CENTER ON HEALTH AND FAMILIES

A UNIFIED STANDARD:

Ensuring All Children Are Given Active Efforts for Prevention and Reunification

WRITTEN BY
Andrew Brown and Nicholas Armstrong
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A UNIFIED STANDARD: ENSURING ALL CHILDREN ARE GIVEN ACTIVE EFFORTS FOR PREVENTION AND REUNIFICATION

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KEY POINTS

- **Under current law,** CPS applies active efforts or reasonable efforts depending on whether a child qualifies as a member of a Native American tribe, effectively creating a two-tiered system of justice.
- **Case law shows** that active efforts is a higher standard than reasonable efforts because it brings more resources to bear to achieve family preservation and reunification.
- **In both state and federal law,** active efforts is better defined, in turn providing CPS caseworkers with greater guidance and accountability for serving families at risk of separation.

EXECUTIVE SUMMARY

Federal and Texas law require Child Protective Services (CPS) to make reasonable efforts to prevent the removal of a child into foster care or to reunify a child placed in foster care with their family. Despite this standard, neither the federal government nor Texas has a clear definition of what constitutes reasonable efforts. This obscurity has given courts broad discretion in determining if reasonable efforts have been made. For Native American children, the standard is raised from reasonable efforts to active efforts under the Indian Child Welfare Act (ICWA). Courts across the United States have found that child protective services must provide more services to families involved with the agency under the active efforts standard than are required under reasonable efforts. This research paper compares the active and reasonable efforts standards and proposes legislative reforms to provide a uniform standard and well-defined actions that CPS must take to prevent foster care entry and achieve family reunification.

INTRODUCTION

The United States Supreme Court and Texas Supreme Court have both recognized that the Due Process Clause of the U.S. Constitution and the Due Course of Law Clause of the Texas Constitution guarantees parents a fundamental right to raise their child free of government interference. In *Troxel v. Granville,* the Supreme Court stated, "The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court" (2000). Likewise, the Texas Supreme Court recognized, "'[t]he presumption that the best interest of the child is served by awarding custody to [a] parent is deeply embedded in Texas law'" (*In re C.J.C.*, 2020). It is well-established that absent a compelling interest, government cannot separate families or otherwise interfere in the private realm of the family. The child welfare system exists to protect children who have been abused, neglected, or are in immediate danger

at home. However, intervention by CPS is subject to constitutional and legal protections for the fundamental rights of families. In cases where CPS is involved with a family due to an identified risk, the primary goal of child welfare intervention is to ensure the safety of the child and pursue reunification of the family through supportive services.

The body of research on child removal suggests that forcibly separating a child from their family has a "profound effect on the child and family once a child is removed from the home…that cannot be undone" (Department of Health and Human Services, 2000, p. 4052). Children who are removed from their families and enter the foster care system are more likely to experience negative outcomes later in life, such as economic struggles, juvenile delinquency, homelessness, and substance abuse (Brown, 2020, p. 3; Lawrence et al., 2006, pp. 71-72; Mitchell & Kuczynski, 2010, pp. 437, 442-443). Adolescents are no exception. Salazar et. al., found that 17- and 18-year-olds in foster care met the diagnostic criteria for PTSD at higher rates than the general youth population (2012). With this in mind, the goal of effective child welfare policy should be to protect families from unwarranted removal of their child by granting procedural safeguards to make foster care placement and termination of parental rights as last resort options. In the event that removal is necessary, states should prioritize efforts that minimize the amount of time children spend in foster care and reunite them with their families as quickly and safely as possible.

One way that federal policy promotes family reunification is by requiring state child welfare agencies to take certain actions to prevent removal into foster care and incentivize successful family reunification. The Adoption and Safe Families Act (ASFA) and the Indian Child Welfare Act (ICWA) are two key federal laws that set minimum standards for state CPS agencies and state courts to follow when handling cases of alleged abuse or neglect. Both laws require state CPS to make efforts to prevent the removal of children into foster care as well as reunite children removed into foster care with their families. However, the efforts that must be made under ICWA and ASFA are different, with ICWA requiring "active efforts" and ASFA requiring "reasonable efforts". Case law on the state level regularly concludes that the active efforts standard applied in ICWA cases is more stringent than reasonable efforts, which some critics argue effectively creates a two-tiered system that treats children differently based solely on their racial or ethnic background. This paper will examine the differences between the active efforts and reasonable efforts standards, how they are applied by state CPS agencies and courts, and propose reforms that would align both standards to ensure that all children and families are treated equally under the law.

