

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

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

IN THE MATTER OF JADEN TAYLOR LEE,  
A Minor (DOB: 06/13/1999)

Docket No.: 137653

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MACKINAC COUNTY DEPARTMENT OF HUMAN SERVICES,

Petitioner/Appellee,

COA No.: 283038

v

Mackinac County Circuit Court  
Family Division No.: 00-5132-NA

CHERYL LYNN LEE,

Respondent/Appellant,

And

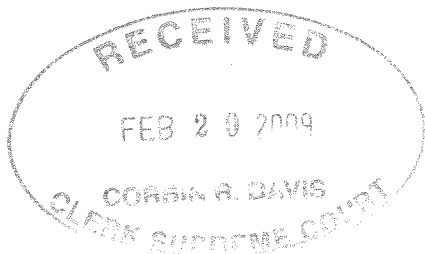
SAULT SAINTE MARIE TRIBE OF  
CHIPPEWA INDIANS,

Intervening Respondent/Appellee.

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**INTERVENING APPELLEE'S BRIEF**

ORAL ARGUMENT NOT REQUESTED



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## **BASIS OF JURISDICTION**

Intervening Appellee accepts Appellant's jurisdictional summary as complete and correct.

**STATEMENT OF QUESTIONS PRESENTED**

- I. Intervening Appellee accepts Appellant's Statement of Question I involved in this review.

TRIAL COURT ANSWERS "NO"

INTERVENING APPELLEE ANSWERS "NO"

- II. Intervening Appellee accepts Appellant's Statement of Question II involved in this review.

TRIAL COURT ANSWERS "NO"

INTERVENING APPELLEE ANSWERS "NO"

## **STANDARDS OF REVIEW**

Intervening Appellee accepts Appellant's standards of review as complete and correct, as stated on page 9 of her brief.

## COUNTER-STATEMENT OF FACTS

Intervening Appellee accepts Appellant's Statement of Facts, but supplements them, as follows:

- **Regina Frazier Testimony** Ms. Frazier is a protective services worker for the state of Michigan (1A). Ms. Frazier testified that she has been working with Appellant and her family since 1998 (1A-2A). And that Ms. Frazier provided Appellant with WrapAround Services for about three years (2A), including the time when Jaden was born in 1999 (3A). Ms. Frazier further testified that WrapAround Services last usually about six months (3A). And that Appellant never completed the WrapAround Services (4A).

Ms. Frazier testified that Appellant failed to cooperate with counseling due to transportation problems, so her agency arranged home-based therapy; essentially adjusting the services to fit Appellant's needs (6A).

Appellant never benefited from any of the services (7A).

Ms. Frazier further testified that Appellant returned to her caseload in 2007, about the time when Appellant again took up residence in Mackinac County (5A).

- **Penny Clark's Testimony** Ms. Clark was a WrapAround Services coordinator and then a Family Continuity Worker who began working with Appellant in 2002 (8A). Ms. Clark formed a group to work with Appellant trying to keep Appellant's family united (8A), doing anything Appellant needed (8A). Ms. Clark attempted to get Appellant Social Security benefits, a payee, and other services; including FIP grant and WIC program support (9A).

Appellant was thought to have been suffering from “Fetal Alcohol Affects” [sic], and could be moody and impulsive (10A).

A lot of times, Appellant did not get benefit from the services, and the team had to keep repeating services, until Ms. Clark stopped working with Appellant in 2005 (11A).

- **Jill Thompson Testimony** Ms. Thompson, a caseworker for the Sault Ste. Marie Tribe of Chippewa Indians Binogii Placement Agency, began working with Appellant in July 2004 (12A). Ms. Thompson testified that Appellant worked diligently with her because she wanted her children back (13A). Appellant was referred to the Families First program, mental health counseling (14A).

Ms. Thompson testified that Appellant had consistent neglect and safety issues with her children (14A). Appellant also exhibited environmental neglect with her children; including choking hazards in the home (15A).

Shortly after she and Justin DuFresne broke up (16A-17A), Appellant called Ms. Thompson on a Sunday saying she couldn't handle the children, so Ms. Thompson sat with the children while Appellant left for a while (16A).

Appellant never had permanent employment, and never even tried to get a job (16A-17A). When Appellant received money from her Social Security payee, she would use the money at “Rent-to-Own” instead of care for the children's needs (18A).

In the end, Appellant showed no improvement at all (19A). The lack of improvement was an issue of capacity not maturity (20A). And none of the services provided were effective (21A).

## INTRODUCTION

For purposes of this Brief, Appellant, Cheryl Lynn Lee, shall be referred to as “Appellant;” Intervening Appellee, the Sault Ste. Marie Tribe of Chippewa Indians, shall be referred to as “Intervening Appellee;” Appellee, the Department of Human Services, shall be referred to as the “state;” and the minor child, Jaden Lee, shall be referred to as simply, “Jaden.”

Additionally, references to page numbers in Intervening Appellee’s appendix shall be cited as page number and “A” (e.g., (23A)), and to Appellant’s appendix as “Appellant,” page number, and “a” (e.g., (Appellant 23a)).

## ARGUMENT

### I. **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?**

#### **INTERVENING APPELLEE ANSWERS “NO”**

**Standard of Review:** The Michigan Supreme Court set forth the “clear error” standard of review in parental rights termination cases. *In Re Trejo*, 462 Mich 341, 356-57; 612 NW2d 407 (2000); See also MCR 3.977(J). Whether the Indian Child Welfare Act [hereinafter “ICWA”] applies to the facts of this case, and/or when there is a dispute as to the proper interpretation of ICWA are questions of law to be reviewed *de novo*. *In Re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005); *In Re SD*, 236 Mich App 240; 599 NW2d 772 (1999).

The Indian Child Welfare Act [hereinafter referred to as “ICWA”] requires “active efforts” before a party in a state court case may seek termination of parental rights to an Indian Child; specifically:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court

that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian Family and that these efforts have proved unsuccessful. 25 USC 1912(d).

Appellant in this matter seeks to broaden the definition of the term “active efforts” as that term is used in 25 USC 1912(d). Appellant requests that this court insert “current” into 25 USC 1912(d), so that current active efforts are required before termination whenever Appellant has another child. Had the drafters so intended, that word could have easily been inserted. It was not. Instead 25 USC 1912(d) simply requires “active efforts.” In the instant case, the caseworkers actively helped the Appellant become a better parent so she could keep her Indian family together.

It was futile to simply keep pouring services into Appellant’s household after years of active efforts. Efforts that went back to 1998 (1A-2A), and included: three years of WrapAround Services (2A), individual counseling (6A), helping Appellant receive Social Security benefits(9A), helping Appellant get in the WIC program (9A), Families First (14A), mental health counseling (14A), a caseworker staying with the children while Appellant left for a while until she could handle her children (16A). These services had to be repeated (11A), but ultimately were ineffective (21A). The services failed due to a lack of Appellant’s capacity (20A). And that lack of capacity could arguably be related to the suspected Fetal Alcohol Effects (10A).

Appellant could not even obtain a job (16A-17A). When Appellant had money from Social Security benefits, she spent it on Rent-to-Own furniture, and not her children’s most basic needs (18A).

The Alaska Supreme Court, in a similar case, provides instructive guidance with regard to the instant case. They distinguish “active efforts” from “passive efforts,”

explaining that “[p]assive efforts are where a plan is drawn up and the client must develop his or her own resources toward bringing it to fruition.” *AA v Alaska*, 982 P2d 256, 261 (Alaska 1999)<sup>1</sup>. The Court said that the drafters’ intent with ICWA was to require that caseworkers take “the client through the steps of the plan rather than requiring that the plan be performed on its own.” *Id.*; *see also CJ v Alaska*, 18 P3d 1214, 1219 (Alaska 2001); *NA v Alaska*, 19 P3d 597 (Alaska 2001). This is exactly what the caseworkers in Appellant’s case did, to the point of futility (19A).

South Dakota’s Supreme Court said that ICWA required the state to make active efforts to preserve an Indian family “but it was not required to persist with futile efforts.” *In Re JSB, Jr.*, 691 NW2d 611, 621; 2005 SD 3 (2005).

