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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico  
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Mark Reynolds

4 **No. A-1-CA-40390 & A-1-CA-40405**

5 **STATE OF NEW MEXICO ex rel.**  
6 **CHILDREN, YOUTH & FAMILIES**  
7 **DEPARTMENT,**

8 Petitioner-Appellee,

9 v.

10 **ERIC E.,**

11 Respondent-Appellant,

12 and

13 **CHERYLE E.,**

14 Respondent,

15 **IN THE MATTER OF KELISHAUN B.,**

16 Child.

17 and

18 **STATE OF NEW MEXICO ex rel.**  
19 **CHILDREN, YOUTH & FAMILIES**  
20 **DEPARTMENT,**

21 Petitioner-Appellee,

22 v.

1 **CHERYLE E.,**

2 Respondent-Appellant,

3 and

4 **ERIC E.,**

5 Respondent,

6 **IN THE MATTER OF KELISHAUN B.,**

7 Child.

8 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

9 **Bradford J. Dalley, District Court Judge**

10 Children, Youth & Families Department

11 Mary McQueeney, Chief Children's Court Attorney

12 Santa Fe, NM

13 Kelly P. O'Neill, Children's Court Attorney

14 Albuquerque, NM

15 for Appellee

16 Cravens Law LLC

17 Richard H. Cravens, IV

18 Albuquerque, NM

19 for Appellant Eric E.

20 Law Offices of Nancy L. Simmons, P.C.

21 Nancy L. Simmons

22 Albuquerque, NM

23 for Appellant Cheryle E.

1 Therese E. Yanan

2 Farmington, NM

3 Guardian Ad Litem

1 **OPINION**

2 **YOHALEM, Judge.**

3 {1} This is an appeal from the adjudication of neglect of K.B. (Child), an Indian  
4 child, by his guardians and Indian custodians, Cheryl E. and Eric E. (collectively,  
5 Guardians). Both Child and Guardians are enrolled members of the Navajo Nation.  
6 This case is governed by the federal Indian Child Welfare Act of 1978 (ICWA), 25  
7 U.S.C. §§ 1901-1963 and the New Mexico Abuse and Neglect Act, NMSA 1978, §§  
8 32A-4-1 to -35 (1993, as amended through 2023).<sup>1</sup> We address Guardians’ separate  
9 appeals together in this opinion in light of the shared record and common issues.  
10 Guardians raise a number of issues on appeal concerning the Voluntary Placement  
11 Agreement (VPA) they entered into with the Children, Youth, & Families  
12 Department (CYFD) months before CYFD filed a petition for abuse and neglect, as  
13 well as issues relating to the adjudication of neglect subsequently entered against

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<sup>1</sup>We note that in 2022 the New Mexico Legislature adopted a new statute governing abuse and neglect proceedings concerning Indian children: the Indian Family Protection Act (IFPA), NMSA 1978, §§ 32A-28-1 to -42 (2022, as amended through 2023). The abuse and neglect petition at issue in this case was filed on December 9, 2021, prior to the enactment of IFPA. We, therefore, rely on the provisions of the New Mexico Abuse and Neglect Act and the federal ICWA, both of which continue to apply to proceedings involving Indian children in New Mexico. ICWA is now supplemented by the provisions of IFPA. *See* § 1921 (noting that if state or federal law applicable to a child custody proceeding “provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under” ICWA, the higher state or federal standard shall apply).

1 them. Because we conclude it is dispositive, we address Guardians’ claim that CYFD  
2 failed to present sufficient evidence to establish that, prior to the filing of an abuse  
3 and neglect petition seeking to remove an Indian child for temporary placement  
4 where the parents, guardians, or Indian custodian cannot have the child returned on  
5 demand, § 1903(1)(i), “active efforts have been made to provide remedial services  
6 and rehabilitative programs designed to prevent the breakup of the Indian family.”  
7 § 1912(d). We agree with Guardians that the evidence at the adjudicatory hearing  
8 was insufficient to establish by clear and convincing evidence that CYFD made the  
9 concerted, active efforts tailored to the unusual circumstances of this case required  
10 by ICWA § 1912(d) prior to the filing of the abuse and neglect petition. We reverse  
11 the adjudication of neglect and remand for proceedings consistent with this opinion.

12 **BACKGROUND**

13 {2} Child was born in December 2007 to Arlinda A. (Mother) and Rupert B.  
14 (Father). Mother and Father were named as interested parties by CYFD in the abuse  
15 and neglect petition that is the subject of this opinion.

16 {3} Eric is Mother’s cousin. In 2015, Child was seven or eight years old, in the  
17 legal custody of the Navajo Nation, and living temporarily at the Navajo Mission.  
18 Eric and his then-wife, Cheryle,<sup>2</sup> agreed at the request of Navajo Nation Social  
19 Services to take Child into their home. At that time, Child’s two older sisters and

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<sup>2</sup>The parties divorced during these proceedings.

1 younger brother were living with Guardians. At one point, Child and four of his  
2 siblings, as well his sister's baby, were living with Guardians, along with Guardians'  
3 own children.

4 {4} Although Guardians agreed to take Child into their home in 2015, they did so  
5 reluctantly because they were aware that Child had lived with Eric's aunt and then  
6 with Eric's mother, and that neither had been able to handle Child's problematic  
7 behavior. The district court found that Child had significant mental health and  
8 behavioral issues because of trauma and mistreatment experienced prior to  
9 placement with Guardians.

10 {5} In 2017, after Child had lived with them for two years, Guardians became the  
11 legal guardians of Child and two of his siblings in a dependency proceeding pending  
12 before the Family Court of the Navajo Nation. The Navajo court found that Child's  
13 biological parents were unable or unwilling to care for him at that time, but did not  
14 terminate their parental rights.

15 {6} The district court found, based on the testimony at the adjudicatory hearing,  
16 that during the years Child was in Guardians' home, there were increasingly severe  
17 problems involving Child's behavior, particularly aggression directed at younger  
18 children. Guardians sought assistance and advice from Navajo Nation Social  
19 Services and CYFD as Child's behavior deteriorated. Guardians obtained counseling  
20 for Child and family therapy at Desert View Family Counseling Services. When

1 Child's aggressive behavior toward the younger children in the home escalated,  
2 Guardians took him to a hospital, and upon doctor's advice, placed him at Mesilla  
3 Valley Hospital's inpatient program for adolescents for seven days.

