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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Markey, PJ, and Whitbeck and Gleicher, JJ)

In the Matter of JADEN TAYLOR LEE,
a minor child.

Supreme Court No. 137653
Court of Appeals No. 283038

v
MACKINAC COUNTY
DEPARTMENT OF HUMAN SERVICES
Co-Petitioners/Appellees,

Trial Court No. 00-005132-NA

v
CHERYL LYNN LEE,

Respondent/Appellant,

BRIEF OF *AMICUS CURIAE* THE STATE BAR OF MICHIGAN'S CHILDREN'S LAW SECTION

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THE STATE BAR OF MICHIGAN'S
CHILDREN'S LAW SECTION

respectfully submits the following position on:
In re Jaden Taylor Lee; MSC No. 137653

The Children's Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Children's Law Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The total membership for the Children's Law Section is approximately 400 members.

The position was adopted by a unanimous vote of the Council of the Children's Law Section after a discussion at the January 15, 2009 meeting, held in conformance with the Section's bylaws. The number of members in the decision-making body is 16. Eleven members voted in favor, and one member abstained from voting on the position that is presented in this Amicus Brief.

Report on Public Policy Position

Name of Section: Children's Law Section

Contact Person: [redacted] Jodi Latuszek

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Other: *Amicus Curiae* brief in the matter of *In re Jaden Taylor Lee*, Docket No. 137653

Date position was adopted: January 15, 2009

Process used to take the ideological position: Discussion at Council meetings on January 15, 2009.

Number of members in the decision-making body: 16

Number who voted in favor and opposed to the position:
11 in favor
1 abstained

FOR SECTIONS ONLY:
_ This subject matter of this position is within the jurisdiction of the section.
_ The position was adopted in accordance with the Section's bylaws.
_ The requirements of SBM Bylaw Article VIII have been satisfied.
If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Positions: The Section respectfully requests that this Court reverse the holding of the Court of Appeals that past active efforts directed at other family members meets the 25 USC 1912(d) ICWA active efforts requirements and this Court hold that the "active efforts" requirement in ICWA refers to *recent* active efforts provided to *that particular* child to prevent the break-up of that particular Indian Family.

The Section respectfully requests that this Court hold that the beyond a reasonable doubt standard required by ICWA at 25 USC 1912(f) requires contemporaneous evidence that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

MICHIGAN CASES:

CASES FROM OTHER JURISDICTIONS

FEDERAL STATUTORY LAW:

MICHIGAN STATUTES AND COURT RULES

OTHER AUTHORITY

STATEMENT OF BASIS OF JURISDICTION

On October 16 2008, the Michigan Court of Appeals affirmed an order terminating Appellant's parental rights to Jaden Taylor Lee in a 2-1 decision. Appellant filed an Application for Leave to Appeal that was granted by this Court in an order dated December 18, 2008. In its Order granting leave, this Court directed the parties to answer the following questions: (1) whether the term "active efforts" in 25 USC 1912(d) requires a showing that there have been recent rehabilitative efforts designed to prevent the breakup of that particular Indian family; and (2) whether the "beyond a reasonable doubt" standard of 25 USC 1912(f) requires contemporaneous evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated.

In addition to providing directives to the parties, this Court invited the Attorney General, the American Indian Law, Children's Law and Family law Sections of the State Bar of Michigan to file *Amicus Curiae* briefs. The Children's Law Section submits this *Amicus Curiae* brief in response to the Court's invitation.

STATEMENT OF RELIEF SOUGHT

The Children's Law Section requests this Court reverse the court of appeals' judgment and interprets the "active efforts" requirement in a manner consistent with the purpose of the ICWA, meaning that recent active efforts are required to prevent the break-up of that particular Indian family. The Section as *Amicus Curiae* urges this Court to maintain the strong burden of proof intended by the ICWA, requiring contemporaneous evidence beyond a reasonable doubt, before the courts can terminate the parental rights, permanently severing ties between members of

Michigan's Native American families. These issues require resolution to promote consistent and correct application of the ICWA by Michigan's attorneys, jurists and social service agencies.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is an interpretation of the ICWA requiring recent active efforts to prevent the break-up of that particular Indian family consistent with rules of statutory construction and Congress's overall purpose in enacting the ICWA?

   The Children's Law Section answers: Yes.

2. Does the "beyond a reasonable doubt" standard of 25 USC 1912(f) require contemporaneous evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated?

   The Children's Law Section answers: Yes.

