

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

JANE DOE; et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 15-CV-471-JED-FHM
)	
SCOTT PRUITT, in his official)	
capacity as as Oklahoma Attorney)	
General; et al.,)	
)	
Defendants.)	

MOTION TO DISMISS AND BRIEF IN SUPPORT OF DEFENDANT ED LAKE

MOTION TO DISMISS

Comes now the Defendant, Ed Lake, in his official capacity as the Director of the Oklahoma Department of Human Services, and through the undersigned attorneys respectfully moves the Court to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the Plaintiffs' "Amended Verified Complaint" (Doc. #22) fails to state a claim upon which any relief can be granted against this Defendant as a matter of law.

BRIEF IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

The Plaintiffs commenced this action for declaratory and injunctive relief under 42 U.S.C. §1983 and the Federal Declaratory Judgments Act, 28 U.S.C. §2201, on August 19, 2015, challenging the constitutionality of certain provisions of the Oklahoma Indian Child Welfare Act ("OICWA"), 10 O.S. §40 through §40.9. Specifically, the Plaintiffs assert 10 O.S. §40.3, §40.4, and §40.6 are "facially unconstitutional, and

unconstitutional as applied to Plaintiffs, under the Fourteenth Amendment to the United States Constitution.” See “Amended Verified Complaint” (Doc. #22) at ¶2.

Named as defendants in the Plaintiffs’ original Complaint (Doc. #2) in this case were Scott Pruitt (in his official capacity as the Attorney General of the State of Oklahoma) and Todd Hembree (in his official capacity as Attorney General of the Cherokee Nation). On October 6, 2015, the Plaintiffs’ filed their “Amended Verified Complaint” (Doc. #22) in which Ed Lake was first joined as an additional party defendant to this action in his official capacity as Director of the Oklahoma Department of Human Services. Defendant Lake now seeks dismissal of this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the Plaintiffs’ Amended Complaint fails to state a claim upon which any relief can be granted against him. (Similar motions to dismiss have been filed in this case by Defendants Pruitt and Hembree and are currently at issue before the Court. See Docs. #23 and #31.)

II. STATEMENT OF THE CASE

The Director of Human Services is the “executive and administrative officer” of the Oklahoma Department of Human Services (“DHS”) and is required by law to “formulate the policies and adopt rules and regulations for the effective administration” of DHS. 56 O.S. §§162(A) and (B). DHS (which was originally known as the “Department of Public Welfare” and later as the “Department of Institutions, Social and Rehabilitative Services”) of the State of Oklahoma was created in 1936 by §2 of Article 25 of the Oklahoma Constitution for the purpose of “administering and carrying into execution” all laws enacted by the Oklahoma Legislature pursuant to §1 of Article 25. See 56 O. S. §§162.1(a) and 162.1a. Section 2 also required DHS to “perform such other

duties as may from time to time be prescribed by law." See generally City of Sand Springs v. Department of Public Welfare, 1980 OK 36, 608 P.2d 1139.¹ DHS's "other duties prescribed by law" include various responsibilities in the administration of the Oklahoma Children's Code, 10A O.S. §1-1-101 through §1-9-122. Apropos for purposes of this case is 10A O.S. §1-7-103(A)(1) which statutorily mandates that:

"In addition to the other powers and duties prescribed by law, the Department of Human Services shall have the power and duty to:

1. "Provide for the care and treatment of children taken into protective or emergency custody pursuant to the provisions of the Oklahoma Children's Code, and placed in the Department's custody by an order of the court."

It is also of note that DHS is not a party ab initio to the very involuntary proceedings that place children in its custody.² Instead, the State of Oklahoma is represented in such involuntary proceedings by the District Attorney. See 10A O.S. §1-4-501. Regardless, DHS is unable to file any legal process seeking to terminate parental rights and is

¹ §3 of Article 25 created the Oklahoma Public Welfare Commission (which was more recently known as the Commission for Human Services) as the governing body for the Department of Public Welfare (now the Department of Human Services). See 56 O.S. §§162.1(a) and (b) and §162.1a. However, the Oklahoma Commission for Human Services was abolished in 2012 when §3 and §4 of Article 25 of the Oklahoma Constitution were repealed by the adoption of State Question No. 765, Legislative Referendum No. 362, at the election held November 6, 2012. The powers formerly vested in the Commission were then transferred to the Director of Human Services and the Governor of Oklahoma by 56 O.S. §162 effective November 7, 2012.

