STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JADEN TAYLOR LEE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

CHERYL LYNN LEE,

Respondent-Appellant,

and

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Intervening Respondent-Appellee.

UNPUBLISHED
October 16, 2008

No. 283038
Mackinac Circuit Court
Family Division
LC No. 00-005132-NA

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority's determination that the denial of respondent's request for a jury trial did not deprive respondent of her due process rights. However, I respectfully disagree that petitioner complied with the "active efforts" provision of the Indian Child Welfare Act (the ICWA), 25 USC 1912(d). In my view, petitioner failed to clearly and convincingly demonstrate "active efforts . . . to provide remedial services and rehabilitative programs designed to prevent the breakup" of respondent's familial relationship with Jaden, the involved minor. Furthermore, the record evidence does not supply proof beyond a reasonable doubt 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," the federal standard for termination of parental rights to an Indian child. *In re SD*, 236 Mich App 240, 243; 599 NW2d 772 (1999), quoting 25 USC 1912(f). For these reasons, I would reverse the circuit court's decision to terminate respondent's parental rights.

I. The Pertinent Factual Background

Child Protective Services (CPS) began working with respondent in 1998, when respondent, a pregnant teenager, resided in a dysfunctional and violent home. Regina Frazier, a CPS worker at that time, described respondent as "a delinquent" and "a victim of child abuse and neglect." CPS removed respondent from her family home and placed her in foster care. After

respondent bore Jaden, CPS provided parenting services for approximately one year before concluding that respondent could not properly care for the child.

Jaden then commenced a series of transitions. For more than a year, he lived with a foster care family. In March 2002, the Mackinac Circuit Court transferred a child protective proceeding involving Jaden to the Tribal Court of the Sault Ste. Marie Tribe of Chippewa Indians. In August 2002, the Tribal Court placed Jaden with Lois Plank, his paternal grandmother. Respondent regained custody of Jaden in September 2003, but four months later the Mackinac Circuit Court awarded full physical custody of the child to Tony Plank, Jaden's father, and ordered that respondent and Plank share Jaden's legal custody. Although respondent's parental rights to three younger children were terminated in 2006 and 2007, respondent retained joint legal custody of Jaden. According to respondent's unrebutted testimony, she enjoyed unsupervised visitation with Jaden between December 2003 and July 2007, including holidays and the summer months. The record reflects that this custodial arrangement remained stable until Plank's arrest in June 2007.

In April 2007, respondent sought additional parenting time. On May 24, 2007, the circuit court ordered that she and Jaden have unsupervised visits every Saturday from 8:00 a.m. until 6:00 p.m. On June 25, 2007, Tony Plank filed a petition seeking the termination of respondent's parental rights to Jaden. Two weeks later, petitioner filed a petition seeking termination of respondent's parental rights at initial disposition, pursuant to MCL 722.638(1)(b)(i). The circuit court authorized the petition and suspended respondent's parenting time.

On August 20, 2007, the circuit court conducted a hearing regarding respondent's request for reinstatement of her visitation. Jill Thompson, a worker with the tribe's child placement service agency, admitted that the tribe had never received any negative reports regarding respondent's 3-1/2 years of unsupervised visits with Jaden. After the hearing, the parties decided to mediate their visitation dispute. In August 2007, the parties agreed to reinstate respondent's visitation with Jaden, at the sole discretion of Lois Plank. The circuit court entered an order consistent with this agreement.

At the termination hearing, three social service caseworkers testified regarding the services provided to respondent between 1998 and 2005. Frazier explained that she provided respondent with services between 1998 and 2002, and admitted that she did not know how respondent would "react to services at this date." Frazier described the prior services as focusing on "behavioral issues . . . teen parenting," because CPS attempted to "gear [the services] toward her age, her development, . . . and her situation." Penny Clark, a caseworker for Anishnabek Community and Family Services, estimated that she worked with respondent for approximately two years, between 2002 and 2005. Clark admitted that she had no basis on which to form an opinion regarding respondent's current ability to parent. Jill Thompson, a caseworker for the Binogii Agency, worked with respondent in 2004 and 2005.[1] During most of that time, Jaden lived with his father, and Thompson directed her efforts toward assisting respondent with her

[1] The Binogii Agency supplies adoption and foster care services to the Sault Ste. Marie Chippewa Tribe.

two younger children. Thompson conceded there had been no "active efforts" to reunite respondent with Jaden after the 2007 petition was filed.