3. Did the court of appeals err in concluding that the futility exception can be properly applied in cases governed by ICWA, when ICWA provides no exceptions to the active efforts requirement, and where there is no indication that the legislature intended to supercede ICWA when enacting ASFA's aggravated circumstances exception that allows states to forego reasonable efforts in some cases?

   The Children's Law Section answers: Yes.

4. Did the court of appeals err in concluding that the futility exception negated the ICWA's active efforts requirements in this instance where the record failed to show that providing active efforts to Appellant would be futile, and where there were several options available to prevent the permanent severance of the parent child relationship between Appellant and her son?

   The Children's Law Section answers: Yes.

INTRODUCTION

Jaden Lee's relationship with his birth mother, Cheryl Lee, a relationship which is protected by the Indian Child Welfare Act (ICWA)[1], was terminated on the basis of the prior termination of Ms. Lee's parental rights to two other children. *Amicus Curiae*, the Children's Law Section of the State Bar of Michigan, respectfully request this Court to affirm the requirements of the ICWA. Specifically, ICWA requires two judicial findings before a child can be permanently deprived of the legal right to maintain a relationship with a parent. First, the Department of Human Services must demonstrate "active efforts" to "provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[2] Second, the court must find, "beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[3]

The *Amicus Curiae* interpret those provisions to require findings of both *current* active efforts and *contemporaneous* evidence of likely harm prior to the termination of the parental rights to an Indian child. The Constitution of the United States, the plain language and intent of the ICWA, U.S. Supreme Court jurisprudence, Michigan court of appeals' jurisprudence, and decisions by courts across the country support this position. Because the record demonstrates that active efforts were not made with respect to this child and since no contemporaneous

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[1] 25 USC 1901 et seq.
[2] 25 USC 1912(d).
[3] 25 USC 1912(f)

findings of unfitness were made, the court of appeals' decision affirming the termination order should be reversed.[4]

STATEMENT OF FACTS

The Children's Law Section as Amicus Curiae adopts and incorporates Appellant's statement of facts.[5]

OVERVIEW OF STATUTORY LAW

Indian Child Welfare Act

The Indian Child Welfare Act of 1978[6] was enacted by Congress to address the widespread removal of Indian children that was decimating federally recognized Indian tribes. Prior to 1978, state social service agencies and the state courts were removing Indian children from their parents and tribes at documented rates of 25 to 35 percent of all Indian children.[7] These children were placed in foster care or adoptive homes and adopted mainly by white families.[8] During these removal procedures, due process was denied to many Indian families.[9]

In adopting the legislation, Congress explicitly stated its findings that no other resource was more vital to the existence and integrity of the Indian tribes than their children.[10] An alarmingly high percentage of Indian families were being broken up by the often unwarranted

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[4] The Children's Law Section of the State Bar of Michigan would like to thank Ryan Particka and Ashanti Huey, student-attorneys in the Child Advocacy Law Clinic at the University of Michigan Law School, for their assistance in drafting this brief.

5 For the purpose of citation to record facts, Amicus Curiae will cite to Appellant's Appendix by noting ("At-Apx at__).

[6] Public Law No. 95-608, 92 Stat. 3069 (Nov. 8, 1978 codified at 25 USC 1901 – 1963).

[7] House Report No. 95-1386, at 9.

[8] House Report No. 95-1386, at 9.

[9] House Report No. 95-1386, at 11.

[10] 25 USC 1901(3).

removal of their children by non-tribal private and public agencies and the placement of these children in non-Indian foster and adoptive homes or institutions.[11] The states, through the administrative and judicial bodies that exercised state jurisdiction over child custody proceedings, often failed to recognize the cultural and social standards prevailing in Indian tribes and communities and the essential tribal relations of Indian people.[12] Congress made clear that "the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[13]

The Congressional purpose for enacting ICWA was declared as:

> the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of *minimum* Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture[14] . . . (emphasis added)

Congress established a higher burden to preserve Indian families through enacting Section 1912(d) that "requires that a party seeking to terminate parental rights to an Indian child under state law must demonstrate 'active efforts' to 'provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.'"[15]

These mandated "active efforts" are not defined in ICWA. The section by section bill analysis of Subsection (d) notes that the "committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to

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[11] 25 USC 1901(4)(2006).
[12] 25 USC 1901(5)(2006).
[13] 25 USC 1901(3)(2006).

initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and families."[16]

> In order to provide additional protections where available, Congress enacted Section 1921 which requires that "[i]n any case where state or federal law applicable to a child custody proceeding under state or federal law provides a *higher standard* of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this sub chapter, the State or Federal court shall apply the State or Federal standard."[17] (emphasis added).

