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STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
JUVENILE DIVISION
SEVENTH JUDICIAL CIRCUIT

The People of the State of
South Dakota in the Interest of,

Child(ren), and concerning

Respondent(s).

COURT FILE NO. A11-

BEFORE: THE HONORABLE WALLY EKLUND
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
October 20, 2011

APPEARANCES:

FOR THE STATE: MS. JENNIFER B. UTTER
Deputy State's Attorney
Pennington County
300 Kansas City Street
Rapid City, South Dakota 57701

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*****P R O C E E D I N G S*****

MS. UTTER: Judge, the next matter for the court is in the matter of the children. I understand that parents are present here and the mother, , is here and sir, are you ?

RESPONDENT FATHER: Yeah.

MS. UTTER: And the father, , is here. I believe you are father to , is that correct?

RESPONDENT FATHER: Yep.

MS. UTTER: Both parents of are here, and in this case we're asking the court to also grant custody. The emergency temporary custody was taken when the parents were -- the father was arrested for DUI and the mother was intoxicated and unable to care for the child. The three-year-old child or approximately three-year-old child -- three-and-a-half-year-old child basically was in the car with them, so the Department of Social Services obtained emergency temporary custody based on that.

And yesterday we learned that there was an 11-year old son in the home. His father is unknown at this time but we'll find out, and so we're requesting the court also authorize temporary custody of the 11-year old,

THE COURT: You folks wish to be heard on this matter?

RESPONDENT FATHER: What can we say?

THE COURT: Well, I'm sure the department will be

1 working with you on this matter in an attempt to get the
2 children back to you but in the meantime, until this is sorted
3 out I'm going to grant the temporary custody as requested.

4 MS. UTTER: The next hearing would be December 12th at
5 1:45. That would be an advisory hearing, and the department
6 will be working with the family to avoid formal charges.

7 Thank you.

8 (These proceedings concluded.)

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1 STATE OF SOUTH DAKOTA)
 2 COUNTY OF PENNINGTON) SS. CERTIFICATE

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I, KATHRYN E. Di MAIO, RPR, Official Court Reporter,
 hereby certify that the foregoing 4 pages, inclusive, are a
 true and correct transcript of my stenotype notes.

Dated at Rapid City, South Dakota, on
 January 18, 2012.

 Kathryn E. Di Maio, RPR
 Official Court Reporter
 My Commission expires: 7/19/2016

STATE OF SOUTH DAKOTA)
) SS.
 COUNTY OF PENNINGTON)
)
 The People of the State of)
 South Dakota in the Interest of,)
)
 [REDACTED])
 [REDACTED])
 [REDACTED])
 Respondent(s).)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT
JUVENILE DIVISION

COURT FILE NO: A11- [REDACTED]

TEMPORARY CUSTODY ORDER
48 HOUR HEARING
ALLEGED: Abused & Neglected

The above-entitled matter having come on for Temporary Custody on the 20th day of October, 2011; the Honorable Wally Eklund, presiding; the State of South Dakota being represented by its Deputy State's Attorney, Roxie Erickson Jennifer B. Utter; the South Dakota Department of Social Services being represented by its designated agent(s), Amanda Q; the Respondent mother (not) appearing in person; the Respondent father (not) appearing in person; the minor child(ren) not appearing in person.

Allegation(s): lack of proper parental care

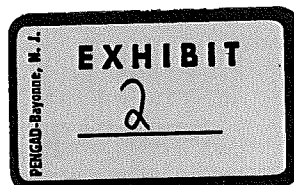
The Court finds that it is in the best interests of the child(ren) that the child(ren) be held in temporary custody and that it is contrary to the welfare of the child(ren) to remain in the home of [REDACTED] that reasonable efforts have been made to prevent the removal of the child(ren) from the home, and that reasonable efforts will be made to reunite the family.

The Court further finds that there is probable cause that the child(ren) is/are abused or neglected.

ABUSED OR NEGLECTED CHILD:

The Court further finds the following:

- Temporary custody of the child(ren) shall continue.
- The Indian Child Welfare Act is applicable to this matter.



- ✓ That active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proven unsuccessful.
- ✓ That continued custody of the child(ren) by the parents or Indian custodian is likely to result in serious emotional or physical damage to the child(en).
- ✓ That the Department of Social Services has provided reasonable efforts to prevent the removal of the children from the home.

The Court finds that temporary custody is the least restrictive alternative available commensurate with the best interest of the child(ren), and hereby ORDERS the following:

Release to Parent(s)
Other
Restrictions

✓ Department of Social Services custody for 60 days, or until further order of the Court.
 Foster Care _____

Shelter at _____

✓ The Department of Social Services is hereby authorized to return full legal and physical custody of the minor child(ren) to the parent(s), guardian or custodian (without further court hearing) at any time during the custody period granted by this Court if, the Department of Social Services concludes that no further imminent child protection issues remain and that temporary custody of the child(ren) is no longer necessary.

✓ The Department of Social Services is hereby authorized to release all information available pertaining to this matter to the Tribe(s) in which the children are enrolled or are eligible for enrollment.