4 {7} Following this inpatient treatment, Child returned to Guardians' home for  
5 approximately two more years. Near the end of that period, in 2019, the medications,  
6 counseling, and therapy that Guardians had obtained for Child no longer seemed to  
7 be working. Child began harming the family cat, harming himself, collecting sharp  
8 objects and hiding them, and threatening to kill Eric. Cheryle testified that she  
9 realized that Child needed "a lot more than [she] was capable of doing." Counselors  
10 suggested a residential treatment center; doctors at the regional hospital who  
11 examined Child agreed. Guardians placed Child at San Marcos Treatment Center, a  
12 Texas residential treatment facility, in August 2020. It was after this placement that  
13 Cheryle attempted suicide and realized, with the help of therapy, that she was  
14 overwhelmed and could not provide the care Child needed if he was returned home.

15 {8} In January 2021, CYFD received a child protective services report from San  
16 Marcos alleging neglect by Guardians based on their unwillingness to sign  
17 paperwork and otherwise assist in Child's discharge to a less restrictive setting. San  
18 Marcos reported that Child would be ready to be discharged from San Marcos in  
19 February 2021. Child could not be discharged because Guardians refused to  
20 participate in treatment meetings, to sign consents, or to allow Child to be placed

1 back in their home. San Marcos recommended transferring Child to treatment foster  
2 care.<sup>3</sup>

3 {9} When contacted by a CYFD investigator about San Marcos’s complaint of  
4 neglect of Child, Guardians told CYFD that they were unable to continue to care for  
5 Child. They informed CYFD that they intended to revoke their guardianship of  
6 Child. CYFD and Guardians entered into a VPA in March 2021. Notice was sent to  
7 the Navajo Nation.

8 {10} The VPA, approved by the district court on April 16, 2021, gave CYFD  
9 temporary legal custody of Child,<sup>4</sup> thereby avoiding CYFD having to immediately  
10 file a petition for abuse and neglect against Guardians. CYFD and the district court  
11 understood that Guardians were unable to care for Child and would be seeking to  
12 relinquish their guardianship of Child in tribal court during the 180 days the VPA  
13 was in effect. CYFD agreed that a VPA, giving CYFD temporary legal custody of  
14 Child, was in the best interest of Child.

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<sup>3</sup>We note that treatment foster care is a type of foster care placement for children in CYFD custody, *see* 8.10.2.7(T), (Z) NMAC (including treatment foster care as a “placement” for children in CYFD custody as a result of an action under the Children’s Code), that provides treatment designed to transition the child to a family placement.

<sup>4</sup>The VPA gave temporary legal custody of Child to CYFD, as provided for in CYFD regulations. *See* 8.10.8.11(B) NMAC (“[CYFD] may accept legal custody of a child placed voluntarily through a written agreement.”).



1 {11} Permanency planning worker Corene Martinez, the CYFD caseworker  
2 assigned to work with Child and Guardians, informed Guardians that until the  
3 guardianship was revoked, they were responsible for attending family-centered  
4 meetings and maintaining contact with CYFD and Child. Guardians were also told  
5 that if the guardianship was revoked during the pendency of the VPA, CYFD would  
6 not file against them for abuse and neglect of Child. A VPA does not prevent CYFD  
7 from filing a petition for abuse and neglect either when the VPA expires, or when  
8 the parents or guardians terminate the VPA if CYFD has “documented concerns  
9 regarding the safety and well-being of your child/children.”

10 {12} Guardians hired a lawyer who was a member of the Navajo bar to assist them  
11 in obtaining an order revoking the guardianship. Guardians testified that they had  
12 little knowledge of how tribal court worked. Their lawyer filed an emergency  
13 petition with the tribal court to discharge Guardians in August 2021. When the VPA  
14 expired in October 2021, the tribal court had not yet ruled on the motion to revoke  
15 the guardianship.

16 {13} During the term of the VPA and following its expiration, Guardians gradually  
17 withdrew from their responsibility to remain in contact with CYFD and Child.  
18 Although it had legal custody of Child for the six months of the VPA, CYFD did not  
19 place Child in treatment foster care as recommended by San Marcos, or with a family  
20 member; he remained at San Marcos despite being ready for discharge. At the time

1 CYFD filed its petition against Guardians for abuse and neglect, on December 9,  
2 2021, and took Child into involuntary state custody, Child remained at San Marcos.  
3 {14} The petition for abuse and neglect states that CYFD made the following  
4 efforts to prevent the breakup of the Indian family prior to removing Child for  
5 involuntary placement in state custody: (1) CYFD investigated the report of neglect  
6 by San Marcos and entered into a VPA with Guardians; (2) CYFD hosted family-  
7 centered meetings; (3) CYFD made multiple attempts to contact Guardians by  
8 telephone; (4) CYFD located Child’s mother and then lost contact with her; (5)  
9 CYFD located another family member “but have not been able to complete the initial  
10 relative assessment.” The petition states that the efforts were unsuccessful because  
11 Guardians refused to communicate with CYFD.

12 {15} On January 11, 2022, a month after the petition alleging neglect and  
13 abandonment by Guardians was filed in state court, the Navajo tribal court informed  
14 Guardians’ counsel that the original dependency case from 2015 involving Child had  
15 been closed, that a new petition was required, and that the petition must be served  
16 on Child’s biological parents.

17 {16} Not long afterward, in February 2022, the district court conducted an  
18 adjudicatory hearing on CYFD’s abuse and neglect petition. Ms. Martinez, who was  
19 assigned to work with Child and Guardians, was the sole CYFD employee to testify  
20 for the agency. Ms. Martinez was questioned about CYFD’s failure to place Child

1 in treatment foster care during the lengthy period he was in CYFD’s legal custody  
2 prior to the filing of a petition for abuse and neglect. It was undisputed that Child  
3 still remained at San Marcos at the time of Ms. Martinez’s testimony on February  
4 22, 2022. Ms. Martinez claimed that CYFD’s hands were tied: CYFD could not do  
5 anything without Guardians’ authorization. Ms. Martinez testified that Child could  
6 not be discharged from San Marcos to a less restrictive treatment foster care setting  
7 because Guardians would not authorize the transfer. There was no evidence at the  
8 adjudicatory hearing about the efforts, if any, made by CYFD to have Child  
9 discharged from San Marcos and transferred to treatment foster care. The only  
10 efforts Ms. Martinez reported making were repeated telephone calls to Guardians.  
11 The district court relied on Ms. Martinez’s testimony to find that Guardians’ failure  
12 to sign the appropriate papers resulted in Child remaining at San Marcos, a highly  
13 restrictive institutional setting, which the court found was inappropriate, for a year  
14 after he was ready to be discharged.