Furthermore, this higher standard of protection is illustrated by ICWA's higher burden of proof. ICWA at 25 USC 1912(f) sets forth the requirement that the state must meet the highest burden of proof, that of "beyond a reasonable doubt," in order to establish that the continued custody of the child by his parent or Indian custodian will likely result in serious emotional or physical damage to the child. This burden must be met prior to the termination of any parental rights. This heightened evidentiary requirement is reflective of Congress' intent to rectify the often unwarranted widespread removal of Indian children from their families.

The Adoption and Safe Families Act

In order to decrease the amount of time children languished in the child welfare system, Congress passed The Adoption and Safe Families Act (ASFA).[18] ASFA changed the federal requirements that states must make "reasonable efforts" in termination cases when certain aggravated circumstances are present, such as the prior termination of parental rights to another

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[14] 25 USC 1902 (2006).
[15] 25 USC 1912(d)(2006).
[16] House Report No. 95-1386 at 22.
[17] 25 USC 1921 (2006).
[18] Pub Law No 105-89, 111 Stat 2115 (1997)(codified in scattered sections of 42 USC).

child of the parent.[19] The AFSA provision allows states to forego reasonable efforts and to file a termination petition and to cease making reasonable efforts to reunify the family. AFSA does not use the "active efforts" language in its section containing aggravated circumstances, thus it is not a proper vehicle for usurping ICWA's active efforts requirement. This is demonstrated by the absence of language in AFSA linking AFSA and ICWA and the comments of the U.S. Department of Health and Human Services during the enactment of the pertinent federal regulations.

While enacting the federal regulations pertaining to AFSA, the U.S. Department of Health and Human Services considered the potential conflict between ICWA and AFSA. The Department stated that "Although we can affirm that States must comply with ICWA and that nothing in these regulations supersedes ICWA requirements, we cannot expound on ICWA requirements since they fall outside of our statutory authority."[20] ICWA clearly states that unless a higher degree of protection is provided under a different state or federal law, ICWA's standards apply.[21]

MCL 712A.19.b(3)(i) (based on AFSA's "aggravated circumstances" language)

In response to AFSA's aggravated circumstances provisions excusing the provision of reasonable efforts, Michigan enacted MCL 712A.19b(3)(i). This provision allows the state to withhold reasonable efforts when a parent "has had rights to the child's siblings involuntarily

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[19] 42 USC 671(a)(15)(D)(providing exceptions to the reasonable efforts requirement). 42 USC 671(a)(15)(iii) is the specific provision excusing reasonable efforts when a parent has had rights terminated to another sibling of the child).
[20] 65 Fed Reg 4020, 4029 (Jan. 25, 2000).
[21] 25 USC 1921 (2006).

terminated."[22] Similar to AFSA, the Michigan law does not contain any language regarding active efforts. This state codification of aggravated circumstances is the basis upon which DHS may deny reasonable efforts to parents who have had their rights to other children previously terminated.

The higher protections specified in ICWA, apply only to Indian children.[23] The more general requirements under AFSA apply to all children.[24] Neither AFSA or the Michigan law contemplate the denial of active efforts to Indian children. ICWA does not provide any exceptions to the "active efforts" requirement, therefore, it is improper for the state to rely on the AFSA based on MCL 712.A.19b(3)(i) for its basis to deny providing active efforts to a parent and specific child of an Indian family.

[22] MCL 712A.19b(3)(i).
[23] 25 USC 1901-1902(2006).
[24] The relevant sections of AFSA cover all children. 42 USC 625(a)(1)(2006). The requirements for a state plan do not apply to less than all children. 42 USC 671(a)(2006).

STANDARD OF REVIEW

The proper interpretation of a federal law (ICWA) is reviewed by this Court as a question of law under the de novo standard.[25]

Michigan case law and court rules require that termination of parental rights cases are reviewed for clear error.[26]

ARGUMENT

I. The term "active efforts" in 25 USC 1912(d) requires a showing that there have been *recent* rehabilitative efforts designed to prevent the break up of *that particular* Indian family.

A. Before the issue of whether recent active efforts are required, a common understanding of the meaning of "recent" must be established.

