People in Interest of C.H., 2021 S.D. 41, 962 N.W.2d 632 (2021)

- **Holding:** Trial court erred in determining that the state social services department had engaged in active efforts, as required by the Indian Child Welfare Act, to prevent the breakup of an Indian family.
- **Summary:** The state department of social services commenced a proceeding in October 2018 alleging that an Indian child was abused or neglected. The child's mother is a member of the Lower Brule Sioux Tribe, and the child is eligible for membership in the Tribe. The mother suffered from unresolved mental health needs and drug addiction. The state department provided various services to the parents until December 2019 when the circuit court "ordered ... that 'no further efforts be made by the Department of Social Services to reunite [C.H.] with' Mother or Father." It is undisputed that between that order and final dispositional hearing in September 2020 no such efforts were made. At that hearing, the state ICWA expert "opined that based on his review of the information provided to him by the State, including DSS's reports, it would be detrimental for C.H. to remain in the custody of her parents." However, a board-certified behavioral analyst (Walton) testified that the mother had made progress in various areas, including cessation of any perceived drug or alcohol use, and that she would give the mother "another six months, but that it could take less time as Mother 'is very motivated to get [C.H.] back[.]'" Moreover, "[w]hen asked whether Walton had tried to communicate Mother's progress to DSS, Walton replied that she had, but that DSS made 'no attempt to further contact [Mother.]' According to Walton, '[t]here was a lot of resistance and a lot of desire to continue to terminate [Mother's] parental rights.'" The trial court later issued a decision determining beyond a reasonable doubt that the department had engaged in active efforts to prevent the family's breakup, as required by ICWA, and that termination of the mother's parental rights "was the least restrictive alternative commensurate with C.H.'s best interests." The mother appealed, arguing in part that the court "erred in concluding that '[a]ppropriate services to the family have failed' and that Mother 'failed to follow the recommendation of the Department of Social Services.'"

  The supreme court reversed and remanded for further proceedings consistent with ICWA and relevant state statutes. It focused on the circuit court's determination that ICWA's active efforts requirement had been satisfied. The court began by pointing out that "it is undisputed that DSS ceased providing any efforts toward reunification after the December 2019 hearing. This means that from December 2019 to September 2020 *no efforts* were made by DSS to provide Mother remedial services or rehabilitative programs and *no efforts* were made to reunite C.H. with Mother." Thus, "[t]he circuit court's finding of fact to the contrary—that DSS 'has been providing active efforts to this family since October 2, 2018; including in-home services to prevent placement, and ongoing services to allow safe return of the child to no avail'—is not supported by the record." But beyond that factual error, the analysis below misapprehended the applicable active-efforts standard:

  > [T]his Court has held that the active efforts requirement under ICWA imposes a heightened responsibility on DSS. ... Therefore, DSS cannot simply give a parent a case plan and wait for the parent to complete the plan. ... As one court explained, "[t]he client should not be required to develop his or her own resources toward bringing the plan to fruition." ... Rather, active efforts require that DSS take the parent through the steps of the case plan to prepare the parent for reunification.

This level of effort was absent here:

> [T]he record reveals that the circuit court ordered in December 2019 that DSS cease all efforts toward reunification. Thereafter, Mother's existing counselor and her lawyer facilitated Mother's efforts to work with a behavioral analyst in an effort to develop the skills necessary to parent C.H. DSS did not direct Mother toward any further services or programs, let alone make active efforts to aid her in developing the resources necessary to satisfy the case plan between December 2019 and the dispositional hearing in September 2020. Additionally, DSS did not facilitate any visits between Mother and C.H. after December 2019.

The court next explained that "as a result of the circuit court's order directing that DSS make no further efforts despite the continuation of the dispositional hearing, neither the State nor DSS had any knowledge about what had transpired with Mother in the nine months leading up to the hearing." In sum, "this is a unique case involving the cessation of active efforts by DSS some nine months prior to the dispositional hearing despite Mother's ongoing work with counselors on her own accord, and a clearly erroneous finding by the circuit court that DSS had been providing active efforts toward reunification since October 2, 2018."

Finally, the court took "this opportunity to address additional errors that occurred below to prevent their reoccurrence." First was the circuit court's failure to appoint counsel to represent C.H.'s interests. Second were other "glaring defects involving ICWA mandates" such as the ICWA qualified expert's testimony that continued custody by the mother would be "detrimental" to the child—as opposed to testimony that continued custody would likely result in serious emotional or physical damage to the child. *See* 25 U.S.C. § 1912(f). Third, the circuit court was admonished to enter more detailed findings concerning "whether termination of Mother's parental rights is the least restrictive alternative commensurate with C.H.'s best interests"—a required state-law parental-rights-termination determination—if that issue again arises on remand.

- **Relevant (2020) Deskbook Section:** 13:24 n.10