² DHS is afforded the right to intervene as a party in juvenile deprived cases arising under the Oklahoma Children's Code by 10A O.S. §1-7-703(E) which provides:

"The Department shall receive notice of all court proceedings regarding any child in its custody and shall, upon application, be allowed to intervene as a party for a specified purpose, to any court proceedings pertaining to the care and custody of the child."

If DHS was automatically a party to all litigation concerning children in its custody from the beginning, there would be no need for DHS to be permitted intervention as of right upon application as provided by §1-7-703(E).

likewise unable to initiate any proceedings for the adoption of a minor child in Oklahoma by statute.³

Turning to the Amended Complaint in the instant case, Plaintiffs John and Jane Doe (‘the Does’) allege they are the biological parents of “Baby Doe,” a child born out of wedlock in July, 2015. Doc. #22 at ¶7. Jane Doe is an enrolled member of the Cherokee Nation while John Doe is not an enrolled member of any Indian Tribe. *Id.*, at ¶3 and ¶4. Both of the Does indicate they are Oklahoma domiciliaries. *Id.* At some point, the Does made the decision to “proceed with a private direct placement adoption through an attorney” and they began planning the adoption at the end of March, 2015. *Id.*, at ¶32 and ¶35. The Does were matched with a prospective adoptive family in April of 2015, approximately one month before Jane Doe first learned she was an enrolled member of the Cherokee Nation in May 2015. *Id.*, at ¶35. Jane Doe’s enrollment in the Cherokee Nation led the adoptive family to withdraw from the adoption “because they did not want to experience the emotional turmoil of litigating an adoption case.” *Id.*, at ¶37. Consequently, the Does “had to search for another family to adopt a child.” *Id.*

³ 10A O.S. §1-4-901(A) provides that in proceedings for termination of parental rights:

“A petition or motion for termination of parental rights may be filed independently by either the district attorney or the attorney of a child alleged to be or adjudicated deprived.”

Also, the Oklahoma Adoption Code, 10 O.S. §7501-1.1, *et seq.*, specifies at 10 O.S. §7503-1.1 (“Eligibility to Adopt”):

The following persons are eligible to adopt a child:

1. A husband and wife jointly if both spouses are at least twenty-one (21) years of age;
2. Either the husband or wife if the other spouse is a parent or a relative of the child;
3. An unmarried person who is at least twenty-one (21) years of age; or
4. A married person at least twenty-one (21) years of age who is legally separated from the other spouse.

Sometime thereafter, the Does were matched with Plaintiffs Richard and Mary Roe (“the Roes”) as prospective adoptive parents and “made an open adoption plan with them.” Id., at ¶38. Richard Roe is an enrolled member of the Cherokee Nation while Mary Roe is not enrolled in any Indian tribe. Id., at ¶5 and ¶6. Both of the Roes are domiciled in Oklahoma. Id.

The Plaintiffs further allege that the Does “do not want the Cherokee Nation to interfere with the plans they have carefully made” and that the Does are “adamant that they do not want the Cherokee Nation put on notice regarding Baby Doe’s adoption” because:

This notice will result in word spreading in the tribal offices of their adoption plan in violation of their privacy rights and if the tribe seeks out alternate placements then others in the tribal community will learn of their adoption plan and John and Jane Doe feel that the decisions that they have made for their child are confidential and are not the proper subject of discussions among tribal members. This will result in embarrassment and immense pressure to deviate from what Jane and John Doe have determined to be the best decision for Baby Doe. This will also provide the tribes with the opportunity to intervene and interfere with Richard and Mary Roe's adoption of the baby which is what Jane and John Doe have determined to be the best decision for Baby Doe.

Id., at ¶40. As a result, the Plaintiffs assert that the “OICWA allows the Cherokee Nation to interfere with the voluntary adoption by Richard and Mary Roe when the notice and intervention provisions of the federal Indian Child Welfare Act would not be applicable to this voluntary adoption.” Id., at ¶44.