The term "recent," although necessary for analysis of ICWA's active efforts requirement, is not statutorily defined. To compound matters, there is no common sense understanding of what "recent means." For instance, one might say, "I recently had a baby," however, that parent may be speaking of her 3-year old. This is understandable since parenthood tends to create a time-warp, but for purposes of an appropriate legal analysis of what recent means in terms of this discussion, we must look elsewhere. *Recent* is not a defined term in Black's Law Dictionary.[27] Nor did research disclose a United States Supreme Court definition of *recent.* However, recent

[25] *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005).
[26] *In re Trejo*, 462 Mich 341, 356-57; 512 NW2d 407 (2000); MCR 3.977(J).
[27] *Black's Law Dictionary*, Seventh Edition, Bryan A. Garner, Editor in Chief (1999).

is defined in The American Heritage Dictionary of the English Language as "Of, belonging to, or occurring at a time immediately before the present."[28]

The same dictionary defines "immediately" to mean "without delay."[29] Therefore, unlike our analogy applying the term *recent* to a mother describing having a baby *recently*, it is clear that recent implies immediacy. Thus, *recent* active efforts would be efforts provided just prior to, or immediately before, the initiation of a termination petition. The language in the Bureau of Indian Affairs guidelines[30] and ICWA direct the state to provide active efforts before removal when at all possible. This language is consistent with active efforts that are current, not efforts that are years old or directed toward other siblings.

Due to the variances in each child welfare case, this Court should decline to apply a bright line rule as to the number of days prior to the action that would be considered *recent.* However, this Court can readily determine that efforts that are over two years old do not meet the recent requirement because such a lengthy period does not trigger the concept of immediacy and, therefore, cannot be deemed "recent," as guided by the definition provided above. This reasoning, applied to the aged efforts in the current case reveal that those efforts should be deemed untimely. Unlike good wine, active efforts do not grow more valuable as they linger. The context and need for those particular efforts changes with the passage of time. For instance, in this case, Ms. Lee was merely a child herself when she was first acquainted with child

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[28] *The American Heritage Dictionary of the English Language*, Third Edition, Houghton Mifflin Co., Boston, MA (1992), p. 1508.

[29] *The American Heritage Dictionary of the English Language*, Third Edition, Houghton Mifflin Co., Boston, MA (1992), p.902.

[30] Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 67584 Fed Reg Vol. 44, No. 228 (Nov. 26, 1979).

protective services. She was immature and unprepared to face the rigors of parenthood, let alone remedy emotional issues resulting from the abuse she endured as a child.

The record before this Court reveals a different context and warrants a conclusion that the efforts provided years ago have reached their expiration date. Essentially, in a situation where Ms. Lee has made improvements to her life, and the proceedings involve a different Indian child than the children involved in previous child protective proceedings, the context is akin to starting with a new family, as the respondent's relationship with that child is unique and individual. Case law or statute is not necessary to define this concept, which any parent can attest to: a parent's relationship with each of his or her children is unique and special in its own way. Each relationship has its own nuances and each requires a different level of certain parenting skills.

In light of that uniqueness, services must be tailored to each relationship instead of being broadly applied without regard to what is at the heart of the very goal in providing services– the parent child relationship. Cheryl Lee should be able to receive new rehabilitative services that are aimed at identifying and ameliorating any current deficiencies in her parenting. This includes active efforts that are tailored to her current relationship with Jaden, accounting for their respective ages and the family support available to them.

B. A statutory interpretation requiring recent rehabilitative efforts for that particular family is consistent with the purpose of ICWA and the historical interpretation of Indian law by the U.S. Supreme Court.

The ICWA's active efforts requirement and the higher protections afforded to Indian families cannot be satisfied in perpetuity. The protections put in place by Congress require a certain level of immediacy in order to be applicable to a particular family's circumstances.

In addition to the timeliness of active efforts, to afford Indian families the higher safeguards Congress intended, active efforts would logically extend to each individual child involved in the familial relationship. Any other interpretation would essentially codify the proposition that, once an Indian parent had been adjudicated, the Indian parent would essentially always be deemed, "unfit" and any future attempt at creating or maintaining an Indian family would be futile. This is the very outcome that Congress intended to avoid and is reflective of the previously existing practices by the states to remove Indian children without adequate rehabilitative efforts.

The U.S. Supreme Court has reinforced this reasoning by interpreting the statutory language in Indian law liberally to favor the Indians. For example, in *Montana v Blackfeet Tribe* the Court noted that "[t]he State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, '[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and Indians.'"[31] The mandate that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" has existed for over 90 years.[32]

One example of this construction is found in *Mississippi Band of Choctaw Indians v Holyfield*, where the Court held that although the term 'domicile' in key jurisdictional provision of ICWA was not statutorily defined, Congress did not intend for state courts to define that term as matter of state law due to the inconsistent application that would result. [33] The Court then held

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[31] *Montana v Blackfeet Tribe of Indians*, 248 US 78, 89 (1918) (citing, *Oneida County v Oneida Indian Nation*, 470 US 226, 247. 105 SCt 1245 (1985)).
[32] *Montana v Blackfeet Tribe of Indians*, 248 US 78, 89 (1918).
[33] *Holyfield,* 490 US 30, 109 S Ct 1597 (1989) (Chancery Court denied jurisdiction).

that children were 'domiciled' on reservation within meaning of Act's exclusive tribal jurisdiction provision even though they were never physically present on reservation themselves.[34] Through its holdings, the Court interpreted ICWA in a manner that provided consistent protections throughout the various states and that interpreted a key term in a manner that would provide tribes the greatest amount of protection.