15 {17} When asked what assistance CYFD had provided Guardians in revoking the  
16 guardianship and freeing Child for possible return to one of his biological parents or  
17 to other extended family members, the case worker admitted CYFD had not  
18 provided any assistance. When asked why CYFD had offered no assistance, Ms.  
19 Martinez simply stated that it was “with the Navajo Nation court.”

1 {18} The only other effort reported by CYFD in its testimony at the adjudicatory  
2 hearing to avoid having to place Child in involuntary state custody was a routine  
3 absent parent search for Child's biological mother and father. The search located  
4 Mother in prison. Although Mother expressed interest in reuniting with Child,  
5 CYFD lost touch with her upon her release from prison. CYFD's routine search did  
6 not succeed in locating Father, and although Child's paternal grandmother had  
7 expressed interest in caring for Child, CYFD never completed an assessment of her  
8 home.

9 {19} Father contacted CYFD in December 2021, apparently after being notified  
10 that an abuse and neglect petition had been filed against Guardians. Father and  
11 Mother were not named as respondents, but are identified in the petition and were  
12 served. Father contacted CYFD in December 2021, and told Ms. Martinez that he  
13 wanted to regain custody of Child and was willing to work with CYFD. Ms.  
14 Martinez reported having several phone calls with Father after the December  
15 custody hearing.

16 {20} A social worker with the Navajo Nation, Lynette Mose, testified at the  
17 adjudicatory hearing as the ICWA expert. Ms. Mose testified she had not been  
18 involved with this case prior to January 21, 2022, a few weeks before the  
19 adjudicatory hearing, and that she was testifying based solely on her review of  
20 documents provided by CYFD and the evidence she heard presented at the

1 adjudicatory hearing. She testified about the strong Navajo tradition of family  
2 members caring for children who needed a home and opined that family members  
3 generally felt an obligation to remain involved with a child once they began to care  
4 for them. She testified that return of Child to Guardians in this case, in her opinion,  
5 would result in serious emotional and physical damage to Child, and that it was in  
6 Child's best interest to be placed with other relatives able to care for him. CYFD did  
7 not question Ms. Mose about the adequacy of the efforts made by CYFD prior to  
8 placing Child in involuntary state custody. The district court asked Ms. Mose  
9 whether she believed CYFD had made active efforts to avoid filing a petition for  
10 abuse and neglect and involuntarily placing Child in state custody. Ms. Mose  
11 responded that she believed active efforts had been made, without pointing to any  
12 evidence supporting her belief or otherwise explaining her opinion. On cross-  
13 examination by Guardians, Ms. Mose was asked what efforts CYFD could have  
14 made to assist Child and his family during the period CYFD had voluntary legal  
15 custody of Child. She responded that she did not work for CYFD and did not know.

16 {21} At the conclusion of the hearing, the district court expressed understandable  
17 frustration with the choices available to the court. The district court asked counsel  
18 for CYFD whether the court could realistically do anything other than continue Child  
19 in CYFD custody under the circumstances. CYFD's counsel did not suggest an  
20 alternative. The district court then noted that it believed Guardians had made the best

1 choices they could make and had appropriately tried to involve CYFD and other  
2 social services agencies in Child’s care. The court, nevertheless, found that  
3 Guardians had neglected Child by “actively hindering further placement, treatment  
4 and progress of [Child]” by not signing the papers for treatment foster care, forcing  
5 Child to remain in a residential facility for more than a year after he was ready to be  
6 discharged to a less restrictive setting. The district court found Guardian’s efforts to  
7 revoke the guardianship “dilatory and insufficient,” noting in particular the failure  
8 of Guardians’ counsel to serve Child’s biological parents. The district court noted  
9 that Guardians remained legally responsible for Child, and concluded that Guardians  
10 had neglected and abandoned Child. Addressing the ICWA requirement that CYFD  
11 make active efforts under ICWA to prevent the unnecessary removal of Indian  
12 children from their family and tribe into involuntary state custody, the district court  
13 concluded that “[t]he efforts made by CYFD in this case have been active,  
14 reasonable, and unsuccessful at preventing breaking up this family.”

15 {22} At the dispositional hearing, the Court Appointed Special Advocate (CASA)  
16 urged the district court to include in its dispositional order a requirement that CYFD  
17 engage in active efforts with Child’s parents—efforts to find Mother to serve her  
18 with notice and to work with Father—rather than delaying these efforts until the  
19 guardianship was revoked by the tribal court or was terminated by the district court  
20 based on abuse or neglect by Guardians.

1 {23} We discuss additional evidence later, as necessary to our decision.

2 **DISCUSSION**

3 {24} Guardians raise a number of issues on appeal. Cheryle makes the following  
4 arguments: (1) she was entitled to ICWA § 1912 procedural protections, including  
5 court-appointed counsel, at the district court hearing approving the VPA; (2) she was  
6 entitled to notice of her right to move the proceedings to tribal court at that same  
7 hearing; (3) she did not understand and was not adequately informed that failure to  
8 participate in Child’s care during the VPA could result in CYFD filing a petition for  
9 abuse and neglect against her; (4) CYFD failed to make active efforts to assist  
10 Guardians prior to entering into the VPA; (5) her rights to due process were violated  
11 by CYFD’s failure to act as Child’s legal custodian during the term of the VPA; (6)  
12 the evidence at the adjudicatory hearing was insufficient to support the court’s  
13 findings that she had neglected Child; and (7) CYFD failed to make the active efforts  
14 required by ICWA § 1912(d) to prevent the removal of Child into the involuntary  
15 custody of CYFD prior to initiating abuse and neglect proceeding. Eric argues: (1)  
16 the evidence was insufficient to support abandonment for the time period required  
17 by Section 32A-4-2(A); (2) the evidence was insufficient to support the district  
18 court’s finding of neglect of Child by Guardians; and (3) CYFD failed to make the  
19 active efforts required by ICWA § 1912(d) prior to filing the petition for abuse and  
20 neglect and taking Child into involuntary CYFD custody.