✓ The Department of Social Services shall begin supervised visitation at their discretion between the minor child(ren) and parent(s), guardian(s), or custodian(s) while minor child(ren) are in the legal and physical custody of the Department of Social Services. This Order shall supersede any No Contact Order, Order of Protection, or any other Court order which would otherwise prohibit contact between the minor child(ren) and parent(s)/guardian(s)/or custodian(s).

✓ The Court further ORDERS the minor child [redacted] is hereby placed in the legal and physical custody of DSS
DSS is authorized to place the minor child in care
and law enforcement is ordered to assist by any means
 ABUSED OR NEGLECTED CHILDREN MAY NOT BE DETAINED OR JAILED. necessary

Dated this 20 day of October, 2011.

BY THE COURT:

Wally Eklund
 The Honorable Wally Eklund
 Judge of the Circuit Court

ATTEST:

Ranae Truman, Clerk of Courts

By: Ranae Truman
 (Deputy)

(SEAL)

Pennington County, GA
 FILED
 IN CIRCUIT COURT

OCT 20 2011

Ranae Truman, Clerk of Court
 By: Ranae Truman Dep

- Inquired about potential relative placement resources in close proximity to the parent or child.
- Explored availability of Native American foster homes in close proximity to the parent or the child.

11. That returning _____, an Indian child, to his/her parents care would result in serious emotional or physical damage to the child; for the reasons stated below:

-
-
-

12. The following efforts have been made to rehabilitate and reunite the family by Family services specialist _____:

-
-
-

13. That Affiant finds that the ICWA requirements have been met and the least restrictive alternative available in the children's best interest, is continued placement in foster care.

Further Affiant sayeth not.

Dated this _____ day of _____, 19_____.

Affiant

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF _____)

Subscribed and sworn to before me on _____, 1999.

(Magistrate)(Circuit Judge)(Notary Public)

My commission expires on _____

(SEAL)

Form 7

STATE OF SOUTH DAKOTA)
)
) SS
COUNTY OF _____)

IN CIRCUIT COURT

JUDICIAL CIRCUIT

IN THE INTERESTS OF,)
)
)
Minor Child(ren))
)
and concerning)
)
)
_____, and)
)
)
Respondent(s).)
)

No. _____

TEMPORARY CUSTODY ORDER

A 48 Hour Hearing was held on _____, 19___. The State was represented by _____ and ___ the child ___ mother, ___ father, ___ other guardian(s) or custodian(s) _____, and _____ were present.

The Allegations are: _____

The Court finds that it is in the best interests of the child that the child be held in temporary custody and that it is contrary to the welfare of the child to remain in the home of _____,

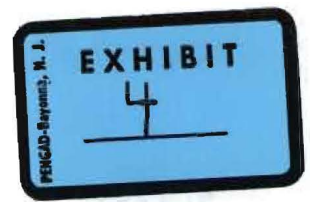
_____ that reasonable efforts have been made to prevent the removal of the child from its home, and that reasonable efforts will be made to reunite the family

OR

_____ that reasonable efforts are not necessary pursuant to SDCL 26-8A-21.1 because
_____ the parent has committed certain crimes (murder, manslaughter, rape, incest, sexual exploitation of children, or criminal child abuse);
_____ the parent has committed felony assault against a child;
_____ the parent has had parental rights to another child terminated by a prior abuse and neglect proceeding.
_____ the parent has a documented history of abuse and neglect associated with chronic alcohol abuse
_____ the parent has demonstrated inability to protect the child from substantial harm or risk of substantial harm and the child has been adjudicated abused and neglected on at least one previous occasion and removed from the parent's custody

2. That there is probable cause to believe that the child(ren) is/are abused or neglected, as that term is defined by law.

3. That temporary custody is the least restrictive alternative in the child(ren)'s best interest.



The Court further finds (if applicable):

___ The Indian Child Welfare Act is applicable to this matter⁶.

___ That active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proven unsuccessful⁷.

___ That continued custody of the child by the parents or Indian custodian is likely to result in serious emotional or physical damage to the child⁸.

___ [any additional findings] _____

The court hereby ORDERS the following:

___ Release to ___ Parent(s) _____
 ___ Other _____
 ___ Restrictions _____

___ Department of Social Services custody

___ Foster care _____

___ Shelter at _____

ABUSED OR NEGLECTED CHILDREN MAY NOT BE PLACED IN DETENTION OR JAIL

The Department of Social Services is hereby authorized to release all information available pertaining to this matter to any Court Appointed Special Advocate (CASA) assigned to the case, to the attorneys for the parents and the child and any other attorneys representing a party in this case and to the Tribe(s) in which the children are enrolled or are eligible for enrollment, if applicable.

The Court further ORDERS [list any additional Court rulings and the date for the next hearing]

Dated: nunc pro tunc.

BY THE COURT:

Circuit Judge

ATTEST:

/s/ _____

Clerk of Courts

BY _____

Deputy

⁶ In ICWA cases, if the child(ren) remain in foster care, these additional findings must be added to avoid a challenge of the validity of the foster care placement.

⁷ 25 USC 1912(d).

⁸ 25 USC 1912(e).

