State ex rel. Children, Youth & Families Dep't v. James M., 2022-NMCA-___, ___P.3d ___, 2022 WL 4475937 (Sept. 26, 2022)

- **Holdings:** District court properly applied the clear-and-convincing-evidence standard in determining that a father neglected his children under state law but erred in finding that the state department satisfied the ICWA "active efforts" requirement.
- **Summary:** The district court terminated the parental rights of a mother and father to three Indian children. In an "adjudicatory" hearing concerning whether the children were abused or neglected, the court found with respect to the father that, "by clear and convincing evidence, that Father had neglected Children, pursuant to [N.M. Stat. §] 32A-4-2(G)(2) (defining a 'neglected child' to mean a parent's inability to provide adequate care because of the parent's faults or habits)." It applied the same evidentiary standard in also finding during the hearing "that continued custody of Children by Father was 'likely to result in serious emotional or physical damage' to Children, a finding required by [the Indian Child Welfare Act], 25 U.S.C. § 1912(e), because he had placed Children at risk by leaving them with Mother, knowing Mother was drinking and using drugs." The court further held that the responsible state department had provided "active efforts" to prevent the family's breakup as required under 25 U.S.C. § 1912(d). The father appealed, arguing that the trial should have applied the "beyond a reasonable doubt standard" as to the state-law "neglect" determination and that the department had not satisfied the "active efforts" requirement.

  The court of appeals reversed the termination order, concluding that the district court had applied the correct evidentiary standard in deeming the children neglected but that the state department had not engaged in adequate "active efforts." The first issue received brief analysis because its resolution was governed by a prior case, "*State ex rel. Children, Youth & Families Department v. Maisie Y.*, 2021-NMCA-023, 489 P.3d 964, [where] we held that the state law requirement that the district court find abuse or neglect 'on the basis of clear and convincing evidence,' § 32A-4-20(H), applies to adjudicatory proceedings concerning an Indian child."

  As to the active-efforts issue, the panel's analysis was longer and factually detailed. Here, the department's task in providing reunification services was made more difficult because the father's work required his presence outside New Mexico for much of the relevant period, but the panel gave little weight to that difficulty. One paragraph itemized the defects that it perceived in the delivery of such services:

  > The undisputed evidence showed that CYFD (1) had not provided active assistance in obtaining services for Father, (2) had not developed or proposed alternative ways of meeting Father's need for parenting classes in light of his difficulty with computer technology, (3) had not facilitated in-person visits with Children, (4) had not monitored Father's progress, (5) provided no assistance to Father in obtaining appropriate housing for him and Children, and (6) did not assess either the home Father ultimately found without CYFD assistance prior to the termination of his parental rights, or Father's ability to care for Children in his North Dakota home without creating a likelihood of serious emotional or physical damage to Children. CYFD's efforts to assist Father in North Dakota, where he lived for eight months before the TPR hearing, were limited to calling that state's child protective agency to obtain referral lists to give to Father. Merely providing a referral list and instructing the parent to contact the providers and arrange services

> and provide their own progress reports—the primary effort CYFD made in this case—have been held by both our Supreme Court and this Court to be insufficient to satisfy the "active efforts" requirement of ICWA.

The panel, moreover, specifically rejected the department's "suggest[ion] that it is excused from making active efforts to assist Father because he was not living in New Mexico" with the response that "[l]iving in another state does not excuse CYFD's failure to follow both federal and New Mexico law in a termination of parental rights proceeding any more than it excuses CYFD from assisting a parent who is living in another country."

The court's disposition directed the department to begin anew:

> We remand to the district court with direction to require CYFD to promptly assess both Father's home and his ability to care for Children without a likelihood of serious emotional or physical damage to Children and to initiate active efforts to transition Children to Father's care. If circumstances amounting to neglect or abuse under the [subsequently enacted] New Mexico [Indian Child Protection Act] are found, such that return to Father's custody would likely result in serious emotional or physical damage to Children, CYFD may file a new petition for neglect or abuse, and comply in such proceedings with the New Mexico ICPA.

- **Relevant (2022) Deskbook Section:** 13:24 n.4