The rule of liberal construction that favors the Indian family is especially significant when the courts seek to intervene in the lives of Indian families potentially severing Indian familial bonds by terminating parental rights. For all families, Indian and non-Indian, the U.S. Supreme Court has established that parents have a vital interest in their ability to raise their children. Termination of parental rights is the most extreme remedy a court may order during an abuse and neglect proceeding. The Court observed that "parents retain a vital interest in preventing the irretrievable destruction of their family life."[35] With the gravity of the consequences present in an erroneous interpretation and application of statutes relating to Indian families, it is important to note that any interpretation should be applied delicately and afford all available protections.

On that note, applying such statutes without requiring a petitioner who advocates for termination of parental rights to make a showing using *current* evidence that *recent* active efforts were made, permits a court to terminate parental rights by presuming that once a parent makes a mistake, regardless of the time that has passed, that parent is always unfit. As a practical matter, such a proposition treads dangerous waters and could set precedent which essentially affords all parents little to no constitutional protections. This point was eloquently applied in *Stanley v Illinois*, where the Court stated, "Procedure by presumption is always cheaper and easier than

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[34] *Id.*

individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."[36]

Even if this Court is inclined to find that the facts of this case demonstrate that ICWA was properly followed, *Amicus Curiae*, the Children's Law Section would respectfully request that it do so cautiously. Child welfare law is unique in that it brings together so many different roles that are orchestrated and guided by statute. In cases involving Indian children, there are even more players guided by more laws. For instance, there are: tribal authorities, expert witnesses, petitioner, petitioner's attorney, L-GAL, caseworkers, parent's attorney, and trial court judge. Each player's role must conform to two different statutory frameworks, while recognizing both their common and individualized goals.

The ICWA seeks to protect Indian families, while the Juvenile Code seeks to protect children and reunite families when possible. Additionally, caseworkers are also guided by their DHS policy manual. Somehow each player must remain true to his or her role, while respecting the overall purpose of the statutes that guide them. Consequently, they need guidance and cannot be left to determine for themselves what is recent. If two years is recent, is ten years? Hypothetically, if an Indian mother was an inadequate parent at age 18 and her rights were terminated, would the services provided then satisfy active efforts if she were to become involved in the system again with a new baby at 28? Without putting the intent of ICWA into full effect based on the rules of construction that favor Indian families into a form which can be

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[35] *Santosky v Kramer*, 455 US 745, 753 (1982).
[36] *Stanley v Illinois*, 405 US 645, 651, 656-657; 92 S.Ct. 1208 (1972).

successfully and consistently applied, the entire purpose of ICWA will remain misinterpreted at best, and at worst, ignored. The Children's Law Section as Amicus Curiae respectfully suggests that "recent" means months, not years.

Thus, an application of the ICWA in a manner that requires recent active efforts to prevent the break up of that particular Indian family is not only consistent with statutory interpretation, but it also appeals to common sense.

C. *The Michigan Court of Appeals erroneously adopted the futility exception because ICWA does not make any exceptions to the provision of active efforts.*

Citing cases from other jurisdictions, the Michigan court of appeals adopted the futility exception in *In re Roe*, holding that ICWA's active efforts requirement could be satisfied by a showing that services had been provided to respondent in the past, and that those services yielded no positive response.[37] In doing so, the court left the decision of whether new services would be futile to the discretion of the trial courts. However, the majority opinion in *Roe* does not indicate a realistic standard for the concept of what is "futile."