Melissa Vanluven, who supervised Thompson and Clark, testified as a qualified Indian expert pursuant to 25 USC 1912(f), which provides as follows:

> 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 child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Vanluven admitted that respondent last utilized services regarding Jaden in August 2002. Vanluven characterized respondent as "a minimally adequate parent," but not on a "consistent basis." When questioned regarding the grounds for her opinion that respondent's continued relationship with Jaden would likely subject the child to serious damage, Vanluven admitted that she relied completely on historical evidence:

> *Q*. But the question we have to look at today is will the continued custody result in serious emotional or physical damage to the child. And how do you, again qualitatively or quantitatively, determine . . . that there will be serious, serious emotional distress, and how do you arrive at what that level will be if he remains with Mom?
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> *A*. I guess in what I would say is that, um, her past history here, um, there has [sic] been numerous documented evidence, um, situations where Cheryl has placed her children in unsafe situations. Um, she has failed to supervise them appropriately. Um, and so we use, um, her past behavior to basically, um, give us an idea of what her future behavior is going to be.

The circuit court concluded that petitioner had proven "beyond a reasonable doubt that continued custody with . . . Respondent would likely result in serious emotional or physical harm to the child." According to the circuit court's written opinion,

> The child does not look to Respondent as a parent in most respects. This role has been filled primarily by his grandmother and current primary caretaker Lois Plank. The Court finds that at this point in the child's life it is extremely likely the child would suffer serious emotional harm to be required to begin a reunification process with Respondent.

The circuit court further explained this conclusion as follows:

> Finally, the Court finds that . . . Petitioner has proven beyond a reasonable doubt that continued (or return of) custody with . . . Respondent will likely cause serious emotional or physical damage. This finding is based on: 1) the previous services and lack of benefit from same which raises the likelihood of some form of serious physical injury; 2) the length of time the child has been residing outside . . . Respondent's home and the emotional damage that would result in requiring a

> reunification plan; 3) the testimony presented that Respondent's lack of benefit was not due to Respondent's lack of maturity, but rather a lack of ability; and 4) Respondent's most recent conduct of operating a motor vehicle while impaired due to alcohol.

Respondent challenges on appeal the circuit court's failure to find that petitioner made "active efforts" to reunite respondent with Jaden, and the circuit court's conclusion that petitioner proved beyond a reasonable doubt that respondent's continued custody of Jaden would likely result in serious injury to the child.

II. Active Efforts Analysis

The majority concedes that the circuit court failed to articulate a finding that active efforts had been made to preserve respondent's relationship with Jaden. In fact, the circuit court acknowledged that it terminated respondent's parental rights in the absence of current efforts to rehabilitate respondent with regard to her ability to parent Jaden:

> [D]ue to the circumstances created by the placement with the father and the filing of a petition requesting termination at the initial disposition, neither the tribe nor the department were in a position to provide services to Respondent.

The majority acknowledges that three years had elapsed since respondent received any services intended to preserve her relationship with Jaden. Nevertheless, according to the majority, petitioner satisfied the ICWA's "active efforts" requirement "because the evidence overwhelmingly established [respondent's] past and persistent inability to improve her parenting skills or make any significant progress in addressing her problems." *Ante* at 13. In my view, the ICWA's "active efforts" requirement cannot be satisfied by efforts made three years previously. Further, the record fails to demonstrate proof beyond a reasonable doubt that the continuation of respondent's relationship with Jaden would likely result in serious emotional or physical damage to the child.

A. Applicable Law[2]

In *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989), the United States Supreme Court explained that the ICWA, 25 USC 1901-1963,

> was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from

[2] Given the similarity between the governing legal principles, and to a significant degree the facts, in this case and this Court's recent decision involving ICWA, *In re Roe* ___ Mich App ___; ___ NW2d ___ (Docket No. 283642, issued September 25, 2008), I take this opportunity to again elaborate on the bases for my dissent in *In re Roe*. See *id*., dissenting opinion by Gleicher, J., slip op at 5-14.