1 STATE OF SOUTH DAKOTA)
2 COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
COURT FILE NO. A12- [REDACTED]

4 -----
5 The People of the State of)
6 South Dakota in the Interest)
7 of,)

8 [REDACTED]
9 Child(ren), and concerning)
10 [REDACTED])
11 [REDACTED])

Transcript of:
48 HOUR HEARING

12 Respondents.
13 -----

14 BEFORE: THE HONORABLE JEFF W. DAVIS
15 Circuit Court Judge
16 Seventh Judicial Circuit
Rapid City, South Dakota

17 DATE: July 9 2012, at 1:30 p.m.

18 APPEARANCES:

19 FOR THE STATE: MS. ROXANNE M. ERICKSON
20 Deputy State's Attorney
21 Pennington County State's
22 Attorney's Office
300 Kansas City Street, #400
Rapid City, SD 57701

23 FOR CHEYENNE RIVER
24 SIOUX TRIBE: MR. DANA HANNA

25 ALSO PRESENT: Respondent Mother
DSS

CYNTHIA M. WEICHMANN, RPR



1 THE COURT: I just checked the other courtroom.
2 I'm thinking we have everybody that we need together so
3 we'll go ahead and proceed.

4 We have matters involving the children, the
5 children, the children, the
6 children, and the children which was continued from
7 last Thursday. Correct?

8 MS. ERICKSON: Yes.

9 THE COURT: What order would you like to proceed,
10 Ms. Erickson?

11 MS. ERICKSON: Your Honor, I believe that Mr. Hanna
12 is appearing on behalf of the Cheyenne River Sioux Tribe
13 with regards to the matter, if we would start with
14 that matter.

15 THE COURT: Other than the matter, these are
16 all first appearances today. Is that correct?

17 MS. ERICKSON: It would be -- it is a continued 48
18 hour hearing on but mother was not able to be here
19 so this is her first time appearing, Your Honor.

20 THE COURT: What I'd like to do just briefly, then,
21 is discuss the rights at the 48 hour, this temporary
22 custody hearing.

23 As you folks now know, there has been some issue
24 involving the care, custody, or control of respective
25 children in your care that's come to the attention of

1 the State's Attorney's Office. The matter then ends up
2 in court. It's drawn to my attention.

3 As we sit here today, everyone's interest is in a
4 reunification of the family and keeping family units
5 together. In connection with that, this is to advise
6 you of your rights and notify you that the children have
7 been placed in temporary custody and allow you to
8 determine how you would like to proceed.

9 At the present time, as I've indicated, the
10 intention is that whatever issues are out there be
11 resolved and the children returned or reunited. In that
12 light you're free to work with the Department of Social
13 Services on a voluntary basis for roughly a 60 day
14 period of time to determine if those issues can be
15 resolved and the children returned without any further
16 court action or activity.

17 If that doesn't take place, the State has the
18 opportunity to file a petition alleging abuse and
19 neglect of the children that goes to their continued
20 care, custody, and control. It's a much more formal
21 proceeding and at any time throughout these proceedings
22 from today forward, you need to know that you have the
23 right to be represented by an attorney at all stages of
24 the proceedings against you; that you can hire your own
25 attorney or ask for court appointed counsel if you're

1 unable to hire your own attorney to represent you in
2 these matters.

3 If the matters resolve and the children return,
4 life goes on as you know it. If the State would elect
5 to file a petition alleging abuse and neglect, it
6 becomes a much more formal situation, a much more
7 serious situation, in that an adjudicatory hearing is
8 held, it's in the nature of a trial, to determine if the
9 allegations that the State has in the petition are true
10 and correct, and if that's the case and the State proves
11 the allegations in the petition, the matter moves
12 forward for a dispositional hearing. If the State does
13 not prove the allegations in the petition, the matter is
14 dismissed; the children are returned.

15 If the matter goes on to a dispositional hearing,
16 that's controlled by statute and it goes to the
17 continued care, custody, and control, to include a
18 placement back in the home under supervised conditions,
19 other family or kinship placements, out of home
20 placements, agency placements, up to and including a
21 termination of parental rights and placement of the
22 children for adoptive purposes.

23 So these are very serious matters that are at stake
24 here and you want to make certain that you are advised
25 of and aware of your rights as we proceed.

CYNTHIA M. WEICHMANN, RFR

1 The matter, Ms. Erickson, you indicated?

2 MS. ERICKSON: Yes, Your Honor, if we could start
3 with the matter.

4 THE COURT: Do we have mother present? You
5 want to come forward?

6 Mother : (Complying.)

7 THE COURT: Father ?

8 MS. ERICKSON: No, sir.

9 THE COURT: Or Father ?

10 MS. ERICKSON: No.

11 THE COURT: Okay. So the fathers are absent.

12 Ma'am, you were in the back of the courtroom. Was
13 I speaking loud enough that you were able to hear me?

14 Mother : Uh-huh.

15 THE COURT: And do you essentially understand your
16 rights as I've advised you here today at the temporary
17 custody hearing?