In sum, application of the futility test can circumvent a federal statutory safeguard and circumvent an entire statutory scheme at the trial court's discretion. What may be "futile" in one county may not be futile in another. The court indicated that USC 1912(d) can be satisfied on a trial court's finding that additional attempts to provide services would be futile.[38] In *Roe*, the only prerequisites for triggering the trial court's discretionary ability to circumvent federal statute is articulated as situations where: (1) a parent has consistently demonstrated an inability to benefit from

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[37] *In re Roe*, __ Mich App__; __NW2d__(Docket No. 283642, released Sept. 25, 2008).
[38] *Id.*

the Department's provision of remedial and rehabilitative services, or (2) has otherwise clearly indicated that he or she will not cooperate with the provision of the services.[39]

At first glance, the policy behind such a holding is sound, as there is little sense in providing services to someone who *absolutely refuses* to participate. However, without codified examples of at least several factors a trial court should cite to and without providing a time frame for how *recent* a lack of cooperation or benefit must be in order to satisfy the concept of "futility," the trial courts have unbridled discretion to order that services not be provided to Indian families. This discretion can range in outcomes with findings of "futility" based on lack of cooperation *at any time preceding termination*, to conclusions that a lack of cooperation or benefit as little as six months prior to termination is insufficient to show "futility."

Although the majority opinion in *Roe* is well reasoned in terms of applying persuasive precedent, the potential for inconsistent application that is detrimental to Michigan's Indian families is great. Any test that affords absolute discretion in a proceeding that can result in the breakup of a particular Indian family is contrary to the purpose of ICWA and basically renders 25 USC 1912(d) nugatory.

II. The "beyond a reasonable doubt" standard in the Indian Child Welfare Act requires *contemporaneous* evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated.

The U.S. Supreme Court examined the stringent requirements that the beyond a reasonable doubt burden imposes in termination of parental rights cases versus the lower

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39 *Id.* (slip op. at 10).

evidentiary burden of clear and convincing evidence. The variance between these two evidentiary standards, supports that evidence in a case requiring proof beyond a reasonable doubt would need to be contemporaneous evidence.

One of the underlying principles of Supreme Court jurisprudence relating to the termination of parental rights is that the Constitution requires certain minimum procedural guarantees to birth parents and places high burdens on the states when seeking to destroy familial bonds. As the Court noted in *Santosky v Kramer,*

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State ... If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[40]

The Court in *Santosky* wrote at length about this fundamental right, the source of which is "plain beyond the need for multiple citation," and found that the interests of parents and children align until proof of parental unfitness is demonstrated.[41] After extensive discussion of the importance of this right, the Court held that the Due Process Clause required proof by clear and convincing evidence of unfitness prior to the termination of parental rights.[42] The ICWA, which governs this case, requires an even higher standard of proof than constitutionally required – beyond a reasonable doubt – before a court may terminate parental rights.

The *Santosky* Court described the stringency of the "beyond a reasonable doubt" standard which bespeaks the "weight and gravity" of the private interest affected society's interest in

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[40] *Santosky v Kramer*, 455 US 745, 754 (1982).
[41] *Santosky* at 759 (quoting *Lassiter v Department of Social Services*, 452 US 18, 26(1981)).
[42] 25 USC 1912(F).

avoiding erroneous decisions, and a judgment that those interests together require that "society [impose] almost the entire risk of error upon itself."[43] The Court further noted that "[i]ncreasing the burden of proof is one way to impress the fact finder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate" decisions will be issued.[44]

Michigan courts have also applied the beyond a reasonable doubt standard.[45] Applying this standard requires the state "to conclude with near certitude that the continued custody of the Indian child by the parent is likely to result in serious emotional or physical damage to the child."[46] Failure to establish this heightened evidentiary requirement needed to terminate parental rights to an Indian child can result in the invalidation of a court's decision. [47]

As discussed in the Overview of Statutory Law and Section I, the ICWA drafters believed that proof beyond a reasonable doubt was the appropriate standard of proof in these cases because they sought to impose a high burden on those seeking to permanently sever the ties between Indian children and their parents. Without that contemporaneous finding, the protections of the beyond a reasonable doubt standard for finding unfitness under ICWA cannot be met.

Without requiring a contemporaneous finding of likely harm, Indian families can be permanently dissolved based solely on presumption may be unsteadily stilted upon past conduct, unrelated to the current Indian familial relationship at risk. Consequently familial relationships can be arbitrarily severed on a whim; an idea in stark contrast with the goal of affording Indian families "heightened protection."

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[43] *Santosky*, 455 US at 755 (citing, *Addington v Texas*, 441 US 418, 427 (1979).
[44] *Id.*
[45] *In re Elliott*, 218 Mich App 196; 554 NW2d 32 (1996); *In re AMAC*, Mich App 533, 537; 711 NW2d 426 (2006).
[46] *In re Roe*, ___Mich App__;__NW2d___(Docket No. 283642, released September 25, 2008).
[47] *Id.*