1 {25} We agree with Guardians that CYFD failed to present substantial evidence to  
2 support the district court’s finding that CYFD made active efforts to prevent the  
3 unnecessary removal of an Indian child into involuntary state custody as required by  
4 ICWA § 1912(d). We conclude that ICWA requires that these active efforts be made  
5 from the time CYFD begins to work with a family in response to a referral for abuse  
6 or neglect of an Indian child, with the goal of avoiding the involuntary removal of  
7 that Indian child into state custody, and that the district court’s finding that active  
8 efforts have been made must be supported by substantial evidence of record as to the  
9 efforts made, not merely by conclusory assertions that active efforts have been made.  
10 Because our decision requires reversal of the adjudicatory judgment,<sup>5</sup> we do not  
11 reach the other issues raised by Guardians on appeal.

12 **I. The District Court’s Finding That CYFD Made the “Active Efforts”**  
13 **Required by ICWA § 1912(d) Prior to Filing the Petition for Abuse and**  
14 **Neglect Is Not Supported by Substantial Evidence in the Record**

15 {26} Before we address the sufficiency of the evidence, we must construe ICWA’s  
16 requirement for active efforts by the state agency prior to removing an Indian child  
17 into involuntary state custody. Two questions are important to the resolution of this

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<sup>5</sup>We note that ICWA § 1914 authorizes the child, parent, or Indian custodian, or the tribe to move to set aside any foster care placement or termination of parental rights on the grounds the rights secured under §§ 1911, 1912, or 1913 were violated, even after a judgment has been upheld on appeal.



1 case: When active efforts are required and what efforts are sufficient to satisfy the  
2 active efforts requirement at an adjudicatory hearing.

3 {27} Section 1912(d) of ICWA states as follows:

4 Any party seeking to effect a foster care placement of, or  
5 termination of parental rights to, an Indian child under state law shall  
6 satisfy the court that active efforts have been made to provide remedial  
7 services and rehabilitative programs designed to prevent the breakup of  
8 the Indian family and that these efforts have proved unsuccessful.

9 In § 1903(1)(i), ICWA defines a “foster care placement” as follows:

10 [A]ny action removing an Indian child from its parent or Indian  
11 custodian for temporary placement in a foster home or institution or the  
12 home of a guardian or conservator where the parent or Indian custodian  
13 cannot have the child returned upon demand, but where parental rights  
14 have not been terminated.

15 {28} When a petition for abuse and neglect seeking removal of an Indian child from  
16 the custody of their parent, legal guardian, or Indian custodian<sup>6</sup> is filed by CYFD,  
17 our Supreme Court has held that the district court must make the findings required  
18 by ICWA § 1912(d) at the adjudicatory hearing, including the finding that active  
19 efforts designed to prevent the breakup of the Indian family have been made. *State*  
20 *ex rel. Child., Youth & Fams. Dep’t v. Marlene C.*, 2011-NMSC-005, ¶ 2, 149 N.M.  
21 315, 248 P.3d 863. The required finding by the district court must either be based on

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<sup>6</sup>An “Indian custodian” is defined by ICWA to mean “any Indian person who has legal custody of an Indian child under tribal law or custom or under [s]tate law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.” § 1903(6).

1 clear and convincing evidence regarding the efforts CYFD has made, or on an  
2 admission by the respondent that those efforts have been made. Even when admitted  
3 by the parent or Indian custodian, the district court’s finding that active efforts were  
4 made must be supported by a factual basis in the record. *See id.* (“We hold that, in a  
5 contested adjudication to which ICWA applies, the district court must always make  
6 the findings of fact required under § 1912(d) . . . of ICWA at the adjudication stage,  
7 founded either on evidence of record or admissions supported by a factual basis.”).  
8 Our Supreme Court in *Marlene C.* thus held that satisfying the district court that  
9 active efforts have been made requires more than a conclusory statement. *Id.*

10 {29} While our Supreme Court has made clear that the burden to introduce  
11 sufficient evidence of active efforts is on CYFD, and that an adjudicatory judgment  
12 of abuse or neglect of an Indian child cannot be upheld without a finding supported  
13 by clear and convincing evidence, our Supreme Court did not address the two  
14 questions raised here: When the efforts must begin and the nature of the efforts,  
15 which must be made prior to the initiation of an involuntary custody proceeding.

16 **A. ICWA’s Active Efforts Requirement**

17 {30} We look first to our existing precedent. Although this Court has previously  
18 construed the active efforts requirement, that construction has been in the context of  
19 a proceeding to terminate parental rights and has focused on the efforts CYFD must  
20 make to implement a treatment plan aimed at reuniting parents and children after an

1 adjudication of abuse or neglect. *See, e.g., State ex rel. Child., Youth & Fams. Dep't*  
2 *v. James M.*, 2023-NMCA-025, ¶ 18, 527 P.3d 633, *cert. denied*, 2023-NMCERT-  
3 002 (S-1-SC-39716); *State ex rel. Child., Youth & Fams. Dep't v. Yodell B.*, 2016-  
4 NMCA-029, ¶ 20, 367 P.3d 881, *overruled on other grounds by State ex rel. Child.,*  
5 *Youth & Fams. Dep't v. Maisie Y.*, 2021-NMCA-023, ¶ 23, 489 P.3d 964; *State ex*  
6 *rel. Child., Youth & Fams. Dep't v. Arthur C.*, 2011-NMCA-022, ¶¶ 41-45, 149  
7 N.M. 472, 251 P.3d 729, *superseded by statute on other grounds as stated in State*  
8 *ex rel. Child., Youth & Fams. Dep't v. Tanisha G.*, 2019-NMCA-067, ¶ 11, 45 P.3d  
9 86.