18 Mother : I would like to have an attorney so
19 I can understand my rights better.

20 THE COURT: Okay. Have you filled out an
21 application for court appointed counsel?

22 Mother : No, I haven't.

23 THE COURT: Okay. I'll furnish you one. I'll let
24 you fill that out and determine eligibility.

25 Mr. Hanna on behalf of Cheyenne River.

1 MR. HANNA: Thank you, Your Honor.

2 Judge, I'm informed that *Mother* is an enrolled
3 member of the Cheyenne River Sioux Tribe and her
4 children are either -- they're either enrolled or
5 eligible for enrollment, so I'm filing a motion to
6 intervene with a proposed order for the Court on behalf
7 of the Cheyenne River Sioux Tribe. I'm filing my own
8 notice of appearance and then I'm also asking the Court
9 to approve a transcript for this matter.

10 THE COURT: Okay.

11 MR. HANNA: I've served the State, Your Honor, with
12 these documents.

13 THE COURT: Okay. The order to intervene is
14 signed.

15 *Mother*, as soon as you complete the application
16 and see that it's returned to me and we'll determine
17 eligibility and proceed on that basis. In the meantime,
18 temporary custody remains with the State.

19 MS. ERICKSON: Your Honor, I would request that an
20 advisory hearing be held September 4th at 10:00. If the
21 issues are resolved, we'll take the matter off the
22 calendar.

23 THE COURT: All right.

24 MR. HANNA: Judge, may I be heard?

25 THE COURT: Yes.

1 MR. HANNA: On behalf of the Cheyenne River Sioux
2 Tribe I'd like to make an application, first of all,
3 that this matter be adjourned to allow the mother to
4 consult with counsel. She can consult with the Public
5 Defender's Office, which is in this building, so we
6 could actually adjourn this to later in this day. We
7 could have an attorney here for her in half an hour,
8 Your Honor.

9 THE COURT: You must have a better connection with
10 the Public Defender's Office than I do, Mr. Hanna,
11 because they don't respond to me that quickly.

12 MR. HANNA: In any case, I would ask the Court to
13 leave the matter in status quo and allow her to seek
14 counsel and then return to deal with the issues that are
15 to be dealt with in a 48 hour hearing. The Tribe is
16 asking, and I am informed by her that she is asking, for
17 immediate return of her children.

18 Judge, I know this is not an evidentiary hearing
19 but I think the Court should be aware of the basic
20 facts.

21 THE COURT: It's a 48 hour hearing, Mr. Hanna.
22 She's asked for counsel. You represent the Tribe. On a
23 technical basis, your interests could be adverse to hers
24 and I'm not going to set this up for any potential
25 conflicts. Don't read anything into that but it's just

1 how it sorts out. Once she's asked for counsel, as soon
2 as she does the application, I'll consider the
3 appointment. If you've got a bag of tricks and there's
4 counsel available this afternoon, I'm willing to revisit
5 the situation. Otherwise, we've got the hearing date
6 set --

7 MS. ERICKSON: Yes, sir.

8 THE COURT: -- and the attorney that is appointed
9 will be able to contact you and/or the State and move
10 the matter forward.

11 MR. HANNA: Judge, may I advise the Court as to the
12 basic facts of taking children. I'm doing this on the
13 Tribe's behalf.

14 THE COURT: It's a 48 hour hearing, Mr. Hanna, and
15 I'm not going to go into why the children were removed.
16 That's not my concern at this point. My concern is that
17 notice is given to everyone and the matter sorts itself
18 out. So even hearing the facts doesn't give me the
19 comfort level I need to return the children today and
20 it's not going to happen.

21 MR. HANNA: All right, Your Honor. The Tribe is
22 asking the Court to appoint counsel for the children at
23 this time.

24 THE COURT: All right.

25 MR. HANNA: And -- are you granting that, Judge?

1 THE COURT: Yes. We'll see the application and
2 we'll see where we go.

3 MR. HANNA: Well, actually, that's a requirement of
4 the statute, I believe, Judge, that you appoint
5 counsel --

6 THE COURT: It is. I need to sort things together.
7 I need to see if the Public Defender's Office has a
8 conflict, whether I go to Dakota Plains, whether I go to
9 outside counsel. I'm not going to appoint somebody and
10 then have to reappoint until I get counsel for mom
11 established.

12 MR. HANNA: On behalf of the Tribe, we're moving to
13 have the Court set this down for a fact-finding hearing.

14 THE COURT: Motion denied. It's a 48 hour hearing.

15 MR. HANNA: In the reasonably near future, Your
16 Honor. Not necessarily today, but ICWA requires some
17 kind of a showing that there is grounds to put these
18 children in foster care.

19 Your Honor, you have entered an order granting --
20 the State has filed an application for -- has filed a
21 petition with the Court seeking custody of this woman's
22 children for 60 days.

23 THE COURT: Seeking temporary custody until the
24 matters are finally fully investigated and the facts
25 fleshed out. As you know, Mr. Hanna, if the situation

1 is remedied or not warranted, the Department of Social
2 Services has the authority to return the children at any
3 time. I don't have what I need here today at a 48 hour
4 hearing to make any of those decisions.