LEGISLATIVE HISTORY – ICWA AND ASFA

In 1978, Congress found that Native children were being separated from their families and placed outside their homes at a disproportionate rate compared to other groups (Committee on Interior and Insular Affairs, 1978, p. 9). In response to this report, Congress passed ICWA to address the high number of separations involving Native American and Native Alaskan families. ICWA establishes federal guidelines for child removal proceedings involving Native American children. Among the guidelines established by ICWA is a requirement that states engage in active efforts to prevent removals of children into foster care and achieve the successful reunification of children removed into foster care with their natural families. Seventeen states, specifically those with high Native American populations, have codified ICWA (or similar standards) into their state law (Tiano, 2023). Proponents of ICWA describe the Act as being the "gold standard" for child welfare practice (Casey Family Programs, 2022). Prior to ICWA, the removal rate for Native American children was between 25% and 35%. Since the enactment of ICWA and the active efforts standard, Native American children are now only three times more likely than other children to be removed from their home (National Indian Child Welfare Association, 2015, p. 1). Although this removal rate reflects that Native American children remain more likely to be removed than non-Native children, it is worth noting that improvements have been made in the years since ICWA was enacted.

ICWA is not without controversy or criticism. In *Haaland v. Brackeen* (2023), the Supreme Court upheld the constitutionality of ICWA against a challenge that the law "exceeds federal authority, infringes on state sovereignty, and discriminates on the basis of race" (p. 2). In briefs submitted to the Supreme Court and in oral arguments, however, arguments were raised regarding procedures under ICWA. Proponents of ICWA cite evidence supporting its strong commitment to maintaining family and kinship ties, along with more proactive measures caseworkers take lead to higher rates of reunification (Casey Family Programs, et. al., 2021, p. 28). Furthermore, proponents cite evidence supporting ICWA's focus on equipping families to prevent removal via active efforts and avoiding "rescuing children" from "unfit" parents and placing them in other homes (Casey Family Programs, et. al., 2021, p. 23).

Opponents of ICWA argue that Native American children are at an increased risk of extended stays in foster care or "aging out" of the system entirely due to the restraints put in place by ICWA. Once it is determined that a child is eligible for tribal membership, tribal authorities can choose to intervene on the child's behalf, regardless of whether the child has had any interaction with their Native culture (Goldwater Institute, et al., 2021, pp. 23-24). They claim that ICWA creates a separate test for Native children that bars parents from taking action to protect the best interest of their child (Goldwater Institute, et al., 2021, pp. 17-18).

Cases involving non-Native children are governed by a different set of federal laws, most notably the Adoption and Safe Families Act (ASFA). This landmark piece of legislation was enacted in November 1997 in response to the increasing number of children entering foster care, and was aimed at alleviating growing concerns about the safety of children who were being reunited with their families (Congressional Research Service, 2004, p. 1). ASFA made extensive changes to Titles IV-B and IV-E of the Social Security Act, which are the primary sources of federal funds distributed to states for providing child welfare services (p. 2). An earlier law, the Adoption Assistance and Child Welfare Act of 1980 (AACWA) established many of the provisions amended by ASFA and introduced the concept of reasonable efforts into child welfare practice. Under AACWA, states were eligible for federal reimbursement of costs associated with providing foster care services if they had an approved plan by the Secretary of Health, Education, and Welfare. Approved plans must provide "reasonable efforts… to prevent or eliminate the need for removal of the child from his home and to make it possible for the child to return to his home" (H.R. 3434, 1980). AFSA also required states to meet this standard in order to claim Title IV-E reimbursement (45 CFR §1356.21 (b)(2)(ii)). If a court finds that efforts made by CPS do not meet the reasonable efforts standard the child is ineligible for foster care maintenance payments for the duration of their stay in foster care, thus shrinking the amount of money states receive from the federal government (45 CFR §1356.21(b)(1)(ii)).

