

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Markey, P.J., and Whitbeck and Gleicher, JJ.

IN THE MATTER OF JADEN TAYLOR LEE,
A minor (DOB: 6/13/1999) Docket No. 137653

MACKINAC COUNTY DEPARTMENT OF HUMAN SERVICES,

Petitioner/Appellee

COA No. 283038

v.

Mackinac Circuit Court
Family Div. No. 00-005132-NA

CHERYL LYNN LEE

Respondent/Appellant

BRIEF ON APPEAL – APPELLEE

(ORAL ARGUMENT REQUESTED)

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BASIS OF JURISDICTION

The People of the State of Michigan stipulate to and abide by the bases of jurisdiction set forth by Appellant.

RELIEF SOUGHT

Appellees respectfully request this honorable Court to uphold the decisions of the 11th Circuit Court, Family Division and the Michigan Court of Appeals. Appellee's abided by the requirements of ICWA before terminating parental rights. Granting Appellant's demands would defeat the purpose of ICWA and intrude on tribal sovereignty.

QUESTIONS PRESENTED FOR REVIEW

- I. **WHETHER THE TERM “ACTIVE EFFORTS” IN 25 USC 1912(d) REQUIRES RECENT EFFORTS PRIOR TO TERMINATING PARENTAL RIGHTS EVEN IF THOSE EFFORTS WOULD BE FUTILE?**

- II. **WHETHER THE TRIAL AND APPELLATE COURTS DID EXAMINE CONTEMPORANEOUS EVIDENCE TO DETERMINE IF THE CONTINUED CUSTODY OF THE INDIAN CHILD BY THE PARENT WAS LIKELY TO RESULT IN SERIOUS EMOTIONAL OR PHYSICAL DAMAGE TO SATISFY THE “BEYOND A REASONABLE DOUBT” STANDARD OF 25 USC 1912(f) PRIOR TO TERMINATION OF PARENTAL RIGHTS?**

INTRODUCTION

For purposes of clarity, the Appellee's Brief will follow the citation format used by Appellant. The Opinion and Order *In the Matter of Shaylynn and Jordan Dufresene* will be referred to as (CW05, p.). The Opinion and Order *In the Matter of Brandy Lynn Plank* will be referred to as CW06, p.) Appellant's Brief will be referred to as (B, p.).

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

These proceedings concern Jaden Taylor Lee, the now nine year old son of Cheryl Lee and Tony Plank. The State of Michigan and The Sault Sainte Marie Tribe of Chippewa Indians have determined that Cheryl Lee is an inadequate parent incapable of rehabilitation. Jaden was removed from his mother's home in 2004 due to ongoing neglect and placed with his father. Jaden lived with his father until 2007 and during that time Cheryl was satisfied with limited parenting time. This petition was prompted by a need for a new permanency plan for Jaden. The purpose of the proceedings is to ensure that Jaden is able to grow up in a stable and appropriate home.

DHS began working with Cheryl and her family in 1998, when she was a victim of neglect and abuse, as well as delinquent. (49a) Regina Frazier began providing WrapAround services to both Cheryl and her family in 1998 and continued working with Cheryl for about three years (49a) In 1999, Cheryl was removed from her home and placed in foster care. (5b) In June of 1999, Cheryl gave birth to Jaden.(5b) As a Wraparound coordinator for DHS, Ms. Frazier's job was to coordinate multiple services and service providers and to provide support for Cheryl. (12b) Cheryl and Jaden returned to Cheryl's family home and Ms. Frazier, the Indian Outreach worker, and Strong Families/Safe Children met weekly in Cheryl's home. They worked on parenting and

household management. (13b) Cheryl was offered a teen parenting course, other services were geared towards her individual development and needs, therapy was provided in her home since Cheryl had no transportation. (9b, 10b) Ms. Frazier testified that Cheryl was not always cooperative and that she often felt that mere compliance was the most Cheryl was able to achieve. (5b, 8b, 10b) In 2000, Jaden was removed by DHS due to substantiated allegations of neglect. (6b, 7b)