10 {31} Our precedent construing the “active efforts” requirement has compared the  
11 reasonable efforts to assist a parent with their treatment plan required by our Abuse  
12 and Neglect Act, § 32A-4-28(B)(2), with the active efforts required by ICWA during  
13 the same time period. In a termination of parental rights case not subject to ICWA,  
14 CYFD must establish, as a condition precedent to the termination of parental rights,  
15 “that the conditions and causes of the neglect and abuse are unlikely to change in the  
16 foreseeable future despite reasonable efforts by the department or other appropriate  
17 agency to assist the parent in adjusting the conditions that render the parent unable  
18 to properly care for the child.” *Id.* This Court has held that the “active efforts”  
19 standard imposed by ICWA is a “more involved and less passive standard than that  
20 of reasonable efforts.” *Yodell B.*, 2016-NMCA-029, ¶ 20 (internal quotation marks

1 and citation omitted). Our Supreme Court agreed, adopting the distinction drawn by  
2 this Court in *Yodell B.*, that “[p]assive efforts are where a plan is drawn up and the  
3 client must develop [their] own resources towards bringing it to fruition. Active  
4 efforts is where the state . . . takes the client through the steps of the plan rather than  
5 requiring that the plan be performed on its own.” *State ex rel. Child., Youth & Fams.*  
6 *Dep’t v. Keon H.*, 2018-NMSC-033, ¶ 42, 421 P.3d 814 (omission, internal quotation  
7 marks, and citation omitted).

8 {32} In this case, we are asked to determine what efforts are required by ICWA “to  
9 prevent the breakup of the Indian family” prior to taking an Indian child into  
10 involuntary state custody. *See* § 1912(d). There is no parallel reasonable efforts  
11 requirement under state law that applies at this stage of the proceedings.<sup>7</sup> We,  
12 therefore, cannot define active efforts in this context as simply providing more  
13 hands-on assistance in obtaining the services CYFD generally includes in a  
14 treatment plan. We look to the principles of statutory construction to define the term  
15 “active efforts” in this context. We then review the record to determine whether  
16 CYFD presented sufficient evidence at the adjudicatory hearing to support the  
17 district court’s finding that, to the degree of certainty required by the clear and  
18 convincing evidence standard, CYFD made the active efforts required by ICWA “to

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<sup>7</sup>State law requires CYFD to give notice to the child’s relatives, *see* § 32A-4-17.1, but there is no requirement of proof before an adjudicatory judgment can be entered that reasonable efforts were made to avoid taking the child into state custody.

1 provide remedial services and rehabilitative programs designed to prevent the  
2 breakup of the Indian family.” § 1912(d).

3 {33} Interpretation of ICWA and its relationship to the New Mexico Abuse and  
4 Neglect Act presents a question of law that we review de novo. *Marlene C.*, 2011-  
5 NMSC-005, ¶ 14. “Our overarching goal when interpreting ICWA is to effectuate  
6 Congress’s intent.” *Id.* ¶ 15. “In determining legislative intent, we look to the plain  
7 language of the statute and the context in which it was enacted, taking into account  
8 its history and background.” *Pirtle v. Legis. Council Comm.*, 2021-NMSC-026, ¶ 14,  
9 492 P.3d 586. If additional guidance is needed to determine congressional intent, we  
10 accord substantial weight to the federal Bureau of Indian Affairs (BIA) regulations  
11 and the BIA interpretive guidelines published with the regulations. *See Marlene C.*,  
12 2011-NMSC-005, ¶ 18 (describing the guidelines as “persuasive authority,” and  
13 relying on them to interpret ICWA); *see also State ex rel. Child., Youth & Fams.*  
14 *Dep’t v. Douglas B.*, \_\_\_-NMSC-\_\_\_, ¶¶ 14-15, \_\_\_ P.3d \_\_\_ (S-1-SC-39139, Sept.  
15 25, 2023) (relying on both the recently adopted BIA regulations and the longstanding  
16 guidelines). In addition to these general rules of statutory construction, both our  
17 Supreme Court and the United States Supreme Court have held that “when  
18 construing ICWA we must resolve all ambiguities liberally in favor of the Indian  
19 parent and the tribe in order to effectuate the purpose of the Act.” *Marlene C.*, 2011-  
20 NMSC-005, ¶ 19; *see Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766

1 (1985) (“[S]tatutes are to be construed liberally in favor of the Indians, with  
2 ambiguous provisions interpreted to their benefit.”).

3 {34} The statutory language of ICWA § 1912(d) fails to offer any detail about when  
4 active efforts must begin or what services will satisfy the active efforts requirement.  
5 We look beyond the plain language of § 1912(d) to other sections of ICWA and to  
6 the congressional policy expressed both within the statute itself and in the legislative  
7 history in an effort to determine the timing and nature of the active efforts CYFD  
8 was required to make in this case.

9 {35} In ICWA § 1902, Congress states that it is the purpose of ICWA  
10 to protect the best interests of Indian children and to promote the  
11 stability and security of Indian tribes and families by the establishment  
12 of minimum [f]ederal standards for the removal of Indian children from  
13 their families.

14 Congress focuses on its responsibility to protect Indian families, tribes, and their  
15 resources, identifying a tribe’s children as its most vital resource. *See* § 1901(3)  
16 (“[T]here is no resource that is more vital to the continued existence and integrity of  
17 Indian tribes than their children.”). Based on the extensive hearings it conducted  
18 prior to the passage of ICWA, Congress found that state agencies and state courts  
19 “have often failed to recognize the essential tribal relations of Indian people and the  
20 cultural and social standards prevailing in Indian communities and families[,]”  
21 resulting in the unnecessary removal of Indian children from their family and

1 community. § 1901(5); *see also Mississippi Band of Choctaw Indians v. Holyfield*,  
2 490 U.S. 30, 32-36 (1989) (detailing the congressional hearings).

