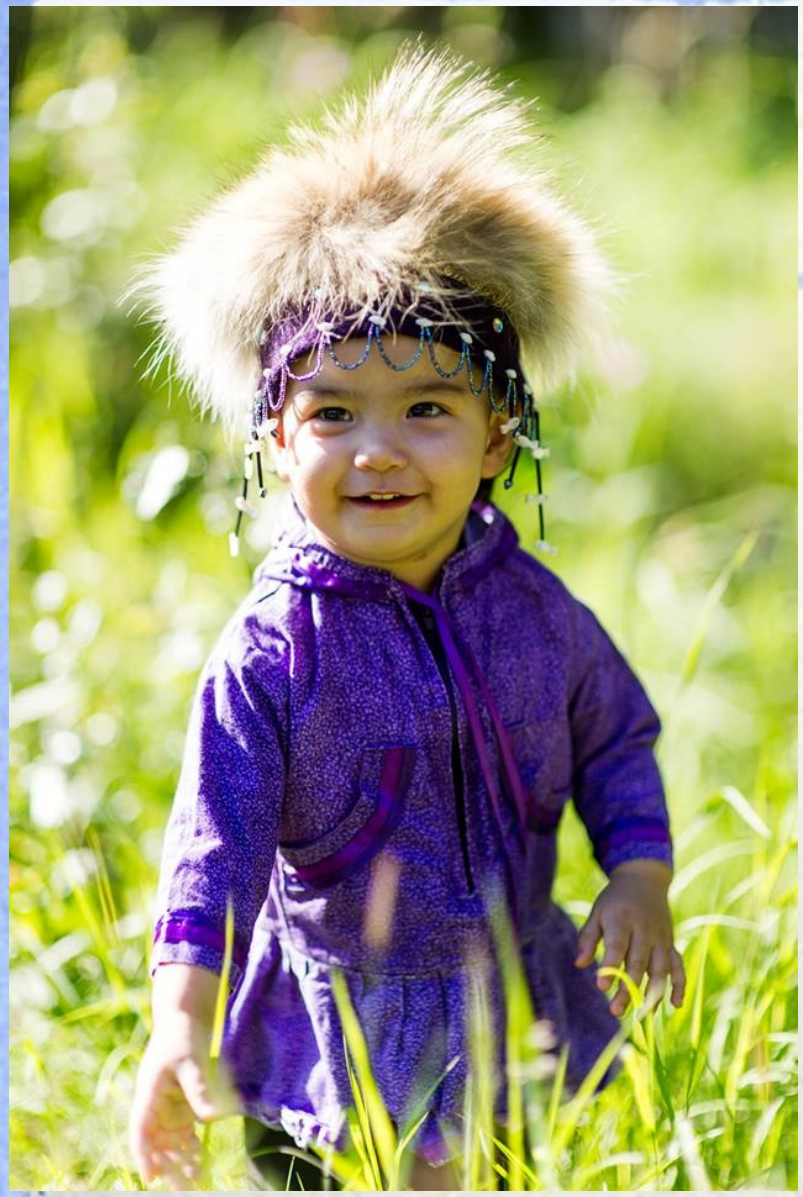

Photo of Ternice by Shanna Ann Schroeder

Oglala Sioux Tribe
v.
Van Hunnik

Stephen L. Pevar

August 7, 2015

Arizona Supreme Court
Administrative Office of the Courts
Court Improvement Program

ICWA: Historical Background

Beginning in the mid-1800s, public and private agencies, with the federal government's consent, routinely removed Indian children from their homes.

A congressional investigation in the 1970s revealed:

1. 25-35% of all Indian children in the US were being taken from their families by state welfare agencies.
2. In some states, Indian children were 7 to 8 times more likely to be removed than white children.
3. The vast majority of these Indian children were placed in non-Indian homes.

Historical Background (cont.)

4. State judges and social workers were often prejudiced against Indians and ignorant of tribal values and customs. Congress found that state officials "have often failed to recognize the . . . cultural and social standards prevailing in Indian communities and families." --25 U.S.C. § 1901

5. These removals were disastrous not only for many Indian children and their families but also for their tribes. Tribes were being robbed of their youth.

ICWA's Purpose

Congress passed ICWA to create "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." --25 U.S.C. § 1902

ICWA contains protections for both Indian families *and* Indian tribes. "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians."

--*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989)

South Dakota Facts

1. State's population: 814,000.
2. 8.9% of which is American Indian or Alaska Native.
3. However, of the children in foster care in 2010: 52.5% were American Indian or Alaska Native, only 30% were white.
4. Thus, an Indian child is 11 times more likely to be taken into foster care than a non-Indian child.

Four Stages of a Foster Care Case

1. Emergency removal of the child from the home, either by Social Services or by the police.
2. Initial (“48-hour”) hearing.
3. Trial.
4. Placement of the child outside the home.

