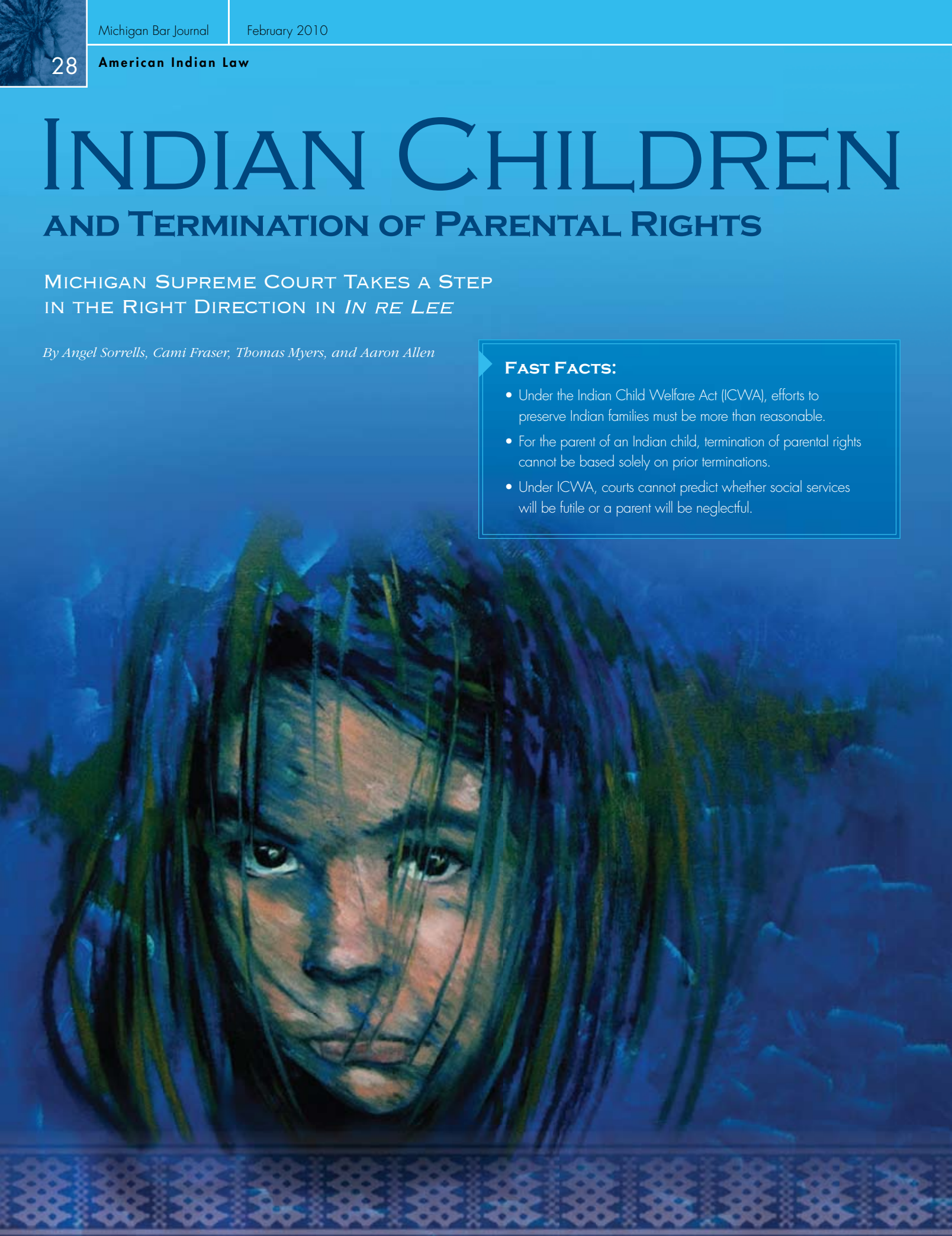
Indian Children and Termination of Parental Rights

Michigan Supreme Court Takes a Step in the Right Direction in *In re Lee*

By Angel Sorrells, Cami Fraser, Thomas Myers, and Aaron Allen

Fast Facts:

- Under the Indian Child Welfare Act (ICWA), efforts to preserve Indian families must be more than reasonable.
- For the parent of an Indian child, termination of parental rights cannot be based solely on prior terminations.
- Under ICWA, courts cannot predict whether social services will be futile or a parent will be neglectful.