3 {36} Unlike state abuse and neglect statutes, which focus the efforts of state  
4 agencies on the general welfare of the child and on protecting parental rights, ICWA  
5 focuses more broadly on maintaining an Indian child’s relationship with their  
6 extended family and their tribe. ICWA not only protects the tribes’ interest in  
7 retaining their children, ICWA also protects the interest of Indian children in  
8 retaining their connection to their extended family and tribe. Congress equates an  
9 Indian child’s best interest with maintaining and preserving that child’s relationship  
10 to their Indian family and tribe. As the Montana Supreme Court cogently stated,  
11 “The principal purpose of ICWA is to promote the stability and security of Indian  
12 tribes by preventing further loss of their children; and to protect the best interests of  
13 Indian children by retaining their connection to the tribes.” *In re C.H.*, 2003 MT 308,  
14 ¶ 11, 318 Mont. 208, 79 P.3d 822 (internal quotation marks and citation omitted).  
15 The rights of the Indian child’s parents or Indian custodian are recognized and  
16 protected as well, but the purpose of ICWA extends beyond protecting the rights of  
17 the child’s parents or Indian custodian. *See Holyfield*, 490 U.S. at 37 (“ICWA . . .  
18 seeks to protect the rights of the Indian child as an Indian and the rights of the Indian  
19 community and tribe in retaining its children in its society.” (internal quotation  
20 marks and citation omitted)); *Haaland v. Brackeen*, 599 U.S. 255, 265 (2023)

1 (describing the purpose of ICWA, and of § 1912(d) in particular, as “to keep Indian  
2 children connected to Indian families”). In this regard, we note the important role of  
3 the “Indian family” in ICWA. It is “the breakup of the Indian family” that active  
4 efforts are intended to prevent. *See* § 1902 (providing that ICWA is intended to  
5 “promote the stability and security of Indian . . . families”). The United States  
6 Supreme Court identified the central role played by the Indian family in ICWA,  
7 noting that “[a]n Indian child may have scores of, perhaps more than a hundred,  
8 relatives who are counted as close, responsible members of the family” who share  
9 in raising an Indian child. *Holyfield*, 490 U.S. at 35 n.4.

10 {37} With this background on the purpose of ICWA, we next turn to the definition  
11 of “active efforts.” In the absence of a precise definition of “active efforts” on the  
12 face of the statute, we consider the definition found in the Code of Federal  
13 Regulations at 25 C.F.R. § 23.2 (2023). As noted previously in this opinion, these  
14 regulations and the federal guidelines that supplement them are relied upon by our  
15 Supreme Court to construe ICWA. *See Douglas B.*, \_\_\_-NMSC-\_\_\_, ¶¶ 14-15. The  
16 regulations first define the term “active efforts” and then follow that definition with  
17 a list of examples of the kinds of services and assistance most often required to  
18 preserve an Indian child’s family and the child’s connection to their tribe. The  
19 definition reads, in relevant part, as follows:

20 Active efforts means affirmative, active, thorough, and timely efforts  
21 intended primarily to maintain or reunite an Indian child with [their]



1 family. . . . To the maximum extent possible, active efforts should be  
2 provided in a manner consistent with the prevailing social and cultural  
3 conditions and way of life of the Indian child’s Tribe and should be  
4 conducted in partnership with the Indian child and the Indian child’s  
5 parents, extended family members, Indian custodians, and Tribe.  
6 Active efforts are to be tailored to the facts and circumstances of the  
7 case.

8 25 C.F.R. § 23.2. This definition and the examples that follow it echo the policies  
9 adopted by Congress. The definition of active efforts focuses on the timeliness of  
10 those efforts, provides that they be directed to maintaining the Indian child with their  
11 family, or, if a separation has already occurred, reuniting the child with their family,  
12 and specifies that efforts be conducted, to the maximum extent possible, in  
13 partnership with the Indian child’s tribe and extended family. *Id.*

14 {38} Likewise, this definition of active efforts emphasizes the requirement that the  
15 state agency work together with the child’s tribe and extended family whenever  
16 possible, to evaluate the unique needs of that family, and then tailor the agency’s  
17 efforts “to the facts and circumstances of the case.” *Id.* Where it is apparent that the  
18 usual services offered in a treatment plan or the usual method of proceeding by the  
19 state agency will not address the unique needs of the Indian child and their family,  
20 or where services are not available in a remote area of a reservation, ICWA demands  
21 the state agency address the barriers to services and provide alternatives tailored to  
22 the circumstances, rather than relying on their usual method of operating. 25 C.F.R.

1 § 23.2(10). Active assistance in utilizing, accessing, and overcoming barriers to  
2 services is required regardless of the stage of the proceedings. *Id.*

3 {39} In terms of the timing of active efforts, the regulations state that the efforts  
4 must be “thorough[] and timely.” 25 C.F.R. § 23.2. The state agency cannot wait  
5 until the Indian child is taken into state custody, an adjudication obtained, and a  
6 treatment plan adopted, as is often the case under state law, to begin its efforts. In  
7 the preadjudication context, active efforts are intended to *prevent* the removal of an  
8 Indian child from their extended family and tribe. § 1912(d). To be effective,  
9 remedial efforts must be undertaken promptly upon referral to the agency for abuse  
10 or neglect. The sole exception is for an emergency placement, where harm to the  
11 child is imminent. *See* § 1922 (providing an exception to allow immediate state  
12 custody in an emergency threatening “imminent physical damage or harm to the  
13 child”).

14 {40} The ICWA regulations and the legislative history of ICWA support this  
15 construction of § 1912(d)’s requirement for remedial active efforts provided prior to  
16 initiating a placement and designed to prevent having to take a child into state  
17 custody. In its report, the House Committee on Interior and Insular Affairs explained  
18 the purpose of the active efforts requirement in § 1912(d), stating,

19 The committee is advised that most state laws require public or private  
20 agencies involved in child placement to resort to remedial measures  
21 *prior to initiating placement . . . proceedings*, but that these services are

1 rarely provided. This subsection imposes a Federal requirement in that  
2 regard with respect to Indian children and families.

3 H.R. Rep. No. 95-1386, at 263 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7531, 7545  
4 (emphasis added).

5 {41} We next apply these policies and standards, both as to timing and as to the  
6 nature of the efforts required, to the evidence concerning CYFD’s efforts in this case  
7 to avoid taking Child into state custody.