> their families and tribes through adoption or foster care placement, usually in non-Indian homes.

The Supreme Court further observed that congressional findings "incorporated into the ICWA" included,

> "(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;
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> "(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
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> "(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." [*Id*. at 35-36, quoting 25 USC 1901.]

The ICWA contains "[v]arious . . . provisions" that "set procedural and substantive standards" for state court child custody proceedings involving Indian children. *Mississippi Band of Choctaw Indians, supra* at 36. The ICWA's "active efforts" standard provides,

> Remedial services and rehabilitative programs; preventive measures.
>
> 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).]

In contrast to the ICWA's mandate that a party seeking termination of parental rights satisfy the court that "active efforts" have been made to provide remedial services and rehabilitative programs, Michigan law permits a petitioner to withhold services if a parent "has had rights to the child's siblings involuntarily terminated." MCL 712A.19a(2)(c). Here, petitioner refused to offer any services to respondent because it filed a petition invoking only MCL 712A.19b(3)(i) as a ground for termination of respondent's parental rights. Subsection (i) contemplates as follows:

> Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and *prior attempts to rehabilitate the parents have been unsuccessful*. [Emphasis supplied.]

B. The ICWA's "Active Efforts" Requirement

In *Mississippi Band of Choctaw Indians, supra*, the United States Supreme Court examined the meaning of the word "domicile," used in the ICWA's § 1911(a) to establish

jurisdiction for tribal courts. The Supreme Court considered whether Congress intended the definition of "domicile" to be determined under state or federal law. *Id*. at 43. Invoking congressional purpose, the *Mississippi Band of Choctaw Indians* majority emphasized that "Congress intended a uniform federal law of domicile for the ICWA." *Id*. at 47. The Supreme Court imbued "content" into the term "start[ing] with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used," considering the "'object and policy'" of the statute. *Id.*

Mississippi Band of Choctaw Indians requires that in this case we interpret the phrase "active efforts" using the ordinary meaning of the words, considering the "object and policy" of the ICWA. The record evidence reveals that when petitioner filed the initial permanent custody petition, it refused to provide respondent with services intended to preserve her familial relationship with Jaden, or to improve her ability to parent him. The majority disposes of the "active efforts" requirement by referring to respondent's "past and persistent inability to improve her parenting skills or make any significant progress in addressing her problems." In my view, Congress's use of the term "active efforts" signals its intent that petitioner clearly and convincingly demonstrate the provision of *current* rehabilitative efforts designed to reunite an Indian parent with the particular child that is the target of the termination proceedings. Past efforts, involving other children and different circumstances, do not qualify as "active efforts" under the federal statute.

The term "active" is defined as "characterized by action rather than contemplation or speculation," or "marked by present operation, transaction, movement or use." *Merriam-Webster Online Dictionary*, "active" <http://www.merriam-webster.com/dictionary/active> (accessed August 12, 2008). In *Frasier v Model Coverall Service, Inc*, 182 Mich App 741, 744; 453 NW2d 301 (1990), this Court examined the statutory phrase "active employment," and concluded,

> Placing the "active" before employment must have been for the purpose of adding some further meaning—distinguishing between employees who were actually engaged in performing work for an employer at the time of retirement and those who were not. It follows, therefore, that "active employment" means one who is actively on the job and performing the customary work of his job, as opposed to one who terminates inactive employment.[3]

The phrase "active efforts" inherently embodies a temporal component, particularly in the context of the ICWA's motivating principles. The meaning of "active efforts" becomes clear by reference to the "object and policy" of the ICWA, which requires that a state prove *beyond a reasonable doubt* that "the *continued* custody" of the Indian child by the parent "*is* likely to result in serious emotional or physical damage to the child." 25 USC 1912(f) (emphasis supplied).[4] Standing alone, evidence of a parent's response to efforts provided years before,

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[3] According to Black's Law Dictionary (8th ed), an "active case" is "[a] case that is still pending." In *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 250-251; 704 NW2d 117 (2005), this Court interpreted "active employees . . . of the County" to mean present or current county employees.

[4] Our Supreme Court relied heavily on the tense used when it interpreted MCL 600.2912a(2) in

under different circumstances and with respect to other children, does not supply proof beyond a reasonable doubt regarding an Indian parent's current ability to safely manage "the continued custody" of a child. Indeed, this Court has recognized that "[s]ince a parent's fitness is not a static concept, much can happen in six months to reflect on that fitness." *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973).[5]

Here, respondent and Jaden maintained an uneventful, mutually beneficial family relationship for at least 3-1/2 years before petitioner filed its petition seeking termination of respondent's parental rights to Jaden. Although respondent did not have custody of Jaden, she unquestionably had an enduring familial relationship with her son.[6] Under these circumstances, I believe that the ICWA required the circuit court to find that "active efforts" had been made to provide services and programs designed to "prevent the breakup" of that particular familial relationship, which differed considerably from respondent's past relationships with her other, younger children.

Application of the ICWA's "active efforts" requirement is complicated here by the fact that petitioner presented minimal evidence of respondent's *current* unfitness, as discussed in more detail, *infra*. Without identifying respondent's existing parental strengths and weaknesses, petitioner could not accurately determine which "active efforts" would benefit her. Clark conceded this obvious truth in the following exchange with Jaden's guardian ad litem during the termination hearing:

> *Q.* Ma'am, you, . . . is it fair to say that you do not have any qualitative or quantitative method of determining what [respondent's] ability to parent is as of this date and time?
>
> *A.* No. I think I've seen [respondent] and worked with [respondent] enough to know what her parenting ability has been in the past.
>
> *Q.* Not, not in the past, but as of this date and time. Do you have a method to determine what her ability to parent is as of today's date?
>
> *A.* I've not seen her, no.

The majority declares that "[b]ecause of the intractable nature of [respondent's] inability to learn appropriate parenting techniques, any additional efforts to rehabilitate [respondent] would have been largely futile." *Ante* at 13. In fact, the record is silent regarding respondent's

(…continued)

Wickens v Oakwood Healthcare Sys, 465 Mich 53, 60-61; 631 NW2d 686 (2001).

[5] Notably, in *LaFlure*, this Court remanded for a new de novo hearing regarding the respondent's fitness, and ordered that her "fitness to have custody of Gary is to be determined *as of the date the circuit court considers this case on remand*." *Id*. at 392 (emphasis supplied).

[6] "In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is irretrievably destructive of the most fundamental family relationship." *MLB v SLJ*, 519 US 102, 121; 117 S Ct 555; 136 L Ed 2d 473 (1996) (internal quotation omitted; alteration in original).

"intractable" inability to improve her parenting skills, because petitioner made no effort to evaluate respondent's ability to parent Jaden after it filed the petition, and had not provided services relevant to this child for at least three years before filing the petition. Furthermore, no record evidence supports the notion that respondent improperly or unsafely "parented" Jaden when she visited him without supervision over the course of a 3-1/2 year period. Given the total absence of any recent evidence regarding respondent's parenting abilities, I simply cannot conclude that respondent would fail to benefit from services. In my view, petitioner failed to produce clear and convincing evidence that it employed "active efforts" to preserve respondent's family relationship with Jaden. I would reverse the circuit court on this ground.

III. Analysis of Respondent's Unfitness

According to the record, respondent had joint legal custody of Jaden, and limited physical custody. Petitioner bore the burden of proving beyond a reasonable doubt that respondent's "continued custody" of Jaden would "likely result in serious emotional or physical damage to the child." 25 USC 1912(f). The record evidence revealed that during the 3-1/2 years respondent had unsupervised visits with Jaden, the child suffered no physical or emotional harm. Petitioner offered no testimony or documentary evidence regarding Jaden's emotional status. Jaden testified that he enjoyed and looked forward to his visits with his mother. Therefore, the circuit court's conclusion that continuation of respondent's relationship with Jaden would "likely" cause the child serious emotional or physical damage amounts to pure speculation, unsupported by clear and convincing evidence, let alone proof beyond a reasonable doubt.

The majority concludes that evidence of respondent's past behavior permitted the circuit court to conclude, beyond a reasonable doubt, that maintenance of the status quo would result in serious emotional or physical harm to Jaden. In my view, petitioner could not possibly prove a likelihood of harm *beyond a reasonable doubt* based on stale information that failed to take into account the quality, quantity and character of respondent's ongoing interactions with her child. See *In re Matthew Z*, 80 Cal App 4th 545, 552; 95 Cal Rptr 2d 343 (2000), in which the California Court of Appeals explained,

> [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.

Furthermore, not even one witness at the termination hearing testified that Jaden would incur "damage" by continuing to visit respondent. The circuit court assumed that "requiring a reunification plan" would harm Jaden. However, it reached this conclusion in the absence of any evidence to that effect, because none of the witnesses had actually spoken to Jaden or evaluated his readiness to "reunite" with respondent. The determinative question in a case governed by the ICWA is whether a petitioner proves beyond a reasonable doubt 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." 25 USC 1912(f). In my view, the circuit court relied on evidence with limited relevance to Jaden's current circumstances, and reached its conclusion of "likely . . . damage" on the basis of presumptions, and not proof beyond a reasonable doubt.

IV. Presuming Unfitness Based on Past Conduct

At its core, this case is about whether a court may conclude that a parent qualifies as presently unfit based solely on the parent's past conduct. In affirming the circuit court, the majority invokes the "well-established doctrine of anticipatory neglect," which the majority describes as, "[H]ow a parent treats one child is probative, though not determinative, of how that parent will treat another, and past behavior is a strong indicator of future performance." *Ante* at 14 (citation omitted). Here, however, respondent's past behavior *did* qualify as determinative because neither petitioner nor the circuit court considered current evidence. Rather, respondent's past behavior functioned not only as a "strong indicator" of future performance, but constituted the *only* evidence of future performance. In my view, the ICWA's "beyond a reasonable doubt" standard of proof precludes a presumption of unfitness predicated solely on past conduct. Indeed, I believe that in cases governed by the ICWA, Michigan's "doctrine of anticipatory neglect" may not be applied in a determinative manner.[7] Rather, a court must engage in a meaningful examination of *present* circumstances to determine whether "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." 25 USC 1912(f).

In *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the United States Supreme Court examined the constitutionality of an Illinois law, under which "the

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[7] The majority's reference to "the well-established doctrine of anticipatory neglect" is somewhat puzzling. The doctrine has been applied frequently in Michigan. In *In re Powers*, 208 Mich App 582, 589; 528 NW2d 799 (1995), this Court explained that "the principle of anticipatory neglect . . . may provide an appropriate basis for invoking probate court jurisdiction." The "anticipatory neglect" doctrine was intended as a potential tool for acquiring jurisdiction, not an evidentiary shortcut allowing termination of parental rights with no current showing of parental unfitness. Further, the "anticipatory neglect" doctrine is not "well-established" in other jurisdictions.

> Although our appellate court has recognized the theory of anticipatory neglect for some time . . . , our courts have also held that there is no *per se* rule that the neglect of one child conclusively establishes the neglect of another child in the same household. Rather, such neglect should be measured not only by the circumstances surrounding the sibling, but also by the care and condition of the child in question. Although section 2-18(3) of the Act (705 ILCS 405/2-18(3)(West 2000)) provides that the proof of neglect of one minor "shall be admissible evidence" on the issue of the neglect of any other minor for whom the parent is responsible, we emphasize that the mere admissibility of evidence does not constitute conclusive proof of the neglect of another minor. Each case concerning the adjudication of minors, including those cases pursued under a theory of anticipatory neglect based upon the neglect of a child's sibling, must be reviewed according to its own facts. [*In re Arthur H*, 212 Ill 2d 441, 468; 819 NE2d 734 (2004) (some citations and internal quotation omitted)].