Introduction

The Michigan Supreme Court has made its first major foray into the Indian Child Welfare Act (ICWA), a federal law that mandates minimum federal standards in child protection cases involving Indian children, which means more rigorous preventive measures and higher standards of evidentiary proof.[1] Although Cheryl Lee ultimately lost her parental rights, the Supreme Court interpreted ICWA in a manner that protects Indian families. The *Lee* Court clarified the intersection of ICWA and Michigan law, particularly in cases in which termination of parental rights is based on prior terminations.

Facts

Cheryl Lee and her son, JL, are members of the Sault Ste. Marie Tribe. Between 1999 and 2006, Lee had four children. She had JL, the oldest, when she was 16 and living in a foster home. JL was first removed from Lee in 2000. The tribe took jurisdiction of the case and placed JL in the guardianship of his grandmother. JL was returned to his mother in 2003, and she had two more children. All three children were subsequently removed, and JL was placed with his father. The other two children were returned to Lee only to be removed again in 2005. The tribal court terminated Lee's rights to those two children by 2006. Shortly afterward, Lee had a fourth child. The tribe immediately removed that child and terminated Lee's parental rights based on the two prior terminations.

Lee received services during the six-year period from JL's birth through 2005, the first time the court terminated her rights. Many of the services were tailored to meet the special needs of Lee, who may have experienced fetal alcohol effects.

Lee maintained a parental relationship with JL since 2003. Beginning in spring 2007, Lee had unsupervised visitation with JL pursuant to a custody order until JL's father was arrested in June 2007. Shortly after and without providing any additional services, the Department of Human Services (DHS) sought termination of Lee's parental rights based on prior terminations. The circuit court authorized the DHS petition, suspended Lee's parenting time, and later terminated her parental rights. During trial, caseworkers testified that the parenting skills they tried to teach Lee never seemed "to take." An expert witness testified that the tribe had offered every possible service, all without success. The Court of Appeals affirmed, and Lee was granted leave to appeal to the Michigan Supreme Court.

Holdings

- The Adoption and Safe Families Act does not relieve DHS from ICWA's requirements.
- The clear and convincing standard applies to ICWA 1912(d).
- ICWA requires that active efforts be affirmative as opposed to passive and must be more than the "reasonable efforts" required by state law.
- ICWA-required services do not have to be current or for the benefit of the subject child; however, services provided too long ago to be relevant to current circumstances can raise reasonable doubt and defeat termination. Past efforts for other children must be shown to be relevant.
- When a petition for termination is based on a prior termination, the petitioner cannot fulfill ICWA requirements merely by showing that services were provided in the prior case.
- The Court declined to adopt a futility test.
- Under ICWA, DHS cannot simply discontinue services once a petition to terminate parental rights predicated on a prior termination has been filed.
- Termination on the basis of the doctrine of "anticipatory neglect" or presumption of unfitness is inconsistent with ICWA. However, lower courts may take into account past conduct in conjunction with current evidence.