Key to eligibility for reimbursement under Title IV-E is a court finding that the state CPS agency complied with the reasonable efforts standard in each individual case. However, neither ASFA nor AACWA provide a definition for reasonable efforts, thus leaving interpretation up to state courts and federal regulations. During the initial rulemaking process following the enactment of ASFA, stakeholders in the child welfare field recommended that the U.S. Department of Health and Human Services (HHS) develop a clear definition. However, HHS declined to do so, stating that "any regulatory definition would either limit the courts' ability to make decisions on a case-by-case basis or be so broad as to be ineffective" (Department of Health and Human Services, 1998). Although preserving flexibility for states to apply the reasonable efforts standard on a case-by-case basis to account for the unique factors at play in individual case is essential, the lack of a baseline definition has led to a wide variance in its interpretation among states, as well as confusion as to what efforts are sufficient to meet the standard.

ACTIVE EFFORTS VS. REASONABLE EFFORTS

Since a definition for reasonable efforts was not included in ASFA, and since HHS declined to define the term through rulemaking, it is up to state courts and legislatures to interpret the standard and distinguish it from the active efforts requirement under ICWA. In contrast, the Bureau of Indian Affairs (BIA) provided detailed guidance on applying active efforts noting that "active efforts are intended primarily to maintain and reunite and Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act" (Bureau of Indian Affairs, 2015). Such efforts include:

(1) Engaging the Indian child, the Indian child's parents, the Indian child's extended family members, and the Indian child's custodian(s);

(2) Taking steps necessary to keep siblings together;

(3) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(4) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate;

(5) Conducting or causing to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement;

(6) Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards;

(7) Offering and employing all available and culturally appropriate family preservation strategies;

(8) Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(9) Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;

(10) Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;

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

(12) Monitoring progress and participation in services;

(13) Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;

(14) Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and

(15) Providing post-reunification services and monitoring.

In applying this guidance, several states have either codified active efforts standards or interpreted them through case law. New Mexico's Indian Family Protection Act, for example, borrows the "affirmative, active, thorough and timely" framing of "active efforts" from the Bureau of Indian Affairs' guidance, and recognizes that the standard requires "a higher

standard of conduct than reasonable efforts" (HB 135, 2022). Oregon's Department of Human Services likewise recognizes that "active efforts require a higher standard of conduct than reasonable efforts" (Chapter 413, 413-115-0060), and Iowa law maintains that reasonable efforts "shall not be construed to be active efforts" (Iowa Indian Child Welfare Act, 2003, Sec. 232B.5 (19)). For foster care placement or termination of parental rights, Iowa courts cannot issue orders unless it is shown there was a "vigorous and concerted level of casework beyond the level that typically constitutes reasonable efforts" (Iowa Indian Child Welfare Act, 2003, Sec. 232B.5 (19)). Appellate courts have similarly differentiated between active and reasonable efforts. In the decision of *In re Nicole B.*, the Maryland Court of Appeals found that "the 'active efforts' standard [of the ICWA] requires more effort than 'reasonable efforts' standard does" (2007). In Michigan, their Supreme Court found that "'active efforts" require more than the "reasonable efforts" required under state law" (*In re JL*, 2009).

Even so, there are two states that view active and reasonable efforts as synonymous: California and Colorado. The Colorado Court of Appeals found that "'Active efforts' are equivalent to reasonable efforts to provide or offer a treatment plan in a non-ICWA case and must be tailored to the circumstances of the case" (*People ex. Rel. K.D,* 2007). California determined that when a court decides whether active efforts and "reasonable services" (reasonable efforts) were provided to families, the two are "essentially undifferentiable" (*In re Michael G.*, 1998).

The key question the state must answer is whether the agency provided enough effort to either prevent the removal of the child or reunify the family as outlined by the case plan. The case plan is the document provided to parents by CPS that defines the actions required by the parents for the child to be safely returned home. The court must be provided with a list of actions taken by CPS for the latter to meet either the active or reasonable efforts requirement. As previously noted, it is generally (though not universally) understood by courts that the two standards differ when it comes to executing the case plan. The National Indian Law Library explains a key difference between the two standards stating that active efforts "engage the family" when completing the case plan, while reasonable efforts only offer "referrals to the family, and leave it to them to seek out assistance" (n.d.). The Oregon Court of Appeals further differentiates between these two standards, explaining that the active efforts standard is "an obligation greater than simply creating a reunification plan and requiring the client to execute it independently" (*State ex rel Juv. Dept. v. T.N.,* 2009). Instead, CPS must "assist the client through the steps of a reunification" (*State ex rel Juv. Dept. v. T.N.,* 2009). Likewise, the BIA describes active efforts as "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" (Indian Child Welfare Act, 1994, Section 23.2). In summary, the courts decided that active efforts are the specific actions the caseworkers or agency took consistent with the regulations provided as to whether active efforts have been provided.