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patriae* , to protect the rights of their tribal members; and ROCHELLE WALKING EAGLE, MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and KIM MALSAM-RYSDON, in their official capacities.

Defendants.

Civ. No. 13-5020

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

STATE OF SOUTH DAKOTA) SS. IN CIRCUIT COURT
COUNTY OF PENNINGTON) 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

COPY

EXHIBIT 1

*****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

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

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

Thank you.

(These proceedings concluded.)

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

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT
JUVENILE DIVISION

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

[redacted]

Respondent(s).

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.

EXHIBIT 2

✓ 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 necessary
ABUSED OR NEGLECTED CHILDREN MAY NOT BE DETAINED OR JAILED.

Dated this 20 day of October, 2011.

BY THE COURT:

The Honorable Wally Eklund
Judge of the Circuit Court

ATTEST:
Ranae Truman, Clerk of Courts
By: _____ (Deputy)
(SEAL)

Pennington County, SD
FILED
IN CIRCUIT COURT
OCT 20 2011
Ranae Truman, Clerk of Co
By _____ Dep

- ✓ “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 custodians is likely to result in serious emotional or physical damage to the child(ren).”
- ✓ “That the Department of Social Services has provided reasonable efforts to prevent the removal of the children from the home.”

Seven Precedent-Setting Rulings From the Motions to Dismiss

1. Do the two tribes have standing to sue *parens patriae* (that is, on behalf of their members)?

   "The court finds this action is inextricably bound up with the Tribes' ability to maintain their integrity and 'promote the stability and security of the Indian tribes and families.' 25 U.S.C. § 1902. The motions to dismiss for lack of standing are denied."

MTD Rulings (cont.)

2. Do the three parents have a right to sue on behalf of a class of all Indian parents in the county?

   The court granted our motion for class certification, agreeing that "each member of the class would be entitled to the same injunctive or declaratory relief," therefore making it appropriate to certify this case as a class action.

MTD Rulings (cont.)

3. Is Sec. 1922 of ICWA, as the Defendants claimed, "a statute of deferment" (thus delaying ICWA's procedural protections until later in the process) or, as we claimed, does Sec. 1922 require state officials to provide certain protections to the family *during* the 48-hour hearing.

Sec. 1922 provides that whenever state officials remove an Indian child from the home on an emergency basis, those officials "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.*"

MTD Rulings (cont.)

The Court ruled in our favor and held that Sec. 1922:

(a) Requires the state court to determine at the 48-hour hearing that there is a *continuing* need to remove the child from the home.

(b) Requires the state court to order Social Services to immediately return the child to the home as soon as the emergency has ended.

MTD Rulings (cont.)

4. Are Indian parents entitled to receive meaningful *notice* at the initial hearing?

The Court held that Indian parents have a right to notice of the charges against them: "Keeping Indian parents in the dark as to the allegations against them while removing a child from the home for 60 to 90 days certainly raises a due process issue."

MTD Rulings (cont.)

5. Does it violate the rights of Indian parents to be forced to wait 60 days for a meaningful *hearing*?

We alleged that the state court usually waited 60 and often 90 days after the 48-hour hearing before holding a full hearing. The Federal Court held that if we prove this is really occurring, it would show a violation of the Due Process Clause.

MTD Rulings (cont.)

6. Does it violate the rights of Indian parents to be coerced into waiving their federal rights?

We alleged that Indian parents were being coerced into waiving their right to a prompt hearing when state judges implied that their children would be returned sooner if the parents, rather than request a hearing, instead "worked" with Social Services. The Federal Court held that: "A failure to provide parents with the advisement of their fundamental rights or coercing a parent into waiving those rights would certainly amount to a constitutional violation."

MTD Rulings (cont.)

7. Must the state produce records of their hearings that are privileged under state law?

"Individual and state privacy interests must yield to the federal interest in discovering whether public officials and public institutions are violating federal civil rights." The Court ordered state officials to produce the transcripts (as we requested) of every third 48-hour hearing held since Jan. 1, 2010.

Our Motions for Summary Judgment: Facts

1. Approx. 100 48-hour hearings involving Indian children are held each year in the 7th Cir. Court.
2. The State won 100% of the time (not counting the cases immediately transferred to tribal court).
3. Between 2010 and 2013, 823 Indian children were removed from their homes, two-thirds of them for more than 15 days.
4. The 48-hour hearings “usually last less than five minutes,” and some less than 60 seconds.

Facts (cont.)

5. In 77 of the 78 transcripts: no reference to the ICWA affidavit or to ICWA at all.
6. Judge Davis “never advised any Indian parent”
    a. of a right to contest the petition.
    b. of a right to call witnesses.
    c. of a right to testify.
    d. of a right to counsel for the hearing.
7. Judge Davis “never required the State” to present evidence in the hearing.
8. Judge Davis always used a “checklist” order.