Analysis

Active Efforts

Under Michigan law, DHS must petition to terminate parental rights when it determines that there is a risk of harm to a child and the parent's rights to another child were previously terminated.[2] To terminate parental rights to an Indian child, ICWA requires DHS to prove that it made active efforts to preserve the Indian family and those efforts failed.[3]

In *Lee,* the trial court terminated Lee's parental rights to JL based on prior terminations. Considering whether active efforts provided in the past for her other children also applied to JL, the Supreme Court framed the issue as "whether the term 'active efforts' in 25 USC 1912(d) requires a showing that there have been

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recent rehabilitative efforts designed to prevent the breakup of *that particular* Indian family."[4]

While declining to apply exact time limits for active efforts, the *Lee* Court gave clear direction to the trial courts to scrutinize the timing of services. Lee urged the Court to adopt Judge Gleicher's dissent, which reasoned that active efforts must be current.[5] The Court described the crux of the case as "not about the nature of the required services, but about the timing of those services."[6] The Court found that DHS had provided active efforts to Lee in the course of prior terminations and declined to adopt Lee's argument that efforts had to be strictly current. Instead, it used a relevance analysis: "The timing of the services must be judged by reference to the grounds for seeking termination and their relevance to the parent's current situation."[7]

The Court noted that "DHS's apparent policy of providing no services when a petition for termination of parental rights is based on a prior termination will not withstand the heightened standard of ICWA."[8] While concentrating on the timing of efforts, the Court also addressed the quality of efforts and affirmed earlier rulings by the Michigan Court of Appeals, which defined active efforts as "affirmative, as opposed to passive" and more extensive than the reasonable efforts required by state law.[9]

By not defining a strict timeline for active efforts, the Court left room for future litigants to argue for expansion of ICWA protections, especially if DHS does not present current evidence about the fitness of the parent or when, for example, a parent betters himself or herself.[10]

Futility Test

In re Roe adopted a "futility test" to assess whether active efforts provided in previous cases can satisfy the requirements in § 1912(d):

> [W]e conclude that the ICWA does not require *current* active efforts "if it is clear that *past* efforts have met with no success." Thus, 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 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.[11]

The Court of Appeals in *Lee* agreed that providing efforts when they have already proven futile was not required.[12]

In *Lee,* the Supreme Court declined to adopt a futility test: "ICWA obviously does not require the provision of *endless* active efforts, so there comes a time when the DHS or the tribe may justifiably pursue termination without providing additional services. [But a] futility test does not capture this concept."[13] The majority shared Judge Gleicher's concern that by utilizing a futility test, a court could avoid applying § 1912(d).

The Court held that when termination of parental rights involves an Indian child, ICWA requires a thorough and contemporaneous assessment of the services provided in previous termination cases to:

- Assess how the parent(s) responded to the previous services, and
- Compare the nature and success of those previous services to the parents' current situation.

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The majority stated

> …the question is whether the efforts made and the services provided in connection with the parent's other children are relevant to the parent's current situation and abilities so that they permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceeding.[14]

The Court acknowledged that active efforts had been made over the six-year period and concluded that "the services offered [Lee] were extensive, relatively recent, and tailored to meet her specific needs."[15] The Court determined that all the services offered were unsuccessful and relied on Lee's testimony to show she continued to make poor choices. However, Justice Cavanagh's dissent emphasized that "the party seeking termination must present evidence of the parent's current circumstances" and "evidence of the relevancy of past efforts to the family's current circumstances and needs."[16] Without such evidence, he noted that it is unknown whether those previous efforts are relevant to the current familial situation.[17] Before ultimately affirming the termination, the majority also examined ICWA's requirements in light of the testimony of tribal and DHS caseworkers that all possible tribal services had been exhausted for this family.[18]

Anticipatory Neglect

The judicially created doctrine of "anticipatory neglect" has been applied only in Michigan and Illinois,[19] where it has regularly been employed in child welfare cases involving non-Indians.[20] In *In re LaFlure,* the first in the line of cases establishing anticipatory neglect in Michigan, the Court recognized that "[h]ow a parent treats one child is certainly probative of how that parent may treat other children."[21] Although the parents successfully argued that the lower court lacked jurisdiction, *Matter of Dittrick Infant* later affirmed the use of anticipatory neglect and held that "the

reasoning of *LaFlure* is sound, even when applied to a situation where no prior determination of neglect has been made."[22] *In re Powers* expanded anticipatory neglect "to guarantee the protection of a child who is not yet born, i.e., because of the past conduct of another person, there is good reason to fear that the second child, when born, will also be neglected or abused."[23]