An Oregon case, *In re A.W.*, provides a stark example of the differences between the active efforts and reasonable efforts standards and how their application can result in vastly different outcomes for similarly situated children, based on little more than their racial and ethnic status. In this specific case, the mother and father had one child (called A.) before ending their relationship. The mother also had a previous child before their relationship (called J.). Even though the two children had the same mother, the standard of removal differed because the father of A. was Comanche, which qualified A. for membership in the Comanche Nation and thus required the application of ICWA. The court recognized the difference in its opinion and observed that ICWA requirements meant that DHS must "do more to attempt to reunify A. with his parents than it must do to reunify J. with mother" (*In re A.W.*, 2012, p. 1240). Ultimately, the court concluded that the reasonable efforts standard was met for J. because the same reunification services were provided to both A. and J., which in turn met the higher active efforts standard (*In re A.W.*, 2012, p. 1242). It is worth noting that under

current law, since J. did not qualify for membership in a Native American tribe, fewer services could have been offered to J. and it would have sufficed the reasonable efforts standard. In short, CPS was not required to provide J. with the same level of services it provided to A. due to reasonable efforts being a less stringent standard.

Numerous appellate decisions have detailed the specific actions taken by caseworkers to meet the active efforts standard. In a 2017 decision by the Kansas Court of Appeals, the court listed all the efforts made by the state to prevent the breakup of the family, including:

(1) tribal participation in the creation of the case plan

(2) family members who were members of the tribe participated in the case plan

(3) the case worker regularly met with the family members and children

(4) the cultural tradition of placing children with maternal relatives was followed as instructed by a qualified witness

(5) visits with the parents were facilitated on the basis that the parents passed a drug test, but the parents only showed up once and

(6) the agency provided therapy to the child (*In re L.M.B.*, 2017, pg. 25)

Likewise, an appellate court in Oregon found the active efforts requirement was fulfilled after the caseworker:

(1) scheduled appointments with psychologists

(2) issued gas vouchers

(3) actively searched for relative placement and

(4) worked with the Cherokee tribe to enroll the child in the tribe when the mother was suffering from severe mental illness (*In re S.A.D.*, 2014)

In contrast to the active efforts standard, the reasonable efforts standard is a more nebulous concept that state courts and child protection agencies often struggle to apply consistently. HHS has provided basic guidance regarding what a court may consider when determining if reasonable efforts have been made, but these considerations are not legally binding. Some of these considerations ask:

(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? (Department of Health and Human Services, 1998)

Similarly, state courts have written about the challenge of applying reasonable efforts due to the lack of a clear and uniform definition guiding its application. One court observed:

The question of what constitutes "reasonable services" is one which cannot be answered by a definitive statement. Instead, it must be answered on the basis of any given factual situation, for it is clear that services which might be reasonable in one set of circumstances would not be reasonable in a different set of circumstances. (*In the Matter of Myers*, Ind. App. 1981)

As for state law, such a definition is either sparse or missing entirely. Some states have chosen to echo the federal standard, while others (like Arkansas) have established their own definitions of what qualifies as reasonable efforts. Arkansas' code includes a list of services that CPS may offer parents to satisfy the reasonable efforts requirement. These services include:

(i) Childcare;

(ii) Homemaker services;

(iii) Crisis counseling;

(iv) Cash assistance;

(v) Transportation;

(vi) Family therapy;

(vii) Physical, psychiatric, or psychological evaluation;

(viii) Counseling;

(ix) Treatment; or

(x) Post-adoptive services (Ark. Code Ann. Section 9-27-303).

The subjectivity of reasonable efforts results in judges having a great deal of discretion in how they make their decisions. Although judicial discretion provides beneficial flexibility for courts to tailor their determinations to the unique facts of individual cases, it can also cause confusion and inconsistency in applying the reasonable efforts requirement.

