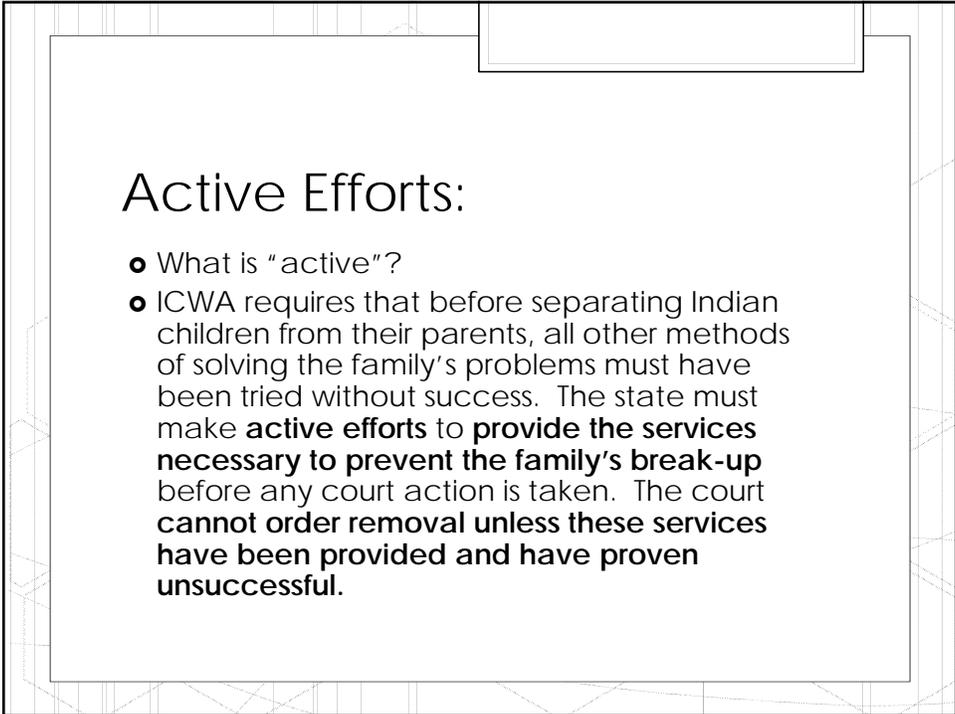




Active Efforts

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Active Efforts:

- What is “active”?
- ICWA requires that before separating Indian children from their parents, all other methods of solving the family’s problems must have been tried without success. The state must make **active efforts** to **provide the services necessary to prevent the family’s break-up** before any court action is taken. The court **cannot order removal unless these services have been provided and have proven unsuccessful.**

An Important Note:

- Under the federal Act, state law trumps the ICWA where "the state law provides a **higher standard**" 25 USC 1921.
- MIFPA does not replace the ICWA but is a supplement to the federal legislation.
- MIFPA provides a definition of "active efforts" whereas the ICWA legislation is silent.

- State courts must comply with both the federal law and the Michigan statute unless one clearly affords a higher standard and, in those cases, only the higher standard applies.
- See generally In re JL, 483 Mich. 300, 317; 770 NW2d 853 (2009); In re Elliott, 218 Mich App 196, 208; 554 NW2d 32 (1996).

ICWA vs. MIFPA

ICWA 25 USC 1912(d)

- “Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to prevent the breakup of the Indian family and that these **efforts have proved unsuccessful.**” 25 USC 1912(d).
- ICWA does not define active efforts.

- The Michigan Supreme Court recently interpreted the ICWA active efforts standard.
 - *In re JL*, 483 Mich. 300; 770 NW2d 853 (Mich 2009). The Court held that active efforts requires "**affirmative**, as opposed to passive **efforts**" and requires **more than** the state's "**reasonable efforts**" standard. *Id.* at 321.
 - The Court directed the trial courts "to carefully assess the **timing of the services** provided to the parent" because "services provided too long ago to be relevant to a parent's current circumstances do not establish by clear and convincing evidence that active efforts have been made." *Id.* at 324- 325.

ALSO!

- The Court explicitly rejected the use of a futility test to avoid the active efforts requirement. *In re JL* at 326-327; *see also In re Roe*, 281 Mich App 88; 764 NW2d 789 (Mich Ct App 2008).