The caseworkers in Appellant’s case had to keep going back and doing the same things with Appellant again and again (11A). The law simply does not require active efforts that are futile. *Id.*

Additionally, 25 USC 1912(d) refers to “the” Indian family, and not to a specific child. The services provided in this case were admittedly provided over the course of many of Appellant’s children. But if Appellant could not grasp the services (19A-20A), and none were effective (21A), it was related specifically to the parent, that is to say Appellant, and not to a particular child, in this case Jaden.

The Michigan Court of Appeals, in *In Re SD*, 236 Mich App 240, 244-45; 599 NW2d 772 (1999), seems to suggest that once the “Indian family” is broken up, active efforts become irrelevant. The court suggested that because the non-Indian father had left the home, and was no longer part of the Indian family, that his parental rights could be terminated without further active efforts. *Id.*

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<sup>1</sup> Alaska does not seem to have an official reporter for citation.

In Appellant's case, she had her rights to other children terminated (Appellant 61a), and, similar to *In Re SD, supra*, she and the father to her other children had separated (16A-17A). There was simply no Indian family left to preserve.

It is Intervener Appellee's position that in this case "active efforts" were provided, and that current active efforts are not required. The caseworkers helped Appellant through the steps to become a better parent. Sometimes this works, sometimes the capacity of the parent simply dictate that further, futile efforts are unnecessarily expended resources. Each case should be analyzed individually. An analysis of the instant case indicates that the lower court did not commit clear error, and termination was appropriate.

**II. 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?**

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The Indian Child Welfare Act requires certain proof before parental rights to an Indian child are terminated in state court; specifically:

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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. 25 USC 1912(f).

Intervening Appellee is asking this Court to adopt the doctrine of anticipatory neglect as it relates to the instant case. The Michigan court of appeals, in *In Re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001) (quoting *In Re LaFlure* 48 Mich App 377, 392; 210 NW2d 482 (1973), said that “[h]ow a parent treats one child is certainly probative of how that parent may treat other children.”

In the instant case, Appellant urges this court to adopt a view that there must be contemporaneous evidence that continued custody of Jaden by her will likely result in serious emotional or physical damage to him. And although ICWA requires a higher

standard of proof for termination to ensure Indian families stay together, ICWA is not meant to be a safe haven for neglectful parents.

In this case, services to Appellant's family go back to 1998 (1A-2A). One year before Jaden was even born (3A). And from that time, both the state (1A) and Intervening Appellee's tribe have provided Appellant vast amounts of services (8A; 12A). The services provided included: three years of WrapAround Services (2A), individual counseling (6A), helping Appellant receive Social Security benefits(9A), helping Appellant get in the WIC program (9A), Families First (14A), mental health counseling (14A), a caseworker staying with the children while Appellant left for a while until she could handle her children (16A). These services had to be repeated (11A), but ultimately were ineffective (21A), and the services failed due to a lack of Appellant's capacity (20A). Lack of maturity was not the issue (20A). Ms. Thompson, a caseworker, went so far as to say that with regard to Appellant's parenting skill, she showed "no improvement at all" (19A).

Appellant always had consistent "neglect issues" (14A); like leaving the kids unsupervised (14A), having environmental neglect and choking hazards around the house (15A), and allowing an unsupervised child to be out in the road (14A). These are the types of behaviors that certainly indicate that Jaden is at risk of serious physical or emotional harm if left in Appellant's care. Her past behavior, especially given Appellant's lack of capacity to pick up the innumerable services offered her (20A), are highly probative of the danger Jaden would be in if he were allowed to be in Appellant's care. See *In Re AH, supra*.

The trial court had to consider all of these factors in coming to the difficult determination that Appellant's parental rights should be terminated (Appellant 16a – 17a). Intervening Appellee urges this Court to conclude that the trial court did not commit clear error in rendering its decision.

**RELIEF**

Intervening Appellee prays this Honorable Court affirm the trial court's order terminating Appellant's parental rights to Jaden Taylor Lee, and uphold the court of appeal's opinion affirming that order.

Respectfully submitted,



Dated: February 18, 2009

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