STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ASHTYN JASMIN ROE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

THERESA FINFROCK,

Respondent-Appellant,

and

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Intervening Respondent-Appellee.

FOR PUBLICATION
September 25, 2008

No. 283642
Chippewa Circuit Court
Family Division
LC No. 07-013621-NA
Advance Sheets Version

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

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

I concur with the majority's conclusion that the clear and convincing evidence standard governs whether "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). I also agree that the circuit court failed to make the required finding that petitioner made "active efforts" that proved unsuccessful. I respectfully disagree, however, with the majority's determination that previous rehabilitative efforts, involving other children and entirely different circumstances, may meet the requirements of §1912(d) of the Indian Child Welfare Act (ICWA), 25 USC 1901 through 1963. Further, I disagree with the majority's conclusion that the circuit court may altogether avoid applying § 1912(d) by simply deciding that additional services would be "futile."

I. Factual Background

Respondent's first child, Daniel Finfrock, died on January 8, 2005. The medical examiner concluded that Daniel had sustained intracranial trauma, and ruled his death a homicide. When Daniel's injury occurred, respondent and Steven Perrault, her then-boyfriend,

were Daniel's sole caregivers. Neither the United States nor the state of Michigan filed criminal charges against Perrault or respondent.[1] Respondent continued to cohabit with Perrault after Daniel's death, despite her belief that Perrault had harmed the child. Respondent later acknowledged her awareness that Perrault's presence created a risk of harm for Aliyah, respondent's two-year-old daughter. On January 10, 2005, petitioner filed a petition seeking circuit court jurisdiction over Aliyah. The tribal court of the Sault Ste. Marie Tribe of Chippewa Indians eventually assumed jurisdiction of the proceedings.[2]

Respondent received services coordinated by the Binogii Placement Agency, which supplies adoption and foster care services to the Sault Ste. Marie Chippewa Tribe. According to Robyn Hill, a Binogii foster care worker, respondent reported that Perrault had abused her emotionally, physically, and sexually, and had confessed to having "hurt Daniel." Respondent also described domestic violence committed by her estranged husband, Jose Bertrand. Hill referred respondent for domestic violence counseling and parenting classes. Hill reported that respondent participated in the recommended services, but failed to terminate her relationship with Perrault. In April 2005, the tribe filed a petition in the tribal court seeking the termination of respondent's parental rights to Aliyah, and all services ceased. Only then did respondent move into a domestic violence shelter. She never reestablished her relationship with Perrault.

In June 2005, respondent independently sought counseling through the Sault Tribe's behavioral health program, and also commenced employment with a local casino. In July 2005, the tribe terminated respondent's parental rights to Aliyah. Respondent continued counseling with William Lane Barber, a mental health therapist employed by the Tribe, until July 28, 2006. In September 2006, after being charged with furnishing alcohol to a minor, respondent entered a drug court diversion program, which she successfully completed.

In December 2006, respondent began an intimate relationship with Samuel Roe, a casino coworker, and conceived Ashtyn in February 2007. Respondent lost her job at the casino because of pregnancy-related complications. She delivered Ashtyn on October 26, 2007. That same day, petitioner filed a petition in the circuit court, seeking circuit court jurisdiction over the infant. An amended petition filed two weeks later described Daniel's death and the previous termination of respondent's parental rights to Aliyah. The petition alleged that Roe "was convicted of attempted 4th degree criminal sexual conduct with a 14 yr old in 1996. He remains a registered sex offender." According to the petition, respondent and Roe had purchased a house, and Roe "told petitioner that he intends to remain with" respondent.

On December 14, 2007, respondent admitted the allegations made in an amended petition, and the circuit court assumed jurisdiction over Ashtyn. The amended petition sought

[1] Because Perrault and respondent lived on reservation land, the Federal Bureau of Investigation investigated Daniel's death.

[2] According to MCR 3.980(A)(3), "[i]f the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer . . . or the court finds good cause not to transfer."

termination of respondent's parental rights to Ashtyn pursuant to MCL 712A.19b(3)(i), which permits a court to terminate parental rights if it finds by clear and convincing evidence that "[p]arental 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."