Our Motions for Summary Judgment: Section 1922 of ICWA

We asked the Court to rule that the State was violating Section 1922 of ICWA in two respects:

1. Judge Davis failed to determine at the 48-hour hearing that continued custody is necessary “to prevent imminent physical damage or harm to the child.”
2. Judge Davis failed to order DSS to immediately return the child to the home as soon as the emergency had ended.

Section 1922 of ICWA (cont.)

The Court began by citing three ICWA findings:

1. “There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”
2. “An alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children by [state] agencies.”
3. “[State officials] have often failed to recognize the essential tribal relations of Indian people and [their] cultural and social standards.”

Section 1922 of ICWA (cont.)

The Court held that Judge Davis violated ICWA by failing to use the Sec. 1922 standard in his 48-hour hearings:

"Judge Davis does not conduct any inquiry during the 48-hour hearing to determine whether emergency removal remains necessary." In fact, "there is no mention of ICWA" during his hearings at all, and he does not allow any evidence to be introduced on the subject.

"Indian children, parents and tribes deserve better."

Section 1922 of ICWA (cont.)

The Court also held that Judge Davis violated ICWA by failing to *order* DSS to return the children as soon as the emergency had ended. His orders only *authorized* DSS to return the children when the emergency was over.

"This authorization vests full discretion in DSS to make the decision if and when an Indian child may be reunited with the parents. This abdication of judicial authority is contrary to the protections guaranteed Indian parents, children and tribes under ICWA."

Our Motions for Summary Judgment: 5 Due Process Claims

The “Due Process Clause” of the Fourteenth Amendment guarantees that we will not be deprived of life, liberty, or property without due process of law.

This Clause “protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children.” Children cannot be removed from the home unless the parents receive due process.

Troxel v. Granville, 530 U.S. 57, 66 (2000).

Our Motions for Summary Judgment: 5 Due Process Claims

1. **The Right to Notice**

The Court held that parents are entitled to adequate notice of the charges against them.

The Court found that the Defendants had no procedure "ensuring that Indian parents or custodians are given copies of the petition for temporary custody and the ICWA affidavit at 48-hour hearings." Parents were kept in the dark as to the allegations against them. This violated the Due Process Clause.

5 Due Process Claims (cont.)

2. <u>The Right to Contest the Charges Against Them</u>

The Court held that parents have a right to contest the charges against them, and present evidence in their defense.

The Court found that Judge Davis violated the Due Process Clause in this regard: “Judge Davis does not permit Indian parents to present evidence opposing the State’s petition for temporary custody.” Parents are not permitted to testify in their own behalf or call witnesses.

5 Due Process Claims (cont.)

3. <u>The Right to Confront and Cross-Examine</u>

Another fundamental aspect of Due Process is the right to confront and cross-examine adverse witnesses.

Indian parents were denied this right. "Judge Davis prevents Indian parents from cross-examining any of the State's witnesses."

In fact, "Judge Davis does not require the States Attorney or DSS to call witnesses to support removal of Indian children."

5 Due Process Claims (cont.)

4. <u>The Right to Counsel in the 48-Hour Hearing</u>

Judge Davis claimed that counsel wasn't necessary at the 48-hour hearing because counsel could be appointed after the hearing, and a new hearing could be scheduled later.

"The practice defies logic because the damage is already done – Indian parents have been deprived of counsel" when they needed one to prevent the taking of their children. The failure to appoint counsel for the hearing violated both ICWA and the Due Process Clause.

5 Due Process Claims (cont.)

5. <u>The Right to A Decision Based on Evidence Presented in the Hearing</u>

The Due Process Clause guarantees that a judge decision must be based on evidence presented at the hearing. It can't be based on secret evidence.

The Court found that all of the judges used the same order, "which functioned as a checklist." These orders listed findings "that had never been described on the record or explained to the Indian parents." The reliance on "undisclosed documents" violates the Due Process Clause.

The Court's Conclusion

"The Court finds that [the four defendants] developed and implemented policies and practices for the removal of Indian children from their parents' custody in violation of the mandates of the Indian Child Welfare Act and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. . . . Plaintiffs' motions for partial summary judgment are granted."

The Court asked each side to submit a proposed Remedial Order.

Dept. of Justice Amicus Brief

The US Department of Justice on August 14, 2014, filed a “friend of the court” (amicus) brief agreeing with and supporting *every* position contained in the Tribes’ two motions for summary judgment except for the right to counsel, which DOJ doesn’t discuss.

Dept. of Justice Amicus Brief

"The 48-hour hearing cannot be treated as an informal or insignificant proceeding, because it results in judicial findings that can lead to removal of a child from her parents for several months." Accordingly, parents have a right to "notice of the allegations and a meaningful opportunity to be heard regