICWA has a comparable section. It "conclude[d] that the statutory right to appointed counsel in an ICWA or WICWA dependency proceeding does not attach until the parent appears in the proceeding, seeks the appointment of counsel, and establishes indigency." But, here, "[b]ecause the father did not appear until after the court had entered the default dependency order and there was no opportunity for the court to make an indigency determination or for counsel to consult as to the father's wishes until that time, the trial court did not violate ICWA or WICWA in failing to sua sponte appoint counsel to represent the father at the commencement of the dependency."

The majority next held that substantial evidence supported the superior court's "active efforts findings at the dependency hearing, the disposition hearing, and the first dependency review hearing." On this score, it pointed to the social worker's efforts "to establish a working relationship with [the parents] and to help them obtain substance abuse treatment, a mental health assessment, and parenting instruction. She made multiple attempts to engage both parents in services, via text, e-mail, Facebook, and telephone." The panel added that "[t]he Department engaged the [mother's] Tribe in every decision made regarding G.M.W.'s placement after discharge [from hospitalization]."

The dissent disagreed with the majority on the applicable Washington service requirements, arguing that "the Department did not personally serve the father as mandated by RCW 13.34.070(8) despite knowing his probable location three days prior to filing the dependency petition" and that "the Department relied on the mother, another party in the proceedings, to provide service to the father in violation of RCW 13.34.070(9)." The dissent deemed the majority's active efforts analysis misfocused temporally:

> Relevant is the timing of the Department's efforts. The question before us is whether the Department engaged in active efforts prior to the court entering a default order of dependency and default judgment in February. The fact that the Department reached the father in April at Hulbush Lane and provided a phone with minutes, fully charged, activated, and preprogrammed with relevant contact information begs the question of why the Department did not make such efforts prior to the entry of the default dependency order.

It observed later that "[a]side from the case conference where the parents appeared by telephone, the Department never established contact with the father prior to the entry of the default order and its attempts at doing so were limited to mailings, messaging via Facebook, and hoping to reach the father through the mother."

- **Relevant (2022) Deskbook Sections:** 13:24 n.4; 13:27 n.2