After respondent entered her plea, the court heard testimony regarding visitation and "reasonable efforts" to reunite the family. Martha Snyder, a "qualified Indian expert," recommended that the court permit Roe supervised visitation, and that petitioner offer him a service plan. But Snyder opposed allowing respondent any visitation, and admitted that no efforts had been made "to maintain the child in the home." Snyder conceded that the ICWA required "reasonable efforts," although she expressed, "I don't know what would be reasonable efforts in this case."[3] The circuit court opined:

> Alright, then the Court's satisfied, under MCR 3.978(C) that, based upon the evidence here, that I'm satisfied by clear and convincing evidence, including the testimony of Ms. Snyder, that services have been provided in the past and that they failed to be successful as admitted to here in the petition today. And so the Court's satisfied that services were provided to prevent the break-up and removal of the child, and so the Court's going to continue the child out of home under jurisdiction of the Court.

The circuit court commenced a termination hearing on January 15, 2008. As recounted by the majority, Hill, Snyder, David Babcock, and Lori Tomkinson testified in support of terminating respondent's rights to Ashtyn.

Hill explained that she became Aliyah's foster care worker in January 2005, while respondent and Aliyah were under tribal court jurisdiction. Hill described the services offered to respondent during those four months in 2005 as follows: "I did make referrals for domestic violence through the . . . Sault Tribe [sic]. She was offered parenting." Hill provided the court with no further description of the services offered to respondent, and admitted that she had no contact with respondent after April 2005. According to Hill, respondent "did participate" in the services, but Hill did not further elaborate. Hill identified as her current "biggest concern" "that this child would experience and witness some of the same things that have happened to the other two children historically." Hill conceded that she knew "nothing" about the "actual home life" of respondent and Roe, lacked any knowledge regarding Roe besides the fact that he had a previous conviction, knew of no reason that Roe would harm Ashtyn, and could only speculate "as to what may or may not happen in the future" based on respondent's past relationships with Perrault and Bertrand.

Snyder opined that respondent's relationship history did not meet the tribe's "parenting norms." When questioned regarding "reasonable efforts to keep this family intact," Snyder

[3] As discussed in more detail, later, the ICWA actually requires "active efforts," not "reasonable efforts."

testified, "I think there have been many prior reasonable efforts with [respondent], and given this circumstance of her still being only one of two people that could have killed Danny, I mean, at the very best, she has to know, so with [respondent], I'm definite, you know on termination." Snyder did not additionally detail any of the "prior reasonable efforts" given respondent.

Babcock, a Department of Human Services (DHS) worker, admitted that he had never personally worked with respondent. Babcock nonetheless believed that respondent's parental rights to Ashtyn should be terminated because she had a recent conviction of furnishing alcohol to a minor, had become involved with Roe, a convicted sex offender, and failed to promptly extricate herself from her relationship with Perrault, despite her awareness that he was violent and abusive toward her and her children. Babcock lacked awareness of any counseling that respondent received after the termination involving Aliyah. Despite Roe's prior conviction of attempted criminal sexual conduct, Babcock approved that petitioner intended to offer Roe services, and Babcock "specifically did not request termination" of Roe's parental rights.

Tomkinson, another DHS worker, testified that she interviewed respondent and Roe. Tomkinson recalled that respondent referred to Roe as her fiancé and identified the relationship as "a dream relationship." Respondent told Tomkinson that she "wanted to get back in Tribal Social Services for counseling" with Roe. Tomkinson recommended termination of respondent's rights on the basis of "[t]he prior termination of parental rights in the tribal court, the unresolved homicide of Daniel, and the risk of harm to Ashtyn if placed with her mother." Tomkinson further recommended that the circuit court order Roe to separate from respondent.