8 **B. The Evidence Does Not Support a Finding That CYFD Made the Active**  
9 **Efforts Required by ICWA § 1912(d)**

10 {42} Although we review the findings of fact of the district court for sufficiency of  
11 the evidence, deferring to the district court’s credibility determinations, and drawing  
12 inferences in favor of the district court’s findings, we review the district court’s  
13 application of the law to the facts de novo. *State ex rel. Child., Youth & Fams. Dep’t*  
14 *v. Lisa A.*, 2008-NMCA-087, ¶ 6, 144 N.M. 324, 187 P.3d 189. In reviewing for  
15 substantial evidence in the record to support a finding, we are mindful of CYFD’s  
16 burden to prove each element required to support an adjudicatory judgment by clear  
17 and convincing evidence. *See James M.*, 2023-NMCA-025, ¶ 14 (the clear and  
18 convincing evidence standard applies to proof of ICWA requirements at an  
19 adjudication involving an Indian child). “To meet the clear and convincing evidence  
20 standard, the evidence must instantly tilt the scales in the affirmative when weighed  
21 against the evidence in opposition and the fact[-]finder’s mind is left with an abiding

1 conviction that the evidence is true.” *State ex rel. Child., Youth & Fams. Dep’t v.*  
2 *Alfonso M.-E.*, 2016-NMCA-021, ¶ 26, 366 P.3d 282 (internal quotation marks and  
3 citation omitted). Our standard of review therefore is whether, “viewing the evidence  
4 in the light most favorable to [CYFD], the fact[-]finder could properly determine  
5 that the clear and convincing evidence standard was met.” *In re Termination of*  
6 *Parental Rights of Eventyr J.*, 1995-NMCA-087, ¶ 3, 120 N.M. 463, 902 P.2d 1066.  
7 We are mindful as well of the requirement imposed by our Supreme Court that there  
8 must be a factual basis in the record to support the district court’s finding that active  
9 efforts were made. *Marlene C.*, 2011-NMSC-005, ¶ 2.

10 {43} As previously noted, the district court found that “[t]he efforts made by CYFD  
11 in this case have been active, reasonable, and unsuccessful at preventing breaking  
12 up this family.” We conclude, in light of the foregoing, that the evidence at the  
13 adjudicatory hearing does not support the court’s finding that active efforts were  
14 made by CYFD.

15 {44} Guardians argue, in relevant part, that the efforts CYFD described making  
16 ignored the facts and circumstances of this unusual case, failed to comprehensively  
17 assess the circumstances of Child’s extended family, failed to focus on maintaining  
18 or restoring Child’s connection to his extended family, his tribe, and his community,  
19 and were at best passive, and not the active efforts required by ICWA. We agree.

1 {45} As discussed previously in this opinion, CYFD understood based on its  
2 investigation following the report of abandonment and neglect from San Marcos that  
3 Guardians could not continue as Child’s Indian custodians and that Guardians  
4 intended to relinquish their guardianship. It was clear from CYFD’s investigation of  
5 the original report of abuse or neglect that an involuntary foster care placement of  
6 Child would have to be initiated unless successful active efforts were made to return  
7 Child to either a biological parent or to other members of his extended family.

8 {46} CYFD is correct that it was not required by ICWA to make active efforts to  
9 prevent taking Child into *voluntary* state custody pursuant to the VPA. *See Marlene*  
10 *C.*, 2011-NMSC-005, ¶ 22 (holding that voluntary placement agreements are not  
11 subject to the requirements of § 1912 of ICWA, but are instead governed by ICWA  
12 § 1913). In this case, it was evident from CYFD’s initial involvement with Guardians  
13 following the referral from San Marcos of neglect of Child that if CYFD made no  
14 efforts to prepare Child for return to his extended family and tribe and made no  
15 efforts with Child’s biological parents and extended family members, CYFD would  
16 be left with no option but to take Child into involuntary state custody. We, therefore,  
17 review the evidence describing the efforts made by CYFD from the date of the  
18 referral forward until the petition for abuse and neglect was filed and Child taken  
19 into involuntary state custody on December 9, 2021. *See Walker E. v. Dep’t of*  
20 *Health & Soc. Servs., Off. of Child.’s Servs.*, 480 P.3d 598, 608 (Alaska 2021) (The

1 appellate court looks to the entirety of the state's efforts to determine if they are  
2 adequate.).

3 {47} The sole CYFD employee who testified on behalf of the agency, Ms.  
4 Martinez, began her testimony about CYFD's efforts with CYFD's receipt of the  
5 referral for neglect from San Marcos. She reported that CYFD conducted an  
6 investigation, speaking with Guardians and determining that Guardians were  
7 unwilling and likely unable, due to Cheryle's health concerns, to continue as Child's  
8 Indian custodians. CYFD agreed to enter into a VPA with Guardians, which was  
9 described by both Ms. Martinez and Guardians at the adjudicatory hearing as  
10 intended to avoid filing an immediate petition for abuse and neglect against  
11 Guardians, allowing them time (1) to relinquish the guardianship and free Child for  
12 placement with other family members; (2) to ensure Child was discharged from San  
13 Marcos and provided the treatment foster care San Marcos recommended; and (3) to  
14 locate and prepare a parent or extended family member willing and able to meet  
15 Child's special needs in the community. The remainder of Ms. Martinez's testimony  
16 showed that CYFD made little or no effort in any of these three areas identified as  
17 necessary to prevent taking Child into involuntary state custody.

18 {48} The sole efforts described by CYFD during the nine-month period between  
19 the referral for neglect and the initiation of an involuntary custody proceeding were  
20 repeated telephone calls to Guardians to try to get them involved in working with

1 Child and CYFD until the guardianship could be officially terminated by the Navajo  
2 Tribal Court. During the six months the VPA was in place and continuing for the  
3 additional three months that preceded Child being taken into involuntary state  
4 custody, there was no evidence showing that CYFD made any effort to contact and  
5 work with Child's tribe. The only contacts reported by CYFD in its testimony at the  
6 adjudicatory hearing were the mandatory written notices ICWA requires be sent to  
7 an Indian child's tribe when a VPA is filed in state court and when an abuse and  
8 neglect petition is filed. Despite the fact that Navajo social services had been  
9 involved with Child from an early age, Child had been in tribal custody, and tribal  
10 social services had been involved in placing Child with Guardians, there is no  
11 evidence that CYFD made any effort to explore whether there were tribal resources  
12 available to help locate and to assist Child's family. The ICWA expert at the  
13 adjudicatory hearing, a social worker employed by the Navajo Nation, testified that  
14 she was involved by CYFD only after the abuse and neglect petition was filed and  
15 only for the purposes of providing testimony at the adjudicatory hearing. She  
16 testified she had not attended any meetings concerning Child, and that her  
17 knowledge of the case was based on her review of the documents provided to her  
18 after she was asked to testify as the ICWA expert at the hearing.