5 If you're done making your record, we've got other
6 cases I need to handle.

7 MR. HANNA: Actually, I'm not.

8 Judge, the Tribe is asking -- I am going to be
9 making a motion on behalf of the Tribe asking the Court
10 to invalidate this order today.

11 THE COURT: The motion is denied.

12 MR. HANNA: I would ask the Court to set down a
13 schedule to allow me to do that where --

14 THE COURT: The motion is denied. File your
15 motions, Mr. Hanna.

16 MR. HANNA: I'll do that, Judge.

17 I'm moving for a new hearing --

18 THE COURT: Motion is denied.

19 MR. HANNA: -- on the grounds that the Court has
20 not given this person adequate notice of her rights as
21 required by statute, state statute. An ICWA affidavit
22 has been filed alleging that this woman has abused or
23 neglected her children. The State has made application
24 for custody, which you have granted without hearing any
25 facts whatsoever, Your Honor.

1 THE COURT: It's a 48 hour hearing, Mr. Hanna.
2 Your ICWA and my ICWA are just worlds apart. I
3 understand ICWA. I follow it precisely to the best of
4 my ability. And we've just had a recent Supreme Court
5 case. This debate isn't going to happen here today.
6 File your written motions.

7 MR. HANNA: I will.

8 THE COURT: Okay. Are we done?

9 MR. HANNA: Yes.

10 No. This lady has parents here who have been
11 approved by DSS for a placement and we're asking that
12 the children be placed in their custody immediately.
13 They are and , the
14 grandfather and grandmother of the children.

15 There's been no showing -- these kids are in foster
16 care now. There's been no showing why ICWA placement
17 preferences have not been followed in this case, Your
18 Honor, so we're asking the Court to order DSS to take
19 active efforts to present the -- provide the
20 grandparents with custody while this case is pending and
21 if that is not satisfactory, to adjourn this case for
22 about seven days and have the State come here and advise
23 the Court why they have not followed the ICWA
24 preferences if the children are still in a foster care
25 home.

1 THE COURT: I don't know that the ICWA preferences
2 have not yet been followed. I have no objection to your
3 client's -- I'm sorry, I forget she's not your client.
4 You represent the Tribe -- to Mother's parents being
5 considered as a placement and I am not going to order
6 but I'm going to ask that DSS investigate that as I'm
7 sure you'll provide the names so that the proper
8 investigation can be made.

9 Are you done?

10 MR. HANNA: Just a minute.

11 If we -- if Mother qualifies for counsel and
12 that counsel requests to be heard on these matters, will
13 the Court grant an application for the Tribe, which I'm
14 making now, as well as for her, to be back in court a
15 week from now or within the reasonably near future to
16 deal with these matters, including whether there's any
17 factual basis at all for taking these children.

18 THE COURT: This is a 48 hour hearing. You're
19 asking for extraordinary relief that isn't within ICWA
20 or state statutes so I'm not going to make that
21 determination here today.

22 MR. HANNA: I don't believe I have anything else.
23 Thank you, Your Honor.

24 THE COURT: Thank you, Counsel.

25 (Proceedings concluded.)

1 STATE OF SOUTH DAKOTA)
 2) SS. CERTIFICATE
 3 COUNTY OF PENNINGTON)
 4

5 I, Cynthia M. Weichmann, Registered Professional
 6 Reporter and Notary Public, State of South Dakota, do hereby
 7 certify that I reported in stenotype the proceedings of the
 8 above-entitled action; that I thereafter transcribed said
 9 stenotype notes into typewriting; and that the foregoing pages
 10 1 - 12, inclusive, are a true, full and correct transcript of
 11 my stenotype notes.

12 IN TESTIMONY WHEREOF, I hereto set my hand and official
 13 seal this 20th day of July, 2012.

14
 15
 16 Cynthia M. Weichmann
 17 Cynthia M. Weichmann, RPR
 18 Registered Professional Reporter
 19 Notary Public
 20 My Commission Expires: 11-10-15
 21
 22
 23
 24
 25

CYNTHIA M. WEICHMANN, RPR

South Dakota Judicial Circuit Court
PO Box 230
Rapid City SD 57709-0230
(605) 394-2571

CIRCUIT JUDGES

Jeff W. Davis, Presiding Judge
Wally Eklund
Janine M. Kern
Robert A. Mandel
Craig A. Pfeifle
Mary P. Thorstenson
Thomas L. Trimble

MAGISTRATE JUDGES

Scott M. Bogue
Heidi Linggren
Shawn J. Pahlke

COURT ADMINISTRATOR

Kristi K. Wammen

STAFF ATTORNEY

Marya Tellinghuisen

July 3, 2012

Mr. Dana L. Hanna
Hanna Law Office, P.C.
P.O. Box 3080
Rapid City, SD 57709

Ms. Roxie Erickson
Deputy State's Attorney
300 Kansas City Street
Rapid City, SD 57701

Ms. Becky Vogt
Costello Porter Law Firm
P.O. Box 290
Rapid City, SD 57709

Mr. Dan Leon
Dakota Plains Legal Services
P.O. Box 1500
Rapid City, SD 57709

Re: File No. A12-245; Oglala Sioux Tribe's Motion to Invalidate Prior Court Actions and Foster Care Placement; and Tribe's Motion for New Temporary Custody Hearing

Dear Counsel:

There are two motions pending in the above-named file. Those motions are: (1) the Oglala Sioux Tribe's (the "Tribe's") Motion to Invalidate the Prior Proceedings for the State's purported violation of the Indian mother's rights to due process, under state and federal constitutional law and the Indian Child Welfare Act ("ICWA"); and (2) the Tribe's Motion for a New Temporary Custody Hearing. As an initial matter, the Court would note that the Tribe's Motion is Moot as a result of the Court's return of physical custody to the mother, and that the Tribe's Motion, if granted, would only prolong the separation of the family unit. Nevertheless, the Court issues this opinion as a means of clarifying some recurring questions of law that are prevalent in this case.