I find no reference to this "well established" doctrine in jurisdictions other than Michigan and Illinois.

children of unwed fathers become wards of the State upon the death of the mother." *Id*. at 646. Peter Stanley claimed that "he had never been shown to be an unfit parent," and had been unconstitutionally deprived of his children absent a showing of unfitness. *Id*. Illinois responded that "unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children." *Id*. at 647. The Supreme Court observed that the Illinois dependency proceeding involving the Stanley children "has gone forward on the presumption that [Stanley] is unfit to exercise parental rights." *Id*. at 648. Regarding the implicit presumption of unfitness contained within Illinois law, the Supreme Court explained,

> 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. [*Id*. at 656-657.]

Unlike Peter Stanley, respondent *was* previously judged unfit. The circumstances surrounding those determinations certainly constitute relevant evidence of her parenting abilities. Here, however, the circuit court and the majority utilize a presumption of unfitness, predicated solely on historical evidence, to "disdain[] present realities in deference to past formalities." Respondent may be completely unfit to continue parenting Jaden, and her visits with him perhaps might result in serious emotional or physical harm to the child. But I cannot resolve this question with certainty beyond a reasonable doubt solely on the basis of the presumption that respondent's past unfitness supplies the answer, because that logic eliminates petitioner's heavy burden of proving unfitness.[8]

"The stringency of the 'beyond a reasonable doubt' standard bespeaks the weight and gravity of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society impos[e] almost the entire risk of error upon itself." *Santosky v Kramer*, 455 US 745, 755; 102 S Ct 1388; 71 L Ed 2d 599 (1982) (internal quotation omitted). In the criminal law, application of the "beyond a reasonable doubt" standard requires a fact finder to "reach a subjective state of near certitude of the guilt of the accused . . . ." *Jackson v Virginia*, 443 US 307, 315; 99 S Ct 2781; 61 L Ed 2d 560 (1979). Accordingly, application of this standard under the ICWA requires a fact finder 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." 25 USC 1912(f).

The burden of proving parental unfitness rests on the petitioner. *In re AMAC*, 269 Mich App 533, 537; 711 NW2d 426 (2006). Here, petitioner attempted to meet its burden with proof of respondent's prior unfitness. It presented no current evidence that respondent's relationship with Jaden would likely harm the child. The majority "conclude[s] from our own review of

[8] The presumption employed by the majority also ignores the realities of this case. For a period of at least 3-1/2 years, respondent and Jaden enjoyed an uncomplicated, safe, unsupervised and mutually positive mother-son relationship. No efforts were made to disturb this custodial arrangement until Tony Plank's arrest.

[respondent's] history and the other evidence, including the tribal expert's testimony, that the trial court did not clearly err" when it determined that petitioner proved a likelihood of harm beyond a reasonable doubt. *Ante* at 14. I cannot determine what "other evidence" established respondent's current unfitness. Vanluven, the tribal expert, admitted that she grounded her opinion solely on past events. Therefore, I can only conclude that the majority utilized a presumption of unfitness based on past conduct, and failed to scrutinize the evidence under the requisite standard of proof.[9]

Because petitioner failed to satisfy the ICWA's reasonable doubt standard, I would reverse.

/s/ Elizabeth L. Gleicher

[9] In the criminal law, "mandatory presumptions" violate the Due Process Clause "if they relieve the State of the burden of persuasion on an element of an offense." *Francis v Franklin*, 471 US 307, 314; 105 S Ct 1965; 85 L Ed 2d 344 (1985). But a "permissive inference" does not violate due process "because the State still has the burden of persuading the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Estelle v McGuire*, 502 US 62, 79 (O'Connor, J., concurring in part and dissenting in part); 112 S Ct 475; 116 L Ed 2d 385 (1991). In contrast to a "permissive inference or presumption,"

> A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. [*Co Court of Ulster Co, NY v Allen*, 442 US 140, 157; 99 S Ct 2213; 60 L Ed 2d 777 (1979).]

The circuit court conclusively presumed unfitness based on historical evidence, without reference to predicate facts reflecting an existing risk of harm to Jaden. By relying solely on evidence gleaned from respondent's past, the circuit court bypassed the ICWA's requirement of proof beyond a reasonable doubt regarding respondent's current relationship with Jaden. When current evidence of fitness is omitted, the inevitable result is a process governed by presumption, and not proof. Here, an impermissible evidentiary inference supplanted actual proof that if respondent continues visiting Jaden, the child likely will suffer serious damage.