This analysis disfavoring terminations predicated solely on presumption or past conduct is consistent with U.S. Supreme Court case law and lower court decisions. In *Stanley v Illinois*, the Court visited the precise question of what type of evidence could satisfy a finding of unfitness where the State of Illinois sought to presume Mr. Stanley's unfitness based solely on the fact that he was not married to the children's mother. The state argued that "unmarried fathers can reasonably be presumed to be unqualified to raise their children claiming that men are less inclined to child rearing and most unwed fathers are, in fact, unfit parents.[48]

The *Stanley* Court squarely rejected such a presumption of parental unfitness. In *Stanley*, --as in many other cases where anticipatory doctrines or presumptions are swiftly applied– the record bore no facts showing Stanley's unfitness. In repudiating Illinois' statutory scheme, the Court provided the following guidance: "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."[49]

In addition to the stern and thoughtful directives of the U.S. Supreme Court, Michigan's lower courts, in both non-ICWA and ICWA cases, have adopted and applied *Stanley's* holding, requiring evidence of a parent's current unfitness prior to terminating his or her rights. Requiring the state to prove parental unfitness before terminating parental rights is an essential concept of child welfare law, applicable to every case. In *LaFlure*, the Michigan court of appeals observed

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[48] *Stanley v Illinois*, 405 US 645, 653-54 (1972).

[49] *Id. Stanley* is also quoted in Judge Gleicher's artful and well reasoned dissent in *In re Jaden Taylor Lee*, Court of Appeals Docket No. 283038. (At-Apx at 39a).

that the "burden [is] on the state to justify termination of appellant's parental rights."[50] The *LaFlure* court went on to say, "nor do we think that placing the burden of proof on the state, even at all review hearings, significantly interferes with the Legislature's efforts to provide children with stability to which they are entitled."[51]

The need of current information about the parents' situation is a vital part of determining a parent's fitness. If the state does not consistently seek to evaluate the parents in their current situation, they are unable to meet the burden of proof required by the court. The court specifically states that it fails to see how a determination into the fitness of the parents "may be intelligently made unless the court making the determination is fully aware of the circumstances which prompted placing the child in the temporary custody of the court and of all subsequent circumstances, if any, which prompted keeping the child in the temporary custody of the court."[52] Again, this requires the state to take into account the current fitness of a parent before terminating their parental rights.

Other jurisdictions have agreed with the notion that past unfitness cannot be the only indication of current unfitness relied upon by the court when making statutory findings: The California Court of Appeals said *In re Matthew Z* that

> [B]ased on the family-protective policies underlying the ICWA, it is reasonable to assume the ICWA section 1912(f) finding must be made at, or within a reasonable time before, the termination decision is made. Otherwise, it would be possible for a state to terminate parental rights when the current circumstances do not show a return to the parent's custody would be detrimental to the child's well-being. This would violate the words and spirit of the ICWA.[53]

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[50] *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 48 (1973) (Remanded for a de novo hearing to determine fitness of a parent as of the date the circuit court considered the case on remand).
[51] *Id.*
[52] *In the Matter of LaFlure*, 48 Mich App 377, 389; 210 NW2d 482 (1973).
[53] *In re Matthew Z*, 80 Cal App 4th 545, 552 (2000).

(At-Apx at 35a).

Additionally, the state of Georgia has more recently grappled with something akin to a theory of anticipatory neglect and held that "Although the apparently deplorable condition of the mother's house prior to DFCS's most recent involvement is troubling, the mother's "past unfitness, alone, is insufficient to terminate her right to custody. A finding of parental unfitness must be based on present circumstances."[54] The state should take into account a parent's current efforts to prove parental fitness when making a decision to terminate parental rights. *CJ v Department of Health & Social Services*, 18 P3d 1214, 1219 (Alaska 2001).

While the father in that case had previously deserted his children for a short time due to a severe lapse in judgment, he subsequently quit his job and made sincere efforts to relocate closer to his children, and found living quarters suitable for raising his family. His current behavior showed that he was making a concerted effort to provide a stable living environment for his children that would not impede their emotional or physical health. The state failed to take his actions into account. The court found that the state's failure to consider his remedial efforts seriously undermined its assertion that it has met the high standard required by ICWA.

In the present case, the trial court erred, not in deeming that Ms. Lee's prior terminations were relevant to the current matter, but by basing its decision solely on the prior terminations. Essentially, it foreclosed the "determinative issues of competence and care" by explicitly disdaining "present realities" as *Stanley* admonished. Specifically, the trial court stated "The petition seeking termination is based upon the Sault Sainte Marie Tribal Court's Orders terminating the Respondent's parental rights to three other children in two separate cases" and

[54] *In the Interest of CT*, 286 Ga App 186, 190 (Ct App Ga 2007) (quoting *In the Interest of LJL*, 247 Ga App 477, 480

concluded that "there certainly is no question that rights to Respondent's other children were terminated by a Court of competent jurisdictions."[55] (At-Apx at 11a-17a).