For example, a Michigan trial court terminated a mother's parental rights after finding that CPS satisfied the reasonable efforts standard. Although the Michigan Supreme Court upheld the termination, Chief Justice Bridget M. McCormack pointed out in a dissenting opinion how the subjectivity of the reasonable efforts standard can result in unjust outcomes. According to Chief Justice McCormack, the trial court terminated the mother's parental rights because of "her ongoing efforts to manage her mental health" and the fact she drove to court on a suspended license (*In re G.M. Dixson*, 2022, p. 6). Despite the mother making well-documented changes in her behavior, voicing a desire to be involved in her daughter's life, and the daughter wanting the mother to be a part of hers, the trial court still ordered termination (*In re G.M. Dixson*, 2022, p. 3). The Chief Justice criticized the trial court and the department for disregarding the "substantial progress the responded-mother had made toward rectifying the conditions that led to court involvement in her family" and failing to consider another course of action besides custody or termination (*In re G.M. Dixson*, 2022, pp. 6-7). The Chief Justice observed that the court wanted a "perfect parent" instead of a "reasonable parent" (*In re G.M. Dixson*, 2022, p. 7). Perfection is not required because it's unattainable—there is no such thing as a perfect parent. The goal is for the parent to be willing and able to provide a safe, stable environment for the child. The judge in this case was arguing that the lower courts were holding the mother to an impossible standard for anyone to meet.

Texas is no exception when it comes to lacking a standard definition for reasonable efforts. Despite using the term 19 times in Section 262 of the Family Code, Texas does not define it once. There are no lists of services, classes, or resources mentioned that the Department of Family and Protective Services (DFPS) must offer parents to satisfy the reasonable efforts standard. The closest guidance provided is found in Texas Family Code § 262.001(b), which states "[i]n determining the reasonable efforts that are required to be made with respect to preventing or eliminating the need to remove a child from the child's home or to make it possible to return a child to the child's home, the child's health and safety is the paramount concern." Until recently, there was no requirement for DFPS to prove to the court what exact actions it took to satisfy the reasonable efforts standard. Fortunately, Texas rectified this problem in 2023 by passing HB 1087, which legally requires DFPS to describe the actions it took to prevent the removal of the child from his or her family (HB 1087, 2023). In

their *Child and Family Services Review*, DFPS noticed that policy changes like HB 1087 have contributed to a "decreased removal rate" in the state (Texas Department of Family and Protective Services, 2024, p. 21).

With respect to applying the ICWA active efforts standard, Texas case law provides some guidance on actions taken by the state that would satisfy the requirement. As previously mentioned, the BIA defined what efforts count as active efforts. While federal regulations are not legally binding in Texas courts, courts regularly consult the regulations and guidelines when applying ICWA (*S.B., J.B., and C.C. v. Texas Department of Family and Protective Services*, No. 03-22-00156-CV (Tex. App.—Austin, 2022) (citing *S.P. v. Texas Dep't of Family & Protective Servs.*, No. 03-17-00698-CV at *3 (Tex. App.—Austin, 2017)). For example, in *In re C.J.B.,* the Texas Court of Appeals for the 14th District found that DFPS followed the preferential treatment structure outlined by ICWA, contacted eligible kin, provided therapeutic services to the parents, and provided expert witness testimony that the children would continue to be in danger if they stayed with their parents (*In re C.J.B.*, 2023). According to the court, these efforts were sufficient to satisfy ICWA's active efforts requirement. Similarly, the Texas Court of Appeals for the 3rd District found that DFPS provided a comprehensive evaluation of the family's needs, monitored the parents' progress, sought out family members for foster care placement, and obtained expert witness testimony confirming "the Department has made active efforts" (*S.B. v. Tex. Dept of Family & Protective Servs*, 2022).

Though Texas courts look to ICWA and federal regulations for guidance regarding the application of active efforts, there remains division within the state courts over who decides the termination of parental rights for cases involving Native American children: the ICWA or the Texas Family Code.