19 {49} Although CYFD agreed that it was in Child's best interest for the guardianship  
20 to be revoked in order to free Child to be reunited with a biological parent or placed

1 with extended family members, Ms. Martinez testified that CYFD did nothing to  
2 assist Guardians in relinquishing the guardianship despite the barriers they  
3 encountered. We are not convinced that, given the difficulty Guardians were  
4 experiencing in tribal court and their admitted ignorance of the proper procedures,  
5 that some assistance from CYFD in addressing what was, after all, conflicting  
6 jurisdiction in tribal and state court over the same child, was not called for by the  
7 active efforts requirement.

8 {50} Although much of the reasoning behind the VPA was that it would allow  
9 CYFD to place Child in the treatment foster care he needed to continue to make  
10 progress on his aggressive behavior and his mental health issues (both barriers to his  
11 return to his tribal community), CYFD failed to find a treatment foster care  
12 placement for Child. Child remained at San Marcos throughout the six months the  
13 VPA was in place, and still had not been placed in treatment foster care in February  
14 2022. The district court found that San Marcos was an inappropriate and  
15 unnecessarily restrictive setting for Child throughout this entire period. When asked  
16 what CYFD had done to place Child in treatment foster care, Ms. Martinez testified  
17 that her hands were tied because Guardians refused to cooperate. Although this  
18 testimony, if accurate, might well support a finding by the district court that CYFD  
19 had made appropriate efforts and that further efforts would have been futile, this  
20 testimony was patently incorrect. Ms. Martinez's testimony was directly



1 contradicted by documentary evidence in the record showing conclusively that  
2 CYFD had legal custody of Child during the term of the VPA and, therefore, had  
3 legal authority to place Child without authorization from Guardians. A district court  
4 order in the record gave CYFD legal custody of Child. As a matter of law, legal  
5 custody gives CYFD the authority to determine Child’s placement and to make  
6 treatment decisions for Child. *See* NMSA 1978, § 32A-1-4(T) (2023) (defining  
7 “legal custody” as vesting in the legal custodian, in relevant part, with “the right to  
8 determine where and with whom a child shall live” and the right to consent to  
9 medical and psychological care).

10 {51} On review for sufficiency of the evidence, this Court may reject the testimony  
11 of a witness the fact-finder has believed where the statement is obviously incorrect.  
12 *See State v. Sanders*, 1994-NMSC-043, ¶ 13, 117 N.M. 452, 872 P.2d 870. Ms.  
13 Martinez’s testimony on this point is in direct conflict with the statutory definition  
14 of “legal custodian.” CYFD concedes as much in its brief on appeal. We note that  
15 the expert testimony of Ms. Mose to her belief CYFD made active efforts is similarly  
16 flawed. She testified that she did not know what CYFD was authorized to do,  
17 indicating she, like the district court, was relying on the case worker’s testimony as  
18 the basis for her opinion that CYFD’s efforts were adequate under ICWA.

19 {52} The evidence in the record also shows that CYFD’s efforts to find a parent or  
20 extended family member able to care for Child when his treatment was completed

1 were minimal. CYFD did not complete a home study of Child's paternal  
2 grandmother, a relative that expressed interest in caring for Child. Both of Child's  
3 biological parents were alive, their parental rights had not been terminated, and both,  
4 when ultimately located, expressed an interest in having Child returned to their care.  
5 It appears from the evidence that Father was the parent most likely to be able to care  
6 for Child. The CYFD case worker testified that CYFD ran a routine missing person  
7 check to find Father, but that the phone numbers were inaccurate and CYFD was not  
8 successful in locating him. Given that CYFD understood that Child could not be  
9 returned to Guardians' care, that Mother was in prison and unlikely to be able to care  
10 for Child, working with Child's Father was likely the best way, consistent with  
11 ICWA, of preserving Child's Indian family and maintaining his relationship with his  
12 tribe. Ms. Martinez testified she had been in telephone contact with Father, but only  
13 since he contacted CYFD after Child was taken into state custody in December.  
14 Given the importance of Father as Child's biological parent and as a potentially  
15 viable placement option, we are not persuaded that running a routine search for  
16 Father and making a handful of telephone calls, constituted the active efforts  
17 required by ICWA prior to initiating an abuse and neglect proceeding.


18 {53} In sum, the narrowly limited efforts described by CYFD in its testimony at  
19 the adjudicatory hearing are insufficient to constitute the active efforts required by  
20 ICWA prior to taking an Indian child into involuntary state custody. CYFD's efforts

1 were not tailored to the goal of restoring Child to his parents, to his extended Indian  
2 family, or to his tribal community. CYFD failed to do the very things it had  
3 recognized when it entered into the VPA with Guardians were necessary to avoid  
4 having to take Child into involuntary state custody. It failed to actively search for  
5 Child's father and prepare him to reunite with Child. It failed to contact and obtain  
6 assistance from Child's tribe. It failed to provide any assistance to Guardians in  
7 freeing Child for return to a parent or placement with an extended family member.  
8 It offered no evidence to show that it had made active efforts to place Child in the  
9 treatment foster care recommended by San Marcos to help prepare him for return to  
10 his community. We conclude that the district court's finding that the active efforts  
11 required by ICWA were made by CYFD is not supported by substantial clear and  
12 convincing evidence in the record.

13 **CONCLUSION**

14 {54} Because a finding that active efforts have been made prior to initiating a  
15 proceeding for involuntary state custody is a required element of an adjudication of  
16 abuse or neglect in a case involving an Indian child, we reverse. We remand for  
17 further proceedings consistent with this opinion.

18 {55} **IT IS SO ORDERED.**

19  
20   
**JANE B. YOHALEM, Judge**

1 **WE CONCUR:**

2 *Megan P. Duffy*  
3 \_\_\_\_\_  
3 **MEGAN P. DUFFY, Judge**

4 *Katherine A. Wray*  
5 \_\_\_\_\_  
5 **KATHERINE A. WRAY, Judge**