The Plaintiffs’ Amended Complaint sets out four causes of action or “Counts” against the Defendants under 42 U.S.C. §1983 based on the facts summarized above. “Count I” seeks a judgment declaring that 10 O.S. §40.3, §40.4, and §40.6 violate the Plaintiffs’ due process rights under the Fourteenth Amendment while “Count II”

seeks a declaratory judgment that those provisions violate the Plaintiffs' Fourteenth Amendment equal protection rights. Doc. #22 at ¶¶45-55 and ¶¶56-64. Similarly, "Count III" seeks a judgement declaring that §40.3, §40.4, and §40.6 "violate the limited jurisdiction conferred upon the State of Oklahoma by the [federal] Indian Child Welfare Act" and "Count IV" requests a permanent injunction enjoining the Defendants from enforcing §40.3, §40.4, and §40.6. Id., at ¶¶65-68 and ¶¶69-71.

As explained below, Defendant Lake submits this action should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because the Plaintiffs' Amended Complaint fails to state a claim upon which any relief can be granted against him as a matter of law.

III. ARGUMENT AND AUTHORITIES

A. Standard for motion to dismiss for failure to state a claim.

The current standard to be followed by a district court when considering a motion to dismiss under Rule 12(b)(6) was summarized by the United States Court of Appeals for the Tenth Circuit in Robbins v. State of Oklahoma, ex rel. Dept. of Human Services, 519 F.3d 1242 (10th Cir. 2008), as follows:

[T]o withstand a motion to dismiss, a complaint must contain enough allegations of fact "to state a claim to relief that is plausible on its face." [Bell Atlantic Corp. v. Twombly] --- U.S. ---, ---, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). Under this revised standard, as we explained in Ridge at Red Hawk, L.L.C. v. Schneider:

the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.

493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original). The burden

is on the plaintiff to frame a “complaint with enough factual matter (taken as true) to suggest” that he or she is entitled to relief. Twombly, 127 S.Ct. at 1965. “Factual allegations must be enough to raise a right to relief above the speculative level.” Id.

519 F.3d at 1247 (emphasis in original).

When this standard is applied to the Amended Complaint in the instant case, it is clear this action should be dismissed in its entirety as to Defendant Lake pursuant to Rule 12(b)(6) because the Plaintiffs cannot recover against him as a matter of law on any of their causes of action asserted in this case.

B. The Plaintiffs have failed to state a viable claim against Defendant Lake.

Even accepting all of the Plaintiffs’ allegations as true, there is no plausible claim upon which the Plaintiffs can obtain relief against Defendant Lake. Nowhere in their Amended Complaint do the Plaintiffs allege how Defendant Lake has acted or is threatening to act in a manner to deprive them of due process or is enforcing any law in derogation of their due process and equal protection rights in the adoption proceeding for Baby Doe at issue herein which the Plaintiffs acknowledge to be a wholly voluntary private adoption proceeding. See Doc. #22 at ¶28, ¶32, ¶34, and ¶44. In fact, the only specific allegation directly against Director Lake is that he is authorized by 10 O.S. §40.7 “to enter into agreements with Indian tribes in Oklahoma regarding care and custody of Indian children as authorized by ICWA.” Doc. #22 at ¶10. The Plaintiffs fail to describe or delineate how Defendant Lake’s power and ability to enter into agreements with tribes concerning children in the custody of DHS in involuntary placement proceedings has any bearing whatsoever on their causes of action in this case arising from the voluntary private adoption of Baby Doe.

Furthermore, the Plaintiffs make no allegations in their Amended Complaint that Director Lake has any authority to enforce (or that he has taken any action pursuant to) the specific provisions of the OICWA they challenge in this case. With regard to 10 O.S. §40.6, it is undisputed that Baby Doe is not a child in the custody of DHS and consequently there is no set of facts that can be advanced in this litigation to show DHS is making a “placement” of that child in enforcement of §40.6.⁴ Instead, as the Plaintiffs tell us in their Amended Complaint, it is the Does and/or their adoption attorney making the preadoptive/adoptive placement of Baby Doe. Accordingly, there is no plausible way that Defendant Lake has violated the civil rights of the Plaintiffs with regard to the underlying voluntary private adoption proceeding at issue in this case. Likewise, it is impossible to enjoin Director Lake from enforcing a statute against the Plaintiffs in their private adoption action in which neither Defendant Lake nor DHS is involved as a party or otherwise.