Barber, respondent's mental health therapist, testified that during their initial sessions, respondent demonstrated "a lot of shame and guilt, a lot of blame. She blamed herself for getting involved in relationships that were harmful. She blamed herself for being involved with Mr. Perrault." When Barber discharged her from therapy in 2006, respondent "was living by herself. She was holding a job. She was making her own money, not being dependent on someone else to pay bills for her, to make decisions for her." Barber characterized respondent's prognosis as "excellent."

Patrick McKelvie, a caseworker for the tribe's community and family services agency, testified that respondent entered the drug court program sometime in September 2006, when he served as the coordinator of that program. According to McKelvie, respondent "was a model participant," who "did everything that was expected of her. She completed her GED [general equivalency diploma] in record time. She never tested dirty. She kept all of her appointments. She never tried to renegotiate the terms of the program."

Respondent and her mother testified that respondent continued to have supervised visits with Aliyah, even though her parental rights to the child were terminated.

In its bench opinion, the circuit court reviewed the evidence and concluded that petitioner had proven the statutory ground contained in MCL 712A.19b(3)(i) "beyond a reasonable doubt." The circuit court reasoned, "There had been a case service plan. There had been a death of one

child, neglect of the other, and efforts to rehabilitate the [respondent] were unsuccessful, resulting in termination . . . so that part of the statute has been complied with beyond a reasonable doubt." As required by the ICWA,[4] the circuit court made a separate finding, that "the evidence establishes beyond a reasonable doubt . . . that the custody of this child by respondent mother is likely to result in serious emotional or physical damage to the child."

II. The ICWA's "Active Efforts" Requirement

The majority acknowledges that "under the plain language of [25 USC 1912(d)], the Department had the burden of proving that 'active efforts have been made' to prevent the breakup of [respondent's] family and 'that these efforts have proved unsuccessful.'" *Ante* at 5. The majority qualifies this indisputably accurate statement with the observation that "formal or informal services provided *before* the current proceeding may meet the 'active efforts' requirement of § 1912(d)." (Emphasis in original). *Ante* at 8. The majority further opines that "where there is clear and convincing evidence that the provision of additional services would be futile, that finding can meet the requirements of § 1912(d)." *Ante* at 8.

I respectfully disagree with both qualifications. In my view, previously provided services likely cannot satisfy the "active efforts" requirement, and a court may not presume, solely on the basis of prior services, that current services "would be futile."

A. The Meaning of "Active Efforts"

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

> was the product of rising concerns 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 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 . . . ;

[4] Pursuant to 25 USC 1912(f):

> 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.

> "(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
>
> "(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:

> 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. Resolution of any Conflict Between the ICWA and Michigan Law

In *Mississippi Band of Choctaw Indians*, the United States Supreme Court examined the meaning of the word "domicile," used in the ICWA's § 1911(a), 25 USC 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 ICWA embodies Congress's intent "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." 25 USC

1902. In *People ex rel JSB, Jr*, 691 NW2d 611, 616 (SD, 2005), the South Dakota Supreme Court examined in detail the "object and policy" of the ICWA's "active efforts" provision and the interplay between the "active efforts" provision of the ICWA and a state law permitting termination of parental rights when "reasonable efforts" at reunification had failed. *Id*. at 618. In South Dakota, as well as in Michigan, a court may terminate parental rights without providing any services if the involved parent subjected the child to aggravated circumstances, including abandonment or sexual abuse, or has had his rights to other children terminated on the grounds of abuse or neglect. *Id*. The South Dakota Supreme Court held that the state law provision excusing a petitioner from making "reasonable efforts" to unify a family did not override the ICWA's obligation that "active efforts" be made to reunite JSB with his father. *Id*. The South Dakota Supreme Court also rejected that Congress's enactment of the Adoption and Safe Families Act (ASFA), 42 USC 671, which contemplates suspension of a state's duty to undertake "reasonable efforts" toward reunification in certain aggravated circumstances,[5] diminished the

[5] The relevant portion of the ASFA provides as follows:

> (a) Requisite features of State plan.
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> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
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> * * *
>
> (15) provides that—
>
> (A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern;
>
> (B) except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families—
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> (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and
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> (ii) to make it possible for a child to safely return to the child's home;
>
> (C) if continuation of reasonable efforts of the type described in subparagraph (B) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan (including, if appropriate, through an interstate placement), and to complete whatever steps are necessary to finalize the permanent placement of the child;

(continued…)

(…continued)

(D) reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that—

(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) the parent has—

(I) committed murder (which would have been an offense under section 1111(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or

(IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or

(iii) the parental rights of the parent to a sibling have been terminated involuntarily;

(E) if reasonable efforts of the type described in subparagraph (B) are not made with respect to a child as a result of a determination made by a court of competent jurisdiction in accordance with subparagraph (D)—

(i) a permanency hearing . . . , which considers in-State and out-of-State permanent placement options for the child, shall be held for the child within 30 days after the determination; and

(ii) reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child; and

(F) reasonable efforts to place a child for adoption or with a legal guardian, including identifying appropriate in-State and out-of-State placements may be made concurrently with reasonable efforts of the type described in subparagraph (B) . . . . [42 USC 671.]

state's burden to supply "active efforts" in all cases governed by the ICWA. *Id*. at 619-620. The reasoning in *JSB* has been adopted by a number of other state courts.[6]

Here, the record evidence reveals that when petitioner filed the initial permanent custody petition, it entirely refused to provide respondent with services intended to preserve her familial relationship with Ashtyn, or to improve her ability to function as a parent. 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 completely different circumstances, do not satisfy the object and policy of the ICWA, and do not qualify as "active efforts."

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.[7]

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).[8] Standing alone, evidence of a parent's response to efforts provided years before, under altogether different conditions 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

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[6] *In re Welfare of Children of SW*, 727 NW2d 144, 150 (Minn App, 2007); *Winston J v Dep't of Health & Social Services, Office of Children's Services*, 134 P3d 343, 347 n 18 (Alas, 2006); *In re Interest of Dakota L*, 14 Neb App 559, 573-575; 712 NW2d 583 (2006); *In re AN*, 325 Mont 379, 384-385; 106 P3d 556 (2005).

[7] According to Black's Law Dictionary (8th ed), p 228, 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.

[8] Our Supreme Court relied heavily on the tense used when it interpreted MCL 600.2912a(2) in *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60-61; 631 NW2d 686 (2001).

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).[9]

The majority cites several cases from other jurisdictions in support of its conclusion that a finding that further active efforts would be "futile" may satisfy the ICWA's requirement. However, those cases are readily distinguishable from the instant case. For example, in *Letitia V v Superior Court of Orange Co*, 81 Cal App 4th 1009, 1016; 97 Cal Rptr 2d 303 (2000), the mother had a long history of substance abuse, and the child "entered the world—and the juvenile dependency system—under the influence of cocaine." *Id*. at 1011. The court's description of the unsuccessful services provided to the mother over the course of six years before the child's birth consumes almost four pages of the opinion. Despite the mother's dreadful record of noncompliance, the petitioner attempted to provide her with more services after the birth of the child, including a referral to a drug recovery program. *Id*. at 1014-1015. In contrast to this case, the mother in *Letitia V* actually received some current services, but clearly demonstrated that she lacked any genuine interest in reforming her drug habit.

Similarly, the Indian father in *People ex rel KD*, 155 P3d 634, 636 (Colo App, 2007), received years of services during two previous dependency proceedings directed toward rehabilitating his relationship with the child. When the third dependency proceeding commenced involving the same child, the petitioner asserted that the father "suffered from an emotional illness" and, therefore, "no appropriate treatment plan could be devised." *Id*. The Colorado Court of Appeals held that "the court may terminate parental rights without offering additional services when a social services department has expended substantial, but unsuccessful, efforts over several years to prevent the breakup of the family, and there is no reason to believe that additional treatment would prevent the termination of parental rights." *Id*. at 637. In a subsequent ICWA case discussing *People ex rel KD*, the Colorado Court of Appeals explained that because of the father's emotional illness, "no treatment plan could address his parental unfitness." *In re NB*, ___ P3d ___, ___; 2007 WL 2493906, *9 (Colo App, 2007). Nevertheless, in marked contrast to the instant case, the father in *KD* received services for years, including treatment provided shortly before the child's final removal from the home.