LEGAL ANALYSIS:

Firstly, there is no question that both parents and children have fundamental right to maintain the integrity of the familial unit.

Parents have a liberty interest "in the care, custody, and management of their children." Parents and children have a constitutionally protected liberty interest in the care and companionship of each other. However, "the liberty interest in familial relations is limited by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves."

K.D. v. County of Crow Wing, 434 F.3d 1051, 1055 (8th Cir. 2006).

The state as *parens patriae* takes a necessarily strong interest in the care and treatment of every child within its borders . . . The necessity of this right is readily apparent. [The Court] cannot allow the health, safety or life of a young child to be placed back into an environment conclusively proved . . . to be wholly unfit and improper.

In re K. D. E., 87 S.D. 501, 506, 210 N.W.2d 907, 910 (1973). Therefore, in child custody cases, there is an essential balancing between the competing interests of the parents and the State, and the Court must weigh these interests while maintaining a vigilant eye towards the best interests of the children.

I. Tribe's Motions under ICWA.

In this case, the Tribe has brought its motions pursuant to 25 U.S.C. § 1914 of ICWA and SDCL § 26-7A-30. The Tribe's motion based on § 1914 will be addressed first.

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C.A. § 1914. Here, the Tribe has intervened in the proceedings and consequently, has standing to petition the Court under § 1914. Therefore, the only inquiry under this subchapter is whether §§ 1911, 1912, or 1913 were violated by any action of the State.

a. 25 U.S.C. § 1911:

The Tribe does not, and cannot, assert that there was violation of § 1911. Therefore, this section of the ICWA is not implicated and has no bearing on this case.

b. 25 U.S.C. § 1912:

The Tribe's Motions primarily focus on purported violations of § 1912(c), and is centered on the alleged lack of notice that it claims it is entitled to under this section. However, the Tribe fails to recognize the important distinction between a child custody proceeding under §§ 1914 and 1911, thereby triggering § 1912, and an emergency custody proceeding, which is covered by § 1922 of ICWA. As previously discussed, ICWA accounts for the compelling interests of the State in protecting a child from an apparent and immediate danger, and allows the child protection statutes of the state in which the apparent abused and neglected child is located, to govern the process for emergency removal and placement. 25 U.S.C. § 1922.

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Id. (emphasis added). § 1922 permits state courts to apply state law in emergency custody hearings and ICWA does not require the full gambit of its protections to apply at this stage of the proceedings. *In re S.B.*, 130 Cal. App. 4th 1148 (Cal. App. 2005); *In re Esther V.*, 248 P.3d 863 (N.M. 2011). Moreover, all that is required under South Dakota state statute is that, where possible, the parents are provided notice of the temporary custody, or 48-hour, hearing. SDCL § 26-7A-15. That requirement was clearly accomplished in this case, as is evidenced by the mother's appearance at the 48-hour hearing.

Furthermore, the Tribe makes frequent reference to "ex parte documents" in which the State set forth its basis for its petition to temporarily remove the children and place them in foster care. Tribe's Motion to Invalidate, ¶¶ 7, 8. The Tribe argues that procedures employed by the State in filing these "ex parte documents" and not allowing the mother at "any time prior to or during the hearing" were done in violation of § 1912(c) of ICWA. The Tribe's argument on this point is unavailing because 48-hour hearings are conducted under state statute, which was complied with in this case, and ICWA, including its notice requirements, is not implicated at the 48-hour hearing. *In re S.B.*, 130 Cal. App. 4th 1148 (Cal. App. 2005); *In re Esther V.*, 248 P.3d 863 (N.M. 2011). Emergency custody hearings are ill-suited for making § 1912(d) and (e) findings because emergency custody hearings serve as an expedited process which enables the State to remove a child from an apparently dangerous environment, in order to ensure the safety and wellbeing of the child. *See Yount v. Millington*, 869 P.2d 283, 289 (N.M. Ct. App. 1993). As such, there was no violation of ICWA at the 48-hour hearing.

In addition to the fact that there was no violation of federal law by the State's request for temporary custody, there was also no violation of state law. The children in this case were

taken into State custody, under SDCL § 26-7A-13, which specifically contemplates the procedures employed by the state in this case.