MIFPA:

- Party seeking placement must satisfy the court active efforts have been made but with a **clear and convincing evidence standard** and requirement for **expert witness testimony**.
- MIFPA does define active efforts.
 - Action to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the child with the Indian family.
 - Active efforts require more than a referral to a service without actively engaging the Indian child and family. Active efforts include reasonable efforts as required by title IV-E of the social security act, 42 USC 670 to 679c, and also include doing or addressing all of the following:

MIFPA (continued)

- (i) Engaging the Indian child, child's parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child's Indian tribes and Indian social services agencies.

MIFPA (continued)

- (ii) Identifying appropriate services and helping the parents to overcome barriers to compliance with those services.
- (iii) Conducting or causing to be conducted a diligent search for extended family members for placement.

MIFPA (continued)

- (iv) Requesting representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child rearing practices within the tribal community to evaluate the circumstance of the Indian child's family and to assist in developing a case plan that uses the resources of the Indian tribe and Indian community, including traditional and customary support, actions, and services, to address those circumstances.

MIFPA (continued)

- (v) Completing a comprehensive assessment of the situation of the Indian child's family, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.
- (vi) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and actively soliciting the tribe's advice throughout the proceeding

MIFPA (continued)

- (vii) Notifying and consulting with extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, to identify and to provide family structure and support for the Indian child,, to assure cultural connections, and to serve as placement resources for the Indian child.

MIFPA (continued)

- (viii) Making arrangements to provide natural and family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan,, including, when requested by the tribe, arrangements for transportation and other assistance to enable family members to participate in that interaction.
- (ix) Offering and employing all available family preservation strategies and requesting the involvement of the Indian child's tribe to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

MIFPA (continued)

- (x) Identifying community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs, and providing information about those resources to the Indian child's family, and actively assisting the Indian child's family or offering active assistance in accessing those resources.

MIFPA (continued)

- (xi) Monitoring client progress and client participation in services.
- (xii) Providing a consideration of alternative ways of addressing the needs of the Indian child's family, if services do not exist or if existing services are not available to the family.

Specificity!

- MCR 2.517(A) provides "In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts."
 - See generally *Michigan v Porter*, 169 Mich App 190, 193-194; 425 NW2d 514 (1988).

Burden of Proof

- The burden of proof for active efforts is
 - **clear and convincing evidence**
 - including the testimony of at least **one expert witness**
 - Has knowledge of child rearing practices of the Indian child's tribe, in out-of-home placement and TPR cases.
 - The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. MCL 712B.15(2)

Remedy

- Failure to provide active efforts to prevent the breakup of the family prior to removal is **reversible error**.
 - *In re Roe*, 281 Mich. App. 88,98; 764 NW2d 789 (Mich. Ct. App. 2008).

Remedy (ICWA)

- Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such **child was removed**, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of **sections 1911,1912, and 1913** of this title. [25 USC 1914.]

Remedy (MIFPA)

- Any Indian child who is the subject of an **action for foster care placement or termination of parental rights** under state law, any parent or Indian custodian from whose custody an Indian child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of **sections 7, 9, 11, 13, 15,21,23,25,27, and 29** of this chapter. [MCL 712B.39.]

Michigan Court of Appeals

- The Michigan Court of Appeals has twice reversed decisions of the lower court when the trial court failed to make the prerequisite active efforts conclusion.
 - In re Morgan, 140 Mich App 594; 364 NW2d 754 (Mich.App. 1985).
 - In re Roe, 281 Mich App 88; 764 NW2d 789 (Mich Ct App 2008).

Additional MIFPA/ICWA videos are available at the following site:

<http://webcast.you-niversity.com/youtools/companies/viewArchives.asp?affiliateId=128>

Supporting documentation for all MIFPA/ICWA webcasts can be found in the “Index of Training Materials” at the following site:

<http://courts.mi.gov/administration/scao/officesprograms/cws/childwelfareservicetraining/pages/default.aspx>

The archive of the March 8, 2013 training “Michigan Indian Family Preservation Act: New Indian Child Welfare Legislation” is available at the following site:

<http://webcast.you-niversity.com/youtools/companies/viewArchives.asp?affiliateId=133>