Here, petitioner produced absolutely no evidence that respondent received "active efforts . . . to prevent the breakup of [her] Indian family." Snyder, the qualified Indian expert, admitted that no efforts had been made to maintain Ashtyn in respondent's home. Hill conceded that because she lacked any knowledge of respondent's current home situation, she could only speculate regarding respondent's fitness to parent Ashtyn. When petitioner removed Ashtyn from respondent and Roe, it unquestionably split apart their Indian family. It did so without providing *active* efforts to *that* family, as required by the ICWA. The ICWA's stated policy that Indian families be preserved whenever possible reinforces my conclusion that clear and convincing proof of "active efforts" requires more than a passing reference to a brief period of

[9] 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).

services provided three years earlier, under vastly different circumstances. Further, without familiarizing itself with respondent's current situation, petitioner could not begin to determine whether services would potentially benefit respondent.

The majority decides that

> where a parent has consistently demonstrated an inability to benefit from the Department's provision of remedial and rehabilitative services, or has otherwise clearly indicated that he or she will not cooperate with the provision of the services, a trial court's finding that additional attempts to provide services would be futile will satisfy the requirements of § 1912(d) of the ICWA. Nothing in § 1912(d) precludes the Department from seeking termination of parental rights where active efforts to reunite the family have proven unsuccessful in the past. [*Ante* at 10.]

I cannot reconcile this dictum with the majority's definition of "active efforts," or the purposes of the ICWA. Here, "the family" subject to reunification bears virtually no relation to "the family" involved in respondent's prior termination. Previous active efforts to reunite respondent with Aliyah unlikely implicated the parenting issues relevant today, given that Perreault is out of the picture and no record evidence exists that Roe currently qualifies as physically or emotionally abusive. Further, the prior termination occurred pursuant to tribal law, and the tribe rather than the Department provided services. Because the Department never provided "remedial and rehabilitative services," respondent cannot possibly have "consistently demonstrated an inability to benefit" from them.

Additionally, the record evidence does not reflect whether respondent ever received "active efforts" consistent with "leading her to water," rather than passive efforts such as the "offers" and "referrals" described by Hill. The record also is silent regarding whether the previous services had "cultural relevance." On remand, an in-depth analysis of these questions will not serve to answer beyond a reasonable the only significant question now facing the circuit court: will continued custody of respondent likely result in serious emotional or physical injury to Ashtyn? Without a meaningful examination of *present* circumstances, and the success or failure of *current* "active efforts" directly relevant to those circumstances, a circuit court is simply unprepared to determine that further efforts will "clearly and convincingly" qualify as "futile."

In my view, terminating an Indian parent's rights without providing any "active efforts" relevant to the parent's current situation robs the ICWA of meaning. Congress intended the ICWA to preserve Indian families, because intact Indian families represent a "resource . . . vital to the continued existence and integrity of Indian tribes." 25 USC 1901. The elevated standard of proof required by the ICWA and its insistence that "active efforts" must precede termination signal that termination of an Indian parent's rights is intended to be a procedurally painstaking process. Assumptions, presumptions, and evidentiary shortcuts have no place here. Therefore, I would reverse the circuit court's termination of respondent's parental rights, for the single reason that petitioner failed to clearly and convincingly demonstrate that it provided the active efforts required by federal law.