The court may order temporary custody of any child within the jurisdiction of the court during any noticed hearing. *Without noticed hearing*, the court or an intake officer may *immediately* issue a written temporary custody directive in the following instances on receipt of an affidavit or, in the absence of a written affidavit when circumstances make it reasonable, on receipt of sworn oral testimony communicated by telephone or other appropriate means:

(1) On application by a state's attorney, social worker of Department of Social Services, or law enforcement officer respecting an apparent, alleged, or adjudicated abused or neglected child stating good cause to believe as follows:

(a) The child is abandoned or is seriously endangered by the child's environment; or

(b) There exists an imminent danger to the child's life or safety and immediate removal of the child from the child's parents, guardian, or custodian appears to be necessary for the protection of the child . . .

SDCL § 26-7A-13(1) (emphasis added). The statute plainly contemplates the very procedure that took place in this case, and there was nothing improper about it. Under state statute, the State is not required to advise the Indian parent of the details which necessitated the emergency custody, nor does it have an "affirmative duty" to advise the parent that it has "filed various documents" with the Court to secure emergency custody of an Indian child. Taking custody of an infant who has suffered severe physical abuse at the hands of a parent, is precisely the type "emergency custody proceeding" that was exempted under § 1922 from the rigorous procedural safeguards provided in ICWA. Simply stated, § 1912 was not violated in this case because § 1912 does not apply at this stage of the proceedings. *See e.g. In the Matter of Esther V.*, 248 P.3d 863 (N.M. 2011). >

c. 25 U.S.C. § 1913:

This was not a voluntary proceeding, under 25 U.S.C. § 1913, nor did it, at any point, become a voluntary proceeding by act of law or fact. Therefore, § 1913 has not been violated and cannot serve as a basis to invalid the prior proceedings, under § 1914. Because neither § 1911, nor § 1912, nor § 1913, were violated in this case, the Tribe's petition is denied.

II. Tribe's Motion Under Additional SD State Law.

a. SDCL § 26-8A-18:

The Tribe further argues that its motion should be granted under SDCL § 26-7A-30, because the emergency hearing was conducted in violation of state law. Specifically, the Tribe asserts that court violated SDCL § 26-8A-18, by failing to suspend the emergency custody hearing in order to appoint counsel, allow the newly appointed counsel to get caught up to speed, and then resume the hearing at some later date.¹ The Tribe correctly argues that SDCL § 26-8A-18 requires that "the court shall appoint an attorney for any child *alleged* to be abused or

¹ Although this does not affect the Court's legal interpretation, the Tribe appears to completely ignore the fact that this would prolong the removal process even more, and prolong the separation of the children from their parents.

neglected in any judicial proceeding.” SDCL § 26-8A-18. However, the Tribe apparently fails to realize that, at the time of the temporary custody proceeding, the subject child is not an *alleged* abused and neglected child; he or she is only an *apparent* abused and neglected child.

An *apparent* abused or neglected child taken into temporary custody and not released to the child's parents, guardian, or custodian may be placed in the temporary care of the Department of Social Services, foster care, or a shelter as designated by the court to be the least restrictive alternative for the child.

SDCL § 26-7A-14 (emphasis added). This is an important distinction, and one that the legislature apparently deemed prudent to make. As a functional matter, it would be judicially impracticable for the Court to require the appointment of counsel before the parties involved have even been brought before it. Therefore, the Court find that SDCL § 26-8A-18 has not been violated because the child is not *alleged* abused and neglected until the petition is filed.

b. SDCL §§ 26-7A-14; 26-7A-19:

The Tribe also argues that nothing under state law allows the Court to proceed “informally.” This is inaccurate. SDCL § 26-7A-14 provides in pertinent part:

The court may *at any time* order the release of a child from temporary custody without holding a hearing, *either with or without* restriction or condition or upon written promise of the child's parents, guardian, or custodian regarding the care and protection of an apparent abused or neglected child or regarding custody and appearance in court of an apparent child in need of supervision or an apparent delinquent child at a time, date, and place to be determined by the court.

SDCL § 26-7A-14 (emphasis added). Moreover, SDCL § 26-7A-19(2) allows the Court to continue the temporary custody, under the terms and conditions that it requires. Therefore, if the Court deems continued placement no longer necessary, then the order becomes self-executing and the child is returned to his or her parents. Importantly, proceeding in this fashion avoids the additional burden on the parent of having a petition for abuse and neglect filed against them, and it allows return of the child as soon as the dangerous condition is removed. In any case, however, the Court does indeed have authority to proceed “informally” in abuse and neglect cases.

Furthermore, a parent's election to proceed informally does not constitute a waiver of any rights, statutory or constitutional; nor does it transform it from an involuntary proceeding in to a voluntary proceeding by virtue of the parent's decision. As the Court explained at the 48-hour hearing, the parent, whether Indian or non-Indian, has the right to demand the State file a formal petition, and the parents' full gambit of rights remain intact. The Tribe's attorney's characterization of the Court's efforts to determine whether the mother wished to proceed formally or informally as “coercive” is inappropriate and more importantly, inaccurate.