Cheryl's case DHS case was closed after Jaden was removed and she moved to Chippewa County. (6b) Shaylynn was born in 2001 and Cheryl started receiving WrapAround services from Penny Wilson Clark in 2002. (14b) Ms. Clark described the WrapAround program as a network of people around Cheryl and Shaylynn, doing whatever was necessary to help keep mom and baby together. (14b) Penny Clark worked with Cheryl as a WrapAround Coordinator and case manager for two years before starting the Family Continuity Program with Cheryl. (16b) Ms. Clark worked with Cheryl until the case was closed in 2005. (59a) Ms. Clark stated that she did all she could do for Cheryl without being in the home twenty-four hours a day, seven days a week. (18b) During the time that Ms. Clark worked with Cheryl there were consistent issues with safety and sanitation in Cheryl's home. Ms. Clark described seeing broken glass, pennies, and cigarette butts on the floor, and knives left out on the table. (17b) Ms. Clark could not cite any examples of Cheryl gaining anything from the services she provided. (18b) Ms. Clark also described some of Cheryl's mental health issues besides Fetal Alcohol Affects which went undisputed by Appellants. (57a) Penny Wilson Clark did work with Cheryl and Jaden after he had been returned to her care. (20b) During this time Cheryl received

services from Families First, the health department, and a nutrition program, and a parenting program. (27b, 28b)

Jordon was born in 2004. That same year, all three children were removed for neglect. Jill Thompson began working with Cheryl when the children were moved to foster care. (64a) The substantiated allegations leading to removal included multiple instances of Shaylynn being found in the street. (22b, 23b) Cheryl often stayed in bed when her children were awake and wandering in the home. (26b) The children were unkempt. (31b & CW05, p.2) Also, Cheryl never managed to keep her home clean or safe on a long term basis. (17b) Jaden was left in charge of his siblings. (31b) Tony Plank was given custody of Jaden by order of the Mackinac County Circuit Court. (CW05, p.2) Shaylynn and Jordon were returned to Cheryl's home in September of 2004. (CW05, p.2) Jill Thompson describes Cheryl as very cooperative and diligent at this time. (29b) Despite the investment Cheryl made, Ms. Thompson noted that there were still ongoing issues with neglect, and dangerous conditions. (30b) Following the dissolution of Cheryl and Justin Dufresne's relationship that same month, the children moved out of her home and resided with their father until December of 2004. (CW05, p.3)

In July 2005, Shaylynn and Jordon were removed from Cheryl's home by emergency petition after Shaylynn and Jordon were found in the street in the middle of the night wearing dirty diapers and Cheryl was yelling obscenities through the window at them. (CW05, p.2) As a result of that removal, the children's paternal grandfather, Fred DuFresne, agreed to a guardianship agreement. (CW05, p.3) Cheryl demonstrated a disregard for that guardianship by leaving the state with her children without consulting Mr. DuFresne. (CW05, p.10-11)

Appellant does not intend that Jaden should reside with his mother. At the hearing, Appellant suggested alternative arrangements where someone else would continue to bear the burden and expense of raising Jaden while allowing Cheryl to keep her parental rights. (37b, 38b, 39b) Cheryl failed to provide the Court with evidence that she can now provide Jaden with an appropriate home or consistent parenting. Appellant notes that Jaden's father is currently in prison. (B, p.6) Justin DuFresne, the father of Shaylynn and Jordon had a criminal history and was violent with Cheryl. (33b; CW05, p.3) Michael Plank, Cheryl's current partner and Jaden's uncle, also has a criminal history which includes domestic violence. (50b) It is due to Michael Plank's admission of drug use that Cheryl lost her tribal housing. (47b, 48b) Cheryl is completely dependent upon Michael Plank. If the relationship between Cheryl and Michael were to end, Michael would have no obligation to provide for Cheryl or Jaden's support. At the time of trial, Michael's employer, Greg McLeod, provided Michael with a one room cabin free of charge. (44b) Mr. McLeod was under no apparent obligation to continue this arrangement. Michael owned the only vehicle. (86a) Cheryl has had problems with transportation in the past. (1b, 2b, 4b, 95a) Michael earned the majority of the household income. (85a) Cheryl's income was limited to the \$550 a month she received from Social Security. (85a) Cheryl had not worked in at least four years, despite not having children to care for since 2005. (46b)

Throughout the termination hearing, Appellant discussed the likeliness that Cheryl had matured. (53a, 60a, 68a) Cheryl showed no evidence of maturing or becoming more capable between 1999 and 2005. Jill Thompson testified that in 2004 Cheryl would not always behave in an age appropriate manner. (34b) In 2005 Cheryl had multiple

criminal convictions, including an impaired driving offense and assault for a fight that occurred at the Back Door Bar while she was pregnant (CW05, p.2, 3). In October 2006 she was convicted of Operating While Visibly Impaired, 2nd. However, Penny Clark and Jill Thompson testified that Cheryl's problem with parenting was ability, not maturity. (24b, 35b)

The GAL suggested that the Tribe failed to "think outside the box" while searching for ways to keep Cheryl's family together. (27b) Ms. Clark testified to spending her own money on necessary items for Cheryl when Cheryl was unable to manage her own finances. (19b) Ms. Clark arranged for a Payee to assist Cheryl with her finances. (15b) She helped put latches on Cheryl's doors to try to keep the children indoors. (19b, 22b) She also stated that during the Family Continuity program, she was in Cheryl's home more often than once a week. (17b) Ms. Clark testified that she designed the services she provided to accommodate Cheryl's disability. (21b) Ms. Clark also brought in Cheryl's family to try and assist her to manage her household. (17b)

Cheryl complained because she saw so many of the same caseworkers over and over again for different services. (49b) Those same caseworkers testified to caring for Cheryl and wanting very much to keep her family together. (21b, CW05, p.11) Penny Clark and Jill Thompson believe that Cheryl loves Jaden and desires to be a parent. (24b, 33b) Cheryl could not specify what the service providers could have done differently to help her keep her family together. (51b) Cheryl failed to follow through on the services and then the workers would have to return and go over the same material. (58a) Cheryl failed to obtain mental health services recommended after a psychological evaluation. (36b)

The GAL repeatedly asked caseworkers if they had any “qualitative or quantitative” methods for determining if termination is in the child’s best interest. (62a, 70a, 81a) However, neither Appellant nor the GAL produced any data or evidence that Cheryl is now capable of parenting or that Jaden would be more injured by termination than by living in constantly changing circumstances.

Melissa Van Luven was qualified as an Indian expert. She is a tribal member and a child placement supervisor with the tribal family services. (74a, 40b) She did not work directly with Cheryl and Jaden but she did oversee the work of Cheryl’s caseworkers. She was familiar with the extent of services provided to Cheryl. (77a) Ms. Van Luven testified that the Tribe expects parents to consistently provide for the basic needs of children, that these expectations are similar to the expectations of the State of Michigan, and that Cheryl could not consistently meet these minimum standards. (42b, 43b) She testified that active efforts had been made to prevent the termination of the parental relationship and that continued custody was likely to result in serious physical or mental injury to Jaden. (76a)

INTRODUCTION

The People submit that ICWA does not specify the nature or timing of “active efforts” because the needs of each family and each child vary. Sufficiency of efforts should be determined by examining the services received by the parent. If the parent has been actively guided through appropriate services, and still shows no improvement, the addition of more children should not be a cause to continue services. Ongoing services places a burden on both the Tribe and the State, and denies children their right to a safe and permanent placement. Congress clearly did not intend for ICWA to impose specific

requirements, only a higher standard than normally required in abuse and neglect cases.

25 USC §§1902, 1912(d),(f)

Standard of Review:

The People of the State of Michigan stipulate to the “clear error” standard of review set forth in *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000). A decision is “clearly erroneous when the Court is left with a definite and firm conviction that a mistake has been made. *In re Cornet*, 422 Mich 247, 278 (1985). “To be clearly erroneous, a decision must be more than maybe or probably wrong.” *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). This conviction must be tempered by the requirements of MCR 2.613 (C) that “regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” *In re Miller*, 433 Mich. 331at 337, 445 N.W.2d 161 (1989). The People stipulate that questions of law should be reviewed *de novo*; *In re SD*, 236 Mich App 240; 599 NW2d 772 (1999).

Burden of Proof:

The People of the State of Michigan also stipulate to the dual burdens of proof imposed by ICWA for “active efforts” and “serious emotional or physical damage”

25 USC §1912(d) requires “active efforts” designed to prevent the break-up of an Indian family and that the provision of these “active efforts” must be proven by “clear and convincing” evidence. *In re Roe*, ___ Mich App ___; ___ NW2d ___ (Docket N o. 28364) (Sept. 25, 2008) (Slip op. 7)

25 USC §1912(f) requires proof “beyond a reasonable doubt” that continued custody of the child by the parent is likely to result in “serious emotional or physical damage” to the child.

ARGUMENTS

I. WHETHER THE TERM “ACTIVE EFFORTS” IN 25 USC 1912(d) REQUIRES RECENT EFFORTS PRIOR TO TERMINATING PARENTAL RIGHTS TO EACH CHILD EVEN IF THOSE EFFORTS WOULD BE FUTILE?

A. There is No Conflict between ICWA and State Law.

Cheyl Lee is not the intended beneficiary of ICWA. (B, p.22) ICWA was not intended to give Indian parents a greater liberty interest at the expense of their children. Instead, ICWA’s special efforts and higher burdens of proof are designed to protect the integrity of the tribe and the interest of the child in his Indian heritage *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30; 109 S. Ct. 1597; 104 L. Ed.2d 29 (1989) at 36-7

ICWA merely builds on state child protection law to correct damage done by prejudicial application of child welfare laws. ICWA was written to protect the welfare of Indian children by ensuring that decisions concerning the welfare of Indian children could not be made by non-Indians, ignorant of Indian cultural practices, and based on white, middle class American standards. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30 at 32, 37 Children are the greatest resource of Indian communities and removal of those children for subjective reasons is dangerous. *Id*, at 35

Mississippi Band of Choctaw Indians v. Holyfield is certainly the most thorough examination of ICWA available in case law. However, the opinion in that case should be examined in the context of the issues presented to the Supreme Court. In that case, an Indian mother sought to evade the jurisdiction of her tribe in order to arrange the adoption of her children by non- Indian parents. The Mississippi Band was merely requesting to exert jurisdiction over members who were in fact found to be domiciled on

the reservation. *Id* at 490 In the instant case, there is no jurisdictional dispute. No non-tribal agency has interfered with the autonomy of the Sault Sainte Marie Tribe of Chippewa Indians, nor have conflicting cultural practices created a legitimate debate over the meaning of “best interests.” In this case, both the Tribe and the State agree that continued custody of Jaden by his mother will likely put him at risk of serious mental or physical injury.

The Tribe acknowledges that the minimum parenting standards required by the State of Michigan are similar to the minimum standards of the Tribe and that Cheryl Lee cannot meet those standards. (42b, 43b) If members of the Tribe disagree about minimum standards of parenting then it should be up to the Tribe to reform their social services policy and more clearly articulate their own cultural standards. A Michigan State Court should not intervene in the decisions of a sovereign nation when there is clearly no indication of abusive practices, the parent has had more services than other struggling Indian parents ever receive, and the parent cannot demonstrate any substantial improvement in circumstances in nine years. In the words of Mr. Calvin Isaac, “Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.” *Id*, at 34

Appellant seems to confuse her own desires with the needs of her Indian child and she is asking this Court to rewrite federal legislation by adding very specific and demanding requirements in order to satisfy her own needs. (B p.35) ICWA was not designed to force children to suffer instability, neglect, or abuse so that Indian parents could pick and choose parenting obligations. The purpose of ICWA is to protect the rights of the Indian child as an Indian and the Indian community and tribe in retaining its

children in its society. *Id.*, at 37 (*Internal citations omitted*) “We have stated that in termination proceedings, the prime concern of the court is the child. The best interest of the child must prevail.” *In re ARP*, 519 NW2d 56 (South Dakota 1994) (*Internal quotation marks and citations omitted*)

B. Active Efforts Has No Temporal Requirement and Only Applies to the Parent or Custodian.

In effect. Appellant is requesting that this Court issue an *Adrianson* order¹. She is asking this Court to order additional remedial services even though two lower courts have found statutory grounds for termination and there is no evidence that termination is not clearly in Jaden’s best interests. This issue was examined thoroughly by the tribal court in Brandy Plank’s case. CW06, p.5-6 *In re Gazella*. 264 Mich App 668,673-4; 692 NW2d 708 (2005) held that *Adrianson* orders are impermissible. If a court finds that statutory grounds for termination have been met, unless termination is clearly not in the best interests of the child, the court must terminate immediately and cannot order further services.

I. Current Efforts

Congress’ decision not to define the nature or timing of active efforts should be construed to mean that active efforts cannot be quantified and applied in an exact manner in all cases. “Although we hold that active efforts require more than reasonable efforts, we also acknowledge that the determination of whether this standard has been met should be made on a case-by case basis.” *A.D.T. and L.D. v. Utah*, 2008 WL5376534 (Utah Ct App, Dec. 26, 2008) Active efforts are more than reasonable, but less than “futile”. *In re Roe*, ___ Mich App ___, ___ NW2d ___ (Docket 283643). Active efforts are a guided

¹ Suspending an order to terminate parental rights, providing the mother with a final opportunity to comply with the service plan. *In re Adrianson*, 105 Mich App 300; 306 NW2d 487 (1981)

process suited to the needs of each parent. “Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own.” *A.A. v. Alaska*, 982 P.2d 256 (Alaska 1999)

Congress specified in 25 USC §1902 that ICWA was merely to set “minimum federal standards for the removal of children.” Therefore, ICWA cannot possibly require everything that Appellant asks this Court to impute to it. Repetitive efforts contemporaneous with the addition of any child is certainly not what the drafters intended. The additional time required by this approach would certainly be detrimental to a child. *In re Terry*, 240 Mich App 14; 610 NW2d 563 (2000)

Appellant has not disputed that “active efforts” were utilized prior to removing Jaden from his mother’s home each time. DHS and the Tribe complied with the requirements of 25 USC 1912(d) prior to placing Jaden in the care of his father and grandmother. Appellant only suggests that because the Tribe failed to terminate her rights to Jaden when it seemed that an alternative permanent arrangement had been made, she is entitled to start the reunification process over again. The State, on behalf of DHS and the Tribe, complied with 25 USC 1912(f) when finally seeking termination of Cheryl’s parental rights. Testimony from an Indian expert, a variety of case workers, and a factual record of Cheryl’s ability to benefit from services proved beyond a reasonable doubt that continued custody of Jaden by Cheryl was likely to result in serious emotional or physical damage to Jaden.

We conclude that formal or informal services provided before the current proceeding may meet the active efforts requirement of 25 USC §1912(d) of the ICWA. Further, we conclude that, where there is clear and

The “futility test”⁶ does not create an end-run around the requirement to provide active efforts as Appellant suggests. (B. p.22) The “futility test” only determines a point at which active efforts can end. In fact, “futility” would be a high standard. Services cannot end as long as the parent or custodian is making progress. A futility test does not interfere with a liberal interpretation of ICWA in favor of the Indians.⁷ In this case, it would specifically favor the Sault Sainte Marie Tribe and Jaden Lee.

2. *Particular Family*

Because Congress did not include the term “active efforts” in 25 USC 1912(f), the section can operate independent of 25 USC 1912(d) unless the termination of parental rights results in the break-up of the Indian family. *In Re SD*, 236 Mich App at 244. Despite Appellant’s contention, active efforts were provided to this particular family, but no efforts were provided since she voluntarily relinquished custody of the child in question. Additionally, active efforts are not required each time a parent puts a different child at risk. 25 USC §1912(d) does not suggest in anyway that each child creates a new family unit, entitled to a full round of services.

Appellant’s reliance on *A.D.T. and L.D v. Utah*, 2008 WL 5376534 (Utah App Ct, Dec. 26, 2008) is downright deceitful. In that case the “particular” family involved a change in custodian, not a change in at-risk children. Remedial services had already been provided to the mother before the children were placed with their grandfather. When concerns arose with the grandfather’s abilities, there was a question of whether or not he was entitled to remedial efforts. In this case, there is no new custodian and efforts were not merely “made in the past with respect to some other member of the broad Indian

⁶ *In re J.S.B.*, 691 N.W.2d 611, 621 (S.D. 2005)

⁷ *Montana v. Blackfeet Tribe*, 471 US 759 (1985)

family.”(para. 22) Efforts were made with respect to this very same mother. Abused and neglected children do not need to participate in or show a benefit from remedial services to prevent removal. The People agree that every Indian parent is entitled to active efforts. The issue is whether an Indian parent is entitled to never ending services when it becomes clear that she will never be able to adequately parent her children alone. The State of California dealt with questions similar to this case in *Letitia V. v Superior Court of Orange County*, 81 Cal App 4th 1009; 97 Cal Rptr 2d 303 (2000) That Court determined that ICWA created no requirement to duplicate prior unsuccessful rehabilitative and remedial efforts with each child. *Letitia V.* at 1016

The goal of both reasonable and active efforts is to make an inadequate parent adequate for all children, whether those children exist, or are merely contemplated. If a parent can achieve minimum adequacy as to one child, that parent should be required to provide minimally adequate parenting to all other children. If a parent cannot achieve minimum adequacy as to one child, other children should not be subjected to dangerous conditions while active efforts are provided repeatedly. *In re ARP*, 519 NW2d 56, 62 (1994 SD)

The break-up of this Indian family had already occurred. Active efforts had previously been offered in an effort to keep Cheryl and Jaden together. Jaden had not lived with his mother since 2004. It was not until 2007 that Cheryl decided she would like increased visitation with Jaden. She never requested that Jaden actually be returned to her home. The break up of this family was a “*fait accompli*”, exactly the situation contemplated by the Court of Appeals *In re SD*, at 245.

Appellant's concern that DHS allowed the "aggravated circumstances" exception of MCL 712A.19a(2)(c) to trump ICWA is unfounded. The argument is undermined by the fact Cheryl did receive active efforts when Jaden was born and she received active efforts when her other two children were born. Active efforts were provided to Cheryl and Jaden, Cheryl and Shaylynn, Cheryl and Shaylynn and Jordon, and Cheryl and Jaden and Shaylynn and Jordon. Her parental rights to her second and third children were terminated when the second round of efforts failed to make a difference. Appellant asks this Court to require active efforts for every child of any Indian parent immediately prior to termination because she believes that the ICWA standards were ignored. (B, p.11) She asks this Court to overlook the fact that she gained nothing from any of these interventions and focus on the fact that none of these services have been provided since she stopped caring for any children.

II. WHETHER THE COURT IS REQUIRED TO EXAMINE CONTEMPORANEOUS EVIDENCE TO DETERMINE IF THE CONTINUED CUSTODY OF THE INDIAN CHILD BY THE PARENT IS LIKELY TO RESULT IN SERIOUS EMOTIONAL OR PHYSICAL DAMAGE TO SATISFY THE "BEYOND A REASONABLE DOUBT" STANDARD OF 25 USC 1912(f) PRIOR TO TERMINATION OF PARENTAL RIGHTS?

A. Statutory Requirement

25 USC §1921 instructs courts that anytime state law creates a higher standard of protection to a parent, that standard shall be applied in cases involving Indian families. 25 USC §1912(d) indicates only that a qualified expert must testify and that the determination must be made beyond a reasonable doubt. There is no way to interpret a

requirement for contemporaneous evidence from the text of ICWA. MCL 712A.19b(5) and Sault Tribal Code §30.503(b) impose a higher standard with a “best interests test”. Even after grounds to terminate parental rights are proven beyond a reasonable doubt, the Court cannot order termination if termination is “clearly” not in the best interests of the child. It is impossible to speculate as to what conditions would make termination “clearly not in the best interests of the child” after active efforts have been applied and the grounds to terminate have been proven. This test does open the door to contemporary evidence but there is no indication that contemporary evidence is necessary. In fact, both the Sault Tribal Code and Michigan State law require the Court to consider the past, but neither specify examining the parent’s current situation. The Sault Tribal Code defines a child in need of care as a child:

“Whose parents’ rights have been terminated involuntarily or voluntarily at the point of involuntary termination, for another child due to serious and chronic neglect or physical or sexual abuse and prior attempts to rehabilitate the parents have been unsuccessful.
§30.311(11)

The Sault Code also allows termination if:

“Parental rights to one or more siblings have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parent have been unsuccessful.” §30.504(8).

These statutes are very similar to MCL 712A.19b(3)(i), which requires termination if prior attempts to rehabilitate are unsuccessful. Nothing in any of these laws makes contemporary evidence of ability to parent relevant. Michigan and the Sault Code create an opportunity for any party to present evidence that termination is not the best choice. Parents may present contemporary evidence of their current abilities to parent and courts will continue to decide if termination is clearly not in the best interest of the child. There may be many good reasons why courts should look at contemporary evidence, but nothing in ICWA, or the state and tribal laws which require a higher standard of proof

with her for no more than thirty hours a few months prior to the trial. (95a) Her substance abuse counselor provided no proof of expertise in any area besides substance abuse yet he testified that he had worked with Cheryl on parenting, financial management, and other aspects of daily life. He only saw her once a week for an hour at a time. He did not visit her home, he did not observe her with Jaden, he did not work with her family, and he did not help with chores. He based his opinion that she did not pose a risk to Jaden solely on statements she made during their sessions which reflected a positive attitude toward Jaden and anticipation for their brief visits. (96a) Cheryl's situation is similar to that of respondent mother in *In Re Trejo*:

Although the respondent had apparently overcome her ambivalence to the custody of her children that had in part led to the initial adjudication, she had never resolved the housing issue or produced a viable custodial plan for the care of her children *In Re Trejo*, at 358.

Taking interest in the life of her child is not sufficient to prove that termination is clearly not in Jaden's best interests. MCL 712A.19b(5). According to Cheryl's attorney, Cheryl was not exercising any parenting time with Jaden prior to May 24, 2007 and that Cheryl's interest in Jaden was reignited by the termination of her other children. (3b) Cheryl's rights to Brandy were terminated on January 8, 2007. (CW06, p.8.)

Further, a parent's current situation should be considered in the light of past behavior. Although "fitness is not a static concept," "how a parent treats one child is certainly probative of how that parent may treat other children." *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973) Cheryl's past treatment of Jaden and two other children must be considered before making a determination as to the current likelihood that continued custody is likely to result in serious injury to Jaden. She continued neglectful behavior in the midst of services, while living with the knowledge that termination of her

rights was a possibility. Now she seeks to have her rights protected without taking on the full responsibility of parenting.

CONCLUSION

The Tribe and the State of Michigan tried placing Jaden in an alternative permanent placement short of termination and it did not work out. Four custody orders concerning Jaden were entered between 2002 and 2007 through Mackinac County. Jaden's father was sentenced to more than two years in prison. During the pendency of his trial and during his current incarceration, his mother has been Jaden's primary caregiver.

Congress clearly intended for struggling Indian families to be given additional support. This is obvious from the increased burdens of proof and the active efforts requirement. However, ICWA was not intended to force children to remain in unhealthy environments or to turn relatives into state funded nannies. The most important purpose of ICWA is to allow Indian tribes to protect their heritage by allowing them to live according to their own cultural standards and make their own child welfare decisions.

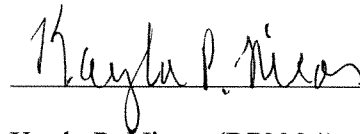
If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, *a sine qua non* to the preservation of its identity. *Wisconsin Potowatomies of the Hannahville Community v. Houston*, 393 F. Supp 719, 730 (W.D.Mich 1973)

Adding additional requirements to ICWA will place Indian children at greater risk of abuse and neglect and will infringe on tribal sovereignty by forcing tribes to abide by the Michigan interpretation of ICWA.

RELIEF

The People request this honorable Court to abide by the decisions of the 11th Circuit Court, Family Division, the Michigan Court of Appeals, and the Sault Sainte Marie Tribe of Chippewa Indians. Both the Tribe and the State have abided by the letter and the spirit of ICWA.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Kayla P. Nixon", written over a horizontal line.

Kayla P. Nixon (P70394)

Dated: 2/18/09