C. The Evidence Established Respondent Benefited from Prior Services

By the time that respondent conceived Ashtyn in February 2007, she had (1) permanently ended her relationship with Perrault; (2) completed her GED; (3) obtained employment; (4) purchased a home jointly with Roe; (5) successfully completed a drug court program; and (6) engaged in uneventful visits with Aliyah. This evidence unequivocally demonstrates that respondent derived substantial benefit from previous services. Although belatedly, respondent removed herself from an exploitative relationship in which she had been entirely dependent on her abuser, and entered into an apparently positive relationship with a gainfully employed man. The record reveals that respondent's situation in November 2007 bore no resemblance at all to her circumstances at the time of Daniel's death. For these reasons, the majority's remand invitation that the circuit court may invoke futility to again terminate respondent's parental rights lacks any factual basis. The existing record simply does not contain clear and convincing evidence that the provision of additional services would be futile.

At the termination hearing, several of petitioner's witnesses asserted that respondent had inappropriately become involved with Roe because he was "a convicted sex offender." In my view, this criticism qualifies as pure pretext. Babcock admitted that despite Roe's conviction, Roe would receive services intended to preserve his parental rights to Ashtyn. If petitioner viewed Roe as a potentially fit and suitable father, I can discern no basis for a conclusion that his conviction automatically rendered respondent an unfit mother, simply on the basis of her involvement with Roe.

The record evidence demonstrates that the circuit court terminated respondent's parental rights primarily in punishment for Daniel's death. Snyder made no effort to conceal that Daniel's death motivated her recommendation for termination: "[G]iven this circumstance of her still being only one of two people that could have killed Danny, I mean, at the very best, she has to know, so with [respondent], I'm definite, you know, on termination." Respondent was never formally charged with killing Daniel, or with being an accessory to his homicide. Nevertheless, the circuit court concluded that respondent's unproven role in Daniel's death, and her conduct during the four months thereafter, supplied proof beyond a reasonable doubt that respondent's custody of Ashtyn "would likely result in emotional or physical damage to the child." 25 USC 1912(f). In my view, petitioner could not possibly prove a likelihood of harm to Ashtyn *beyond a reasonable doubt* in the absence of any current information. 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.

At its core, this case involves whether a court may conclude that a parent qualifies as presently unfit solely on the basis of the parent's past misconduct, uninformed by her current circumstances. I believe that the ICWA's "beyond a reasonable doubt" standard of proof precludes a presumption of unfitness predicated solely on past conduct. 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).

"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 marks and citation 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).

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 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. Unquestionably, the circumstances surrounding Daniel's death and the termination of her rights to Aliyah constitute relevant evidence regarding respondent's current parenting abilities. The circuit court, however, utilized a presumption of unfitness predicated solely on historical evidence to "disdain[] present realities in deference to past formalities." Perhaps a fuller record might reveal that respondent *is* completely unfit to parent Ashtyn and that, in respondent's custody, Ashtyn likely would suffer serious emotional or physical harm. But a court lacks the ability to reach these conclusions with certainty beyond a reasonable doubt by relying solely on a presumption that respondent's past

unfitness supplies the answer. That logic "forecloses the determinative issues of competence and care," and eviscerates petitioner's heavy burden of proving unfitness.[10]

Here, the circuit court ruled that petitioner met its burden by proving respondent's past unfitness. Petitioner presented no current evidence that respondent's custody of Ashtyn would likely harm the child. By deciding that the circuit court may consider "evidence that the provision of additional services to Finfrock would be futile," the majority endorses a meaningless reiteration of the prior proceedings. If the circuit court accepts the majority's advice that it may rely solely on evidence gleaned from respondent's past, the court inevitably will bypass the ICWA's requirement of proof beyond a reasonable doubt. When current evidence of fitness is omitted, the process is governed by presumption, not proof. I would hold that on remand, the circuit court may not rely on inferences of unfitness, unsupported by current evidence demonstrating beyond a reasonable doubt that Ashtyn faces likely harm if returned to respondent's care.

Because petitioner cannot satisfy the ICWA's reasonable doubt standard in the absence of current active efforts, which it undisputedly neglected to provide, I would reverse.

/s/ Elizabeth L. Gleicher

[10] The burden of proving parental unfitness rests on the petitioner. *In re AMAC*, 269 Mich App 533, 537; 711 NW2d 426 (2006).