The trial court was dismissive of any progress made by Ms. Lee and downplayed the current relationship between her and Jaden. Instead, the court should have used the prior termination decisions as a starting point to examine Ms. Lee's current ability to parent. Relevant issues that should have been considered in making this determination should have included the following: 1) the reason why this child entered foster care; 2) the length of time between the prior terminations and the current case and the parent's progress during that time; 3) evidence of the parent's relationship with this child and that the mother and child had been enjoying unsupervised visitation over a period of years without incident.

The agency made none of the inquiries discussed above. First, the trial court obtained jurisdiction over Jaden solely because of the actions of his father, not his mother. Since December of 2003, Cheryl Lee and Tony Plank (Jaden's father) shared joint legal custody of him. For the three and a half years that followed, Ms. Lee had consistent, unsupervised visitation with her son. (At-Apx at 29a). It was not until 2007, when Plank was arrested and jailed on felony charges, that this situation became unstable. Knowing that her son's father would be spending a minimum of two years in prison, Ms. Lee sought increased visitation with Jaden. (At-Apx at 12a). Cheryl was awarded increased visits, specifically every Saturday from 8am until 6pm. Soon thereafter, Plank petitioned the department to terminate Ms. Lee's rights, and DHS subsequently filed a petition on the basis of her prior terminations. (At-Apx at 12a).

(Ct App Ga 2001)).

There is nothing to indicate that her three and a half years of unsupervised visitation would not have continued without incident.

Second, the evidence demonstrated that Ms. Lee had addressed many of the problems that formed the basis of the prior terminations. The most significant change is that Jaden is now nearly ten years old. He does not require the same sort of attention that the youngest of children would require – he will not, and has not in the past three and a half years, been found playing in the street while under Ms. Lee's care. Ms. Lee was once herself a child raising children. She has matured a great deal and, although she is far from a perfect parent, she is an adequate parent according to the trial testimony of Melissa Vanluven, the expert witness in tribal culture. (At-Apx at 82a).

Additionally, Ms. Lee recently completed a substance abuse program with Gary Matheny which included discussion of parenting skills and anger management. Her counselor observed that she benefited from this program. This demonstrates that she is now capable of benefiting from services if they are offered to her. At trial, Mr. Matheny testified that he has spent roughly twenty-five to thirty hours with Ms. Lee and has seen real progress. He does not believe her to be a risk of harm to her son. (At-Apx at 94a-98a). The prior terminations were based largely on her immaturity due to her youth. Cheryl Lee is now in a position where she can maximize the benefits from parenting classes and other such services if they were to be offered to her.

Finally, the only recent evidence at trial demonstrated that Ms. Lee had a nurturing, positive relationship with Jaden. Unsupervised visitation between Cheryl and her son occurred for three and a half years without a single complaint. At no point during that time did anyone allege that she was unfit to parent her son. Jaden himself testified at trial that he looked forward

to visits with his mother. (At-Apx at 35a). At no point did anyone interview Jaden or do any sort of research into the current parent child relationship; if they had, they would have discovered that it is healthy and that a real parent-child bond exists. (At-Apx at 54a). The current placement is akin to an extended family situation. Jaden is happy living with his grandmother, but acknowledges his mother, loves her, and has a place for her in his life. There is no rational reason to terminate this relationship.

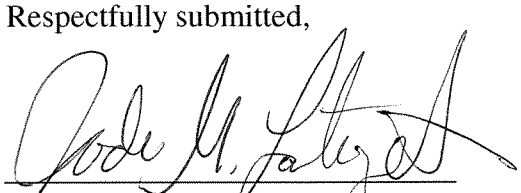
Since her prior terminations, Cheryl has matured considerably and has shown, through her counseling with Gary Matheny, that she is capable of learning to be a better parent. The bond between mother and child is strong. Permanently severing the parent-child relationship would accomplish absolutely nothing and would be much more likely to harm Jaden Lee than maintaining an ongoing relationship with his mother.

CONCLUSION AND REQUEST FOR RELIEF

Applying ICWA's principles in a manner consistent with its overall intent is of key importance to Michigan's entire child welfare system. More importantly, erroneous application of ICWA resulting in unnecessary dissolution of Indian families is a serious concern for Michigan's entire Native American population.

Amicus Curiae request this Honorable Court to overrule the court of appeals decision and reverse the termination of Cheryl Lee's parental rights to her son Jaden Lee.

Respectfully submitted,



February 24, 2009

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