Under ICWA, parental rights can only be terminated if there is "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses" that prove that continued custody of the child by the parent will likely result in further damage to the child (S. 1214, 1978). This is a higher standard to meet than the "clear and convincing" standard used in Section 161.001(b) in the Texas Family Code. In a 2001 decision by the Texas Court of Appeals for the 14th District, the court concluded that the Texas Family Code and ICWA cannot be applied simultaneously in child welfare cases because ICWA supersedes the Texas Family Code, and thus courts should only use the ICWA standard when ICWA applies (*In re W.D.H.*, 2001). However, multiple Texas courts have disagreed with its interpretation. In the case *In re J.L.C.*, the Texas Court of Appeals for the 7th District found that DFPS must satisfy both the Texas Family Code and ICWA standards to terminate parental rights (*In re J.L.C.*, 2018). The Texas Court of Appeals for the 10th District similarly ruled that ICWA does not supersede Texas Family Code, and stated that both statutes afford additional protection for Indian children since DFPS must satisfy federal and state requirements to terminate parental rights (*In re G.C.*, 2015). The Texas Court of Appeals for the 12th District found that Congress did not expressly state that ICWA supersedes state law, and based upon its reading, "disagree that the family code cannot be read in harmony with ICWA" (*In re Interest of K.S.*, 2014).

The cases discussed above are only a few examples of the countless difficulties inherent in applying both the active and reasonable efforts standards in child welfare cases. Clarity and consistency are vital to safeguard the fundamental rights of families and to ensure that children are afforded the best opportunity to find the safety and stability that can only be provided by family.

RECOMMENDATIONS

- DFPS should apply the active efforts standard as articulated in ICWA to all cases, not just those involving Native American children.

- The Legislature should amend the Texas Family Code to include a more definitive list of efforts DFPS caseworkers must offer parents with regards to case plans.

- Courts should be required to detail the specific efforts undertaken by DFPS that satisfy the active efforts requirement in any order relating to the removal or reunification of a child.

- DFPS should prioritize in-home family preservation services and utilize kindship placement in lieu of foster care whenever possible in those cases where children cannot safely remain at home.

- Families should be guaranteed the right of counsel when child protection agencies file to remove a child from their home.

CONCLUSION

Child welfare cases are among the most difficult cases handled by courts because each case is as unique as the individual families and circumstances involved. Nevertheless, there is more that states can do to raise the quality of services provided to preserve and reunite families. The Texas Legislature can advance this goal by providing more clarity and guidance on the efforts that Department of Family and Protective Services caseworkers must make when serving families. This starts by recognizing that having one set of standards applicable to Native American children and another applicable to non-Native children effectively creates a two-tiered justice system. Acknowledging this disparity, Texas should amend the Family Code to require DFPS to apply ICWA's active efforts standard to every child—regardless of racial or ethnic background—who is facing foster case placement or removal. By doing so, Texas will improve the quality of services intended to preserve and reunite families, as well as reduce the number of children entering foster care and minimize the amount of time children spend in foster care. Enacting a single, uniform standard that meets the requirements of ICWA will promote the Legislature's goals of protecting children from unwarranted removal from their parents and keeping foster care placement and termination of parental rights as last resort options.■

REFERENCES

Application of the Indian Child Welfare Act, Oregon. Stat. §413, 413-115-0060 (2020). https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=1881

Arkansas Code § 9-27-303 (2020). https://casetext.com/statute/arkansas-code-of-1987/title-9-family-law/subtitle-3-minors/chapter-27-juvenile-courts-and-proceedings/subchapter-3-arkansas-juvenile-code/section-9-27-303-definitions

Brief for the Casey Family Programs, et. al. as Amici Curiae, Haaland v. Brackeen, 599 U.S. (2023). https://www.supremecourt.gov/DocketPDF/21/21-376/195931/20211008140343477_Casey%20Cert%20Amicus-Final.pdf

Brief for the Goldwater Institute, et. al. as Amici Curiae, Haaland v. Brackeen, 599 U.S. (2023). https://www.supremecourt.gov/DocketPDF/21/21-376/195902/20211008131119928_Brackeen%20Amicus%20Brief.pdf

Brown, A. (2020). *The long and winding road: Improving outcomes for children through CPS court reform*. Texas Public Policy Foundation. https://www.texaspolicy.com/wp-content/uploads/2020/10/Brown-CPS-Court-Reform.pdf

Casey Family Programs. (2022, April 1). *How can child welfare systems apply the principles of the Indian Child Welfare Act as the "gold standard" for all children?* https://www.casey.org/icwa-gold-standard/

Congressional Research Service. (2004, November 8). *Child welfare: Implementation of the Adoption and Safe Families Act*. https://www.everycrsreport.com/files/20041108_RL30759_96784ee8d3d99882a9c887e9da08de67ee99e872.pdf

Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146-10159. (February 25, 2015). https://www.govinfo.gov/content/pkg/FR-2015-02-25/pdf/2015-03925.pdf

Haaland v. Brackeen, 599 U.S. (2023). https://supreme.justia.com/cases/federal/us/599/21-376/case.pdf

HB 135. Passed. 55th New Mexico Legislature. Second Session. (2022). https://www.nmlegis.gov/Sessions/22%20Regular/bills/house/HB0135.PDF

HB 1087. Enrolled. 88th Texas Legislature. Regular. (2023). https://capitol.texas.gov/tlodocs/88R/billtext/html/HB01087I.htm

H.R. 12533 No. 1386, (1978). Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and For Other Purposes. https://www.narf.org/nill/documents/icwa/federal/lh/hr1386.pdf

H.R. 3434. Adoption Assistance and Child Welfare Act of 1980. 96th Congress. (1980). https://www.congress.gov/bill/96th-congress/house-bill/3434

Indian Child Welfare Act, 25 C.F.R. § 23.2 (1994). https://www.ecfr.gov/current/title-25/chapter-I/subchapter-D/part-23

In re A.W., 284 P.3d 1233 (Or. App. 2012). https://casetext.com/case/dept-of-human-servs-v-dlh-in-re-aw-1

In re C.J.B., (Tex. 2023). https://caselaw.findlaw.com/court/tx-court-of-appeals/115071684.html#footnote_2

In re C.J.C., 603 S.W.3d 804 (Tex. 2020). https://casetext.com/case/in-re-cjc-9

In re G.C., No. 10-15-00128-CV (Tex. App. 2015). https://casetext.com/case/in-re-gc-24

In re G.M. Dixson, (Mich. 2022). https://www.courts.michigan.gov/siteassets/case-documents/uploads/SCT/PUBLIC/ORDERS/164625_64_01.pdf

In re Interest of K.S., 448 S.W.3d 521 (Tex. App. 2014). https://casetext.com/case/in-re-interest-of-ks-6

In re JL, 770 N.W.2d 853 (Mich. 2009). https://www.courtlistener.com/opinion/836443/in-re-jl/

In re J.L.C., 582 S.W.3d 421 (Tex. App. 2018). https://casetext.com/case/in-re-j-lc-8

In re Kristen B., 558 A.2d 200 (R.I. 1989). https://casetext.com/case/in-re-kristen-b-2#p204

In re L.M.B., No. 116,155, No. 116,156, No. 116,157, No. 116,158, No. 116,159, No. 116,160 (Kas. App. 2017). https://www.kscourts.org/KSCourts/media/KsCourts/Opinions/116155.pdf?ext=.pdf

In re Michael G., 74 Cal. Rptr. 2d 642 (Cal. App. 1998). https://casetext.com/case/in-re-michael-g-7

In re Nicole B., 976 A.2d 1039 (Md. 2009). https://narf.org/nill/documents/icwa/state/maryland/case/nicoleb.html

In re S.A.D., WL 5897453 (Or. App. 2014). https://narf.org/nill/bulletins/state/documents/in_matter_sad.html

In re W.D.H., 43 S.W.3d 30 (Tex. App. 2001). https://casetext.com/case/in-re-wdh#13d1180e-1ee2-4fc8-9e5c-af9bc3474a78-fn10

In the Matter of Myers, 417 N.E.2d 926 (Ind. App. 1981). https://law.justia.com/cases/indiana/court-of-appeals/1981/1-680a153-6.html

Iowa Indian Child Welfare Act. Iowa 80th Legislative Session. (2003). https://www.legis.iowa.gov/docs/publications/iactc/80.1/CH0153.pdf

Lawrence, C., Carlson, E., & Egeland, B. (2006). The impact of foster care on development. *Development and Psychopathology, 18,* 57-76. https://cca-ct.org/Study%20Impact%20of%20Foster%20Care%20on%20Child%20Dev.pdf

Lassiter v. Department of Social Services, 452 U.S. 18 (1981). https://supreme.justia.com/cases/federal/us/452/18/

Mitchell, M., & Kuczynski, L. (2010). Does anyone know what is going on? Examining children's lived experience of the transition into foster care. *Children and Youth Services Review, 32(3),* 437-44. https://www.sciencedirect.com/ science/article/abs/pii/S0190740909003089

National Indian Child Welfare Association. (2015). *Setting the Record Straight: The Indian Child Welfare Act fact sheet*. https://www.nicwa.org/wp-content/uploads/2017/04/Setting-the-Record-Straight-ICWA-Fact-Sheet.pdf

National Indian Child Welfare Association. (2016). *A guide to compliance with the Indian Child Welfare Act*. https://www.nicwa.org/wp-content/uploads/2016/11/Guide_ICWA_Compliance.pdf

National Indian Law Library. (n.d.). *Topic 12. Active efforts requirement*. Retrieved March 9, 2024, from https://narf.org/nill/documents/icwa/faq/active.html#Q3

People ex Rel. K.D., 155 P.3d 634 (Colo. App. 2007). https://casetext.com/case/people-ex-rel-kd

Requirements Applicable to Title IV-E, 45 C.F.R. §1356. https://www.ecfr.gov/current/title-45/subtitle-B/chapter-XIII/subchapter-G/part-1356

S. 1214. Indian Child Welfare Act. 95th Congress. (1978). https://www.congress.gov/bill/95th-congress/senate-bill/1214

Salazar, A., Keller, T., Gowen, L., & Courtney, M. (2012). Trauma exposure and PTSD among older adolescents in foster care. *Social Psychiatry and Psychiatric Epidemiology, 48*, 545-551. https://link.springer.com/article/10.1007/s00127-012-0563-0

S.B. v. Tex. Dept of Family & Protective Servs., 654 S.W.3d 246 (Tex. App. 2022). https://casetext.com/case/s-b-v-tex-dept-of-family-protective-servs-9

State ex rel Juv. Dept. v. T.N., 203 P.3d 262 (Or. App. 2009). https://casetext.com/case/state-ex-rel-juv-dept-v-t-n#p124

Texas Department of Family and Protective Services (2024, February 1). *Child and family services reviews: Statewide assessment*. https://www.acf.hhs.gov/sites/default/files/documents/cb/tx-cfsr-r4-swa.pdf

Texas Department of Family and Protective Services (2019). *Child Protective Services handbook*. https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2200.asp

Texas Department of Family and Protective Services. (2014). *Texas practice guide for child protective services attorneys*.https://www.dfps.texas.gov/Child_Protection/Attorneys_Guide/documents/Section_7_Evidence.pdf

Troxwel v. Granville, 530 U.S. 57 (2000). https://casetext.com/case/troxel-v-granville#p65

Tiano, S. (2023, July 10). *Tracking efforts to pass state-level ICWA laws.* The Imprint. https://imprintnews.org/youth-services-insider/tracking-efforts-to-pass-state-level-icwa-laws/241211

Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4,052 (January 25, 2000). https://www.govinfo.gov/content/pkg/FR-2000-01-25/pdf/00-1122.pdf

Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50,058, 50,073 (September 18, 1998). https://www.govinfo.gov/content/pkg/FR-1998-09-18/pdf/98-24944.pdf

ABOUT THE AUTHORS

Nicholas Armstrong is a Policy Scholar for the Center on Health and Families with the Texas Public Policy Foundation. He graduated from the University of Southern Mississippi with a B.A. in History and a minor in Applied Economics.

Prior to joining TPPF, Nicholas served as an Appointments Analyst in Governor Ron DeSantis' Executive Office where he helped manage applicants and appointments to over 400 state boards across Florida. Before his time in the Governor's office, he interned at the Heritage Foundation in the Roe Institute where he solidified his passion for conservative policy.

Andrew C. Brown, JD, is the Vice President of Policy at the Texas Public Policy Foundation.

Brown has dedicated his career to serving vulnerable children and strengthening families through community-focused, liberty-minded solutions. As an attorney, he has represented children in the child welfare system, advocated for the rights of parents, and helped build families through domestic and international adoption.

Andrew earned his BA magna cum laude in political science from Baylor University and his JD from Southern Methodist University Dedman School of Law. He is licensed to practice law in Texas and Virginia. His work on international adoption law and other child welfare issues has been published in leading legal journals and respected media outlets.

Texas Public
POLICY FOUNDATION

901 Congress Avenue | Austin, Texas 78701 | (512) 472-2700 | www.TexasPolicy.com