Seventh Judicial Circuit Court
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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.

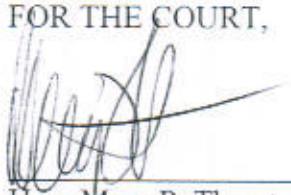
Additionally, the Tribe has placed great significance on the Eighth Circuit's holding in *Whisman v. Rinehart*, 119 F.3d. 1303 (8th Cir. 1997). However, the Tribe's reliance on *Whisman* is misplaced. In *Whisman*, the Court held that a post-deprivation hearing held seventeen days after the removal of 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