

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Aarin Nygaard and Terrance Stanley,

Petitioners,

v

Tricia Taylor; Ted Taylor, Jr.; Jessica
Ducheneaux; Ed Ducheneaux; Cheyenne
River Sioux Tribal Court; Brenda Claymore,
in her official capacity as Chief Judge,
Cheyenne River Sioux Tribal Court of
Appeals; Frank Pommersheim, in his official
capacity as Chief Justice; the South Dakota
Department of Social Services; Todd Waldo
in his official capacity as Social Worker; and
Jenny Farlee in her official capacity as Social
Worker,

Respondents.

Civil No. 3:19-CV-03016-RAL

**PETITIONERS' RESPONSE TO RULE 12(B) MOTION TO DISMISS BY
RESPONDENTS SOUTH DAKOTA DEPARTMENT OF SOCIAL SERVICES, TODD
WALDO, AND JENNY FARLEE**

Petitioners Aarin Nygaard and Terrance Stanley (collectively, "Fathers"), by and through the undersigned counsel, respectfully submit this response to the Rule 12(b) Motion to Dismiss filed by Respondents South Dakota Department of Social Services, Todd Waldo, and Jenny Farlee on January 4, 2022 (Doc. 90) (hereinafter, "DSS Respondents' Motion to Dismiss"). Fathers respectfully request this Court to deny DSS Respondents' Motion to Dismiss because 1) the Petition for Writ of Habeas Corpus adequately states a claim against the South Dakota Department of Social Services, former DSS employee Todd Waldo, and former employee Jenny Farlee ("DSS Respondents"); and 2) this Court has subject matter jurisdiction over the parties and relief requested. In the alternative, Fathers respectfully request this Court to hold DSS Respondents'

Motion to Dismiss in abeyance until a decision on the merits of the Petition for Writ of Habeas Corpus.

FACTS

The facts surrounding this matter, mainly drawn from the Amended Petition for purposes of this Motion to Dismiss, are extensively set forth in this Court’s Opinion and Order Denying Motion to Dismiss, Doc. 69, as well as Fathers’ Brief in Support of their Motion for Summary Judgment, Doc. 79. As a brief summary of the facts relevant to this motion, Petitioner Aarin Nygaard is the father of C.S.N. (born xx/xx/2013) and Terrance Stanley is the father of T.R.S. (born xx/xx/2007). *See* Fathers’ Statement of Undisputed Material Facts (hereinafter “Fathers’ SUMF”),¹ Doc. 78, ¶ 1. Tricia Taylor, is the mother of both children. *See* Fathers’ SUMF, Doc. 78, ¶ 1. Tricia, Terrance, Aarin, and both children were all domiciled in Fargo, North Dakota for several years until August 2014, when Tricia took the children from North Dakota to the Cheyenne River Indian Reservation, which later resulted in a North Dakota state criminal conviction for parental kidnapping. Fathers’ SUMF, Doc. 78, ¶ 2. Both Fathers independently sought and received custody of their respective child through the Cass County District Court, North Dakota. *See* Fathers’ SUMF, Doc. 78, ¶¶ 16-19.

Tricia was subsequently arrested by the Federal Bureau of Investigation in November 2014, at which time the children were placed in the care of Tricia’s brother, Ted Taylor Jr. (Ted). Fathers’ SUMF, Doc. 78, ¶ 3. As indicated in this Court’s Opinion and Order, the FBI “enlisted the help of a criminal investigator of the Cheyenne River Sioux Tribe Law Enforcement Services and apparently had contacted the South Dakota Department of Social Services (DSS) to have social

¹ Fathers’ Statements of Undisputed Material Facts contain supporting citations to the record, including the Tribal Court records of which this Court has taken judicial notice.

workers present at the time of Tricia’s arrest for the children’s welfare.” *See* Opinion and Order Denying Motion to Dismiss, Doc. 69, at 7-8. According to the findings made by the Cheyenne River Tribal Court, DSS “placed [the children] with their maternal uncle, Ted Taylor, Jr.[.]” “issued a ‘Present Danger Plan’[.]” and “advised the uncle to file a petition for custody.” *See* Cheyenne River Tribal Court of Appeals’ Memorandum Opinion and Order (Feb. 25, 2019), Doc. 1-65, at 7. The Cheyenne River Tribal Court of Appeals also indicated that “the FBI transferred physical custody of the children to the [DSS,]” and acknowledged that such transfer was made because “[p]resumably (the record does not speak to this issue) there was an agreement between the Cheyenne River Sioux Tribe and the [DSS] permitting such transfer.” *Id.* at 6. The DSS Respondents’ Motion to Dismiss does not appear to refute those findings, other than indicating that the DSS Respondents allowed the children to “remain” with Ted rather than being “placed” with Ted. *Compare id.* at 6-7 with DSS Respondents’ Motion to Dismiss, Doc. 91, at 3.

In December 2014, Ted initiated an action in Cheyenne River Sioux Tribal Court, requesting temporary custody of the children, although the request was later changed to seek the children’s placement with Jessica Ducheneaux (Jessica), Tricia’s sister. Fathers’ SUMF, Doc. 78, ¶ 4. Without any notice of the Tribal Court proceeding to Aarin and Terrance, the Tribal Court granted two Temporary Custody Orders awarding custody of the children first to Ted, and then to Jessica, until further Order of the Tribal Court, and concluded that it had personal jurisdiction and subject matter jurisdiction. Fathers’ SUMF, Doc. 78, ¶ 5.