Turning to 10 O.S. §40.3 and §40.4, just as Defendant Lake is without the authority or ability to enforce the provisions of §40.6 in the underlying private adoption

⁴ 10 O.S. §40.6 reads in its entirety as follow:

The placement preferences specified in 25 U.S.C. § 1915, shall apply to all preadjudicatory placements, as well as preadoptive, adoptive and foster care placements. In all placements of an Indian child by the Oklahoma Department of Human Services (DHS), or by any person or other placement agency, DHS, the person or placement agency shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act. This requirement shall include cases where a consenting parent evidences a desire for anonymity in the consent document executed pursuant to Section 60.5 of this title. If a request for anonymity is included in a parental consent document, the court shall give weight to such desire in applying the preferences only after notice is given to the child's tribe and the tribe is afforded twenty (20) days to intervene and request a hearing on available tribal placement resources which may protect parental confidentiality, provided that notice of such hearing shall be given to the consenting parent. (Emphasis added).

proceeding at issue in this case so too is he without the ability to enforce compliance with §40.3 and §40.4. Instead, it is the state court in the private adoption proceeding for Baby Doe that is tasked with ensuring compliance with the notice provisions those statutes. See 10 O.S. §40.3(C)(“The court shall seek a determination of the Indian status of the child in accordance with the preceding standard in the following circumstances:”)(emphasis added); 10 O.S. §40.4(E) (“In all Indian child custody proceedings of the [OICWA], including voluntary court proceedings and review hearings, the court shall ensure that the district attorney or other person initiating the proceeding shall send notice to the parents or to the Indian custodians, if any, and to the tribe that is or may be the tribe of the Indian child, and to the appropriate Bureau of Indian Affairs area office, by certified mail return receipt requested.”)(emphasis added). As a result, the Plaintiffs can put forth no set of facts in the instant case demonstrating that Defendant Lake has or imminently will enforce the challenged provisions because he is clearly without any power to do so. Therefore, it is simply impossible for Defendant Lake to have violated the Plaintiffs’ due process and equal protection rights as they allege in their Amended Complaint in this case.

IV. CONCLUSION

In summary, it is clear this case is subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure because the Plaintiffs’ “Amended Verified Complaint” wholly fails to state a plausible claim upon which any equitable or legal relief can be granted against Defendant Lake as a matter of law. Accordingly, Defendant Lake urges the Court to grant his Motion to Dismiss and to dismiss the Plaintiffs’ action against him in its entirety.

Respectfully submitted,

s/ RICHARD W. FREEMAN, JR.

Richard W. Freeman, Jr. (OBA #3130)

Assistant General Counsel

Department of Human Services

Legal Services

P. O. Box 25352

Oklahoma City, OK 73125-0352

Telephone: (405) 521-3638

Facsimile: (405) 521-6816

Email: Richard.Freeman@okdhs.org

Attorneys for Defendant Ed Lake.

Certificate of Service

☒ I hereby certify that on (date) December 21, 2015, I electronically transmitted the

attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on

file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants: (insert names)

Paul E. Swain (pswain@swainlaw.com)
Rebecca Ann Murphy (murphy.becki@gmail.com)

Attorneys for Plaintiffs.

Mithun S. Mansinghani
(mithun.mansinghani@oag.ok.gov)

Attorney for Defendant Scott Pruitt.

David E. Keglovits (dkeglovits@gablelaw.com)
Graydon D. Luthey, Jr. (dluthey@gablelaw.com)
Amelia A. Fogelman (afogleman@gablelaw.com)

and

Chrissi R. Nimmo (chrissi-nimmo@cherokee.org)

Attorneys for Defendant Todd Hembree.

☐ I hereby certify that on (date) _____, I served the attached document by

(service method) _____ on the

following, who are not registered participants of the ECF System: (insert names and addresses)

Richard W. Freeman, Jr.

s/ Attorney Name