In the Supreme Court, Lee argued that the lower courts improperly relied on anticipatory neglect and that current conditions did not support a termination of parental rights under ICWA. ICWA requires DHS to 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 before parental rights may be terminated.[24] Concluding that "past behavior is a strong indicator of future performance," the Court of Appeals majority determined the "trial court did not clearly err" because the court also took current evidence into account.[25] However, Judge Gleicher's dissent noted "anticipatory neglect" was the sole justification for the affirmation by the majority. Judge Gleicher opined that "ICWA's beyond a reasonable doubt standard of proof precludes a presumption of unfitness predicted solely on past conduct" and anticipatory neglect could not "be used in a determinative manner."[26]

The Supreme Court agreed that "termination based on 'a presumption of unfitness predicated solely on past conduct' would be inconsistent with the 'beyond a reasonable doubt' standard of the ICWA" and "invocation of the doctrine of anticipatory neglect to terminate parental rights solely on the basis of past behavior would be inconsistent with that standard."[27] However, the Supreme Court found the lower courts did not err by considering Lee's past conduct because "the current evidence revealed that she continued to make choices that demonstrated a lack of maturity and ability to care for a child."[28]

Conclusion

While Cheryl Lee did not prevail, proponents of ICWA can rely on the *Lee* opinion to protect other Indian families. Michigan law cannot be used to release DHS of its ICWA obligations. Services may not have to be current or for the subject child, although services provided too long ago to be relevant to current circumstances can raise reasonable doubt and defeat termination. When a petition for termination is based on a prior termination, DHS cannot fulfill ICWA requirements merely by showing that services were provided during a prior termination case. Finally, DHS may not use "futility" or "anticipatory neglect" to circumvent ICWA's requirements. ■

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FOOTNOTES

1. *In re JL,* 483 Mich 300; 770 NW2d 853 (2009); *In re Jacobs,* 433 Mich 24; 444 NW2d 789 (1989).
2. MCL 722.638(1)(b)(i).
3. 25 USC 1912(d).
4. *In re JL, supra* at 315 n 12.
5. Appellant's brief at 18 (citing *In re Roe,* 281 Mich App 88 (2008)).
6. *In re JL, supra* at 324.
7. *Id.* at 325.
8. *Id.* at 327.
9. *Id.* at 321.
10. *Id.* at 325 n 17 (citing *CJ v Alaska Dep't of Health & Social Services,* 18 P3d 1214 (Alaska, 2001)).
11. *In re Roe,* 281 Mich App 88, 105; 764 NW2d 789 (2008).
12. *In re Lee,* unpublished opinion per curiam of the Court of Appeals, issued October 16, 2008 (Docket No. 283038), 2008 Mich App LEXIS 2060 at *15.
13. *In re JL, supra* at 326–327.
14. *Id.* at 325.
15. *Id.* at 330.
16. *Id.* at 337–338.
17. *Id.* at 336–344.
18. *Id.* at 321–327.
19. *In re Lee, supra* at *44–52.
20. See, e.g., *In re AH,* 245 Mich App 77, 84; 627 NW2d 33 (2001); *Matter of Andeson,* 155 Mich App 615, 622; 400 NW2d 330 (1986); *Matter of Futch,* 144 Mich App 163, 167–168; 375 NW2d 375 (1984).
21. *In the Matter of LaFlure,* 48 Mich App 377, 392; 210 NW2d 482 (1973).
22. *Matter of Dittrick Infant,* 80 Mich App 219, 222; 263 NW2d 37 (1977).
23. *In re Powers,* 208 Mich App 582, 592; 528 NW2d 799 (1995).
24. 25 USC 1912(f).
25. *In re Lee, supra* at *21–23.
26. *Id.* at *44.
27. *In re JL, supra* at 331.
28. *Id.* at 332.