Legal proceedings surrounding the custody of the two children have been pursued since 2014 in various courts, including North Dakota state court, Cheyenne River Tribal Court, Cheyenne River Tribal Court of Appeals, United States District Court for the District of North Dakota, and currently this Court, the United States District Court for the District of South Dakota.

See Fathers' SUMF, Doc. 78, ¶ 12. Contrary to the North Dakota state court Orders granting Aarin and Terrance custody of their respective child, the children remain on the Reservation, albeit in the physical custody of Tricia's sister Jessica and not with Tricia. Fathers' SUMF, Doc. 78, ¶ 8.

ARGUMENT

Through their Motion to Dismiss, DSS Respondents contend that the Petition for Writ of Habeas Corpus fails to state a claim upon which relief may be granted against DSS Respondents, or in the alternative, that this Court lacks subject matter jurisdiction against DSS Respondents. See DSS Respondents' Memorandum in Support of Motions to Dismiss, Doc. 91. The Supreme Court of the United States has detailed its standard under Federal Rules of Civil Procedure Rule 12 for considering motions to dismiss for failure to state a claim:

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (C.A.7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, *see* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235–236 (3d ed.2004) (hereinafter *Wright & Miller*) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g., Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atlantic v. Twombly, 550 U.S. 544, 556 (2007). Ultimately, “[c]ourts must accept a plaintiff’s allegations as true and construe all inferences in the plaintiff’s favor but need not accept a plaintiff’s conclusions.” *Retro Television Network, Inc. v. Luken Commc’ns, LLC*, 696 F.3d 766, 768-69 (8th Cir. 2012).

As to a motion to dismiss for lack of subject matter jurisdiction, “[i]n order to properly dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments.” *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). The Eighth Circuit Court of Appeals has indicated that “all doubts on jurisdictional points must be resolved in favor of a plenary trial rather than dismissal at the pretrial stage[.]” *Miller v. Cent. Chinchilla Grp., Inc.*, 494 F.2d 414, 417 (8th Cir. 1974).

Here, Fathers have pleaded specific factual allegations and have provided grounds for their entitlement to relief as to the DSS Respondents. Further, this Court has already concluded that it has subject matter jurisdiction over this Petition. Therefore, DSS Respondents’ Motions to Dismiss must be denied.

As addressed by this Court’s Opinion and Order denying Tribal Court Respondents’ Motion to Dismiss for lack of subject matter jurisdiction, this Court has authority under 25 U.S.C. § 1303 to afford relief to Fathers. *See* Doc. 69, at 30-31; *see also DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989). Nothing within DSS Respondents’ Motion to Dismiss supports a conclusion to the contrary. Instead, it seems that DSS Respondents’ primary argument is that they are not an appropriate party to the litigation. *See generally* DSS Respondents’ Motion to Dismiss.

DSS Respondents’ own actions, as supported by the pleadings and the Tribal Court record, sufficiently establish that the DSS Respondents should not be dismissed from this matter at this

time. Indeed, upon Tricia's arrest, the DSS Respondents facilitated the change in physical custody of the children from Tricia to the children's maternal uncle, Ted Taylor. *See* Tribal Court of Appeals' Memorandum Opinion and Order (Feb. 25, 2019), Doc. 1-65, at 7. As indicated by the Tribal Court of Appeals, this involvement may have been acting pursuant to an agreement between the Tribe and the DSS, a fact which has not been disputed by DSS either in the underlying Tribal Court proceedings (it seems DSS did not appear) or in the current proceeding. *See id.* at 6-7. While DSS may not have taken *legal* custody of the children through a court proceeding, their participation as relating to the *physical* custody of the children is undisputed.

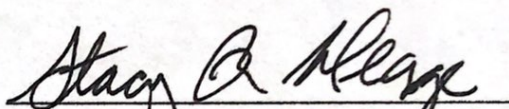
For this reason, if the Court were to grant Fathers' Petition for Writ of Habeas Corpus, DSS should facilitate a change in physical custody of the children to the Fathers, whether acting under the scope of the Tribe's authority pursuant to an agreement or otherwise. DSS Respondents' position that it has no responsibilities or obligations in this matter fails to pass muster under the standard for a Motion to Dismiss. Accordingly, Fathers respectfully request this Court to deny the DSS Respondents' Motion to Dismiss.

In the alternative, Fathers respectfully request this Court to hold DSS Respondents' Motion to Dismiss in abeyance until a decision on the merits of the Petition for Writ of Habeas Corpus. If this Court grants issuance of the writ, it may be necessary at that time to determine the obligations of DSS Respondents, through their agreement with the Tribe or otherwise, to facilitate production of the children.

[SIGNATURES ON FOLLOWING PAGE]

Dated this 25th day of January, 2022.

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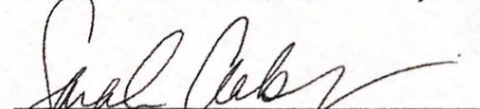
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