III. Additional Points of Clarification.

The Court would also note some additional points of clarification for the edification of the parties. First, the Tribe does not have a fundamental right to fairness under ICWA, even

though the parents and children involved do. ICWA serves as a procedural prophylactic which permits, or compels, a state court to transfer a child custody proceeding to tribal court so that the tribe may exercise its inherent sovereignty over its tribal members. The Tribe, at its option, could invoke that jurisdiction and have the case transferred into tribal court. However, it has elected not to do so. Consequently, state law prevails in the 48-hour hearing, and Indian parents who appear before the Court are subject to those rules at this stage.

Additionally, the Tribe has placed great significance on the Eighth Circuit's holding in *Whisman v. Rinehart*, 119 F.3d, 1303 (8th Cir. 1997). However, the Tribe's reliance on *Whisman* is misplaced. In *Whisman*, the Court held that a post-deprivation hearing held seventeen days after the removal of the child was a violation of the family's due process rights. *Id.* at 1311. *Whisman* is inapposite to this case because the procedure at issue in this case was the post-deprivation, or 48-hour, hearing. This hearing was held promptly after the removal of the children, and done in compliance with state statute, which was not the case in *Whisman*. Accordingly, any effort to construe the *Whisman* holding as persuasive authority for 48-hour proceedings is unmerited.

Instead, *Whisman*'s application should be reserved for those cases in which the post-deprivation hearing is unreasonably delayed beyond what is required by state statute. This is obviously not the situation at hand.

CONCLUSION

In accordance with the foregoing analysis and the Court's oral findings, the Tribe's Motion to Invalidate the Prior Proceedings and Motion for New Temporary Custody Hearing are hereby DENIED.

FOR THE COURT,



Hon. Mary P. Thorstenson
Circuit Court Judge
Seventh Judicial Circuit

STATE OF SOUTH DAKOTA)
) SS.
 COUNTY OF PENNINGTON)
 The People of the State of)
 South Dakota in the Interest of,)
)
 [Redacted])
 Child(ren), and concerning)
)
 [Redacted])
 Respondent(s).)

IN CIRCUIT COURT
 SEVENTH JUDICIAL CIRCUIT
 JUVENILE DIVISION

COURT FILE NO: A12 [Redacted]

TEMPORARY CUSTODY ORDER
 48 HOUR HEARING
 ALLEGED: Abused & Neglected

The above-entitled matter having come on for Temporary Custody on the 8TH day of March, 2012; the Honorable Mary P. Thorstenson, presiding; the State of South Dakota being represented by its Deputy State's Attorney, Roxie Erickson/Richard J. Rylance II; the South Dakota Department of Social Services being represented by its designated agent(s), Janice Rylance; the Respondent mother (not) appearing in person; the Respondent father (not) appearing in person; the minor child(ren) not appearing in person.

Allegation(s): Injurious environment.

The Court finds that it is in the best interests of the child(ren) that the child(ren) be held in temporary custody and that it is contrary to the welfare of the child(ren) to remain in the home of [Redacted] that reasonable efforts have been made to prevent the removal of the child(ren) from the home, and that reasonable efforts will be made to reunite the family.

The Court further finds that there is probable cause that the child(ren) is/are abused or neglected.

ABUSED OR NEGLECTED CHILD:

The Court further finds the following:

- Temporary custody of the child(ren) shall continue.
- The Indian Child Welfare Act is applicable to this matter.
- That active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proven unsuccessful.



That continued custody of the child(ren) by the parents or Indian custodian is likely to result in serious emotional or physical damage to the child(en).

That the Department of Social Services has provided reasonable efforts to prevent the removal of the children from the home.

The Court finds that temporary custody is the least restrictive alternative available commensurate with the best interest of the child(ren), and hereby ORDERS the following:

Release to Parent(s)
Other
Restrictions

Department of Social Services custody for 60 days, or until further order of the Court.
Foster Care
Shelter at

The Department of Social Services is hereby authorized to return full legal and physical custody of the minor child(ren) to the parent(s), guardian or custodian (without further court hearing) at any time during the custody period granted by this Court if, the Department of Social Services concludes that no further imminent child protection issues remain and that temporary custody of the child(ren) is no longer necessary.

The Department of Social Services is hereby authorized to release all information available pertaining to this matter to the Tribe(s) in which the children are enrolled or are eligible for enrollment.

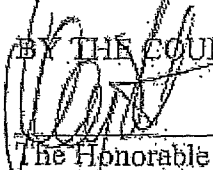
The Department of Social Services shall begin supervised visitation at their discretion between the minor child(ren) and parent(s), guardian(s), or custodian(s) while minor child(ren) are in the legal and physical custody of the Department of Social Services. This Order shall supersede any No Contact Order, Order of Protection, or any other Court order which would otherwise prohibit contact between the minor child(ren) and parent(s)/guardian(s)/or custodian(s).

The Court further ORDERS

ABUSED OR NEGLECTED CHILDREN MAY NOT BE DETAINED OR JAILED.

Dated this 8 day of March, 2012.

BY THE COURT:


The Honorable Mary P. Thorstenson
Judge of the Circuit Court

ATTEST:

Ranae Truman, Clerk of Courts

By: _____
(Deputy)

(SEAL)

Pennington County, SD
FILED
IN CIRCUIT COURT
MAR 09 2012

Ranae Truman, Clerk of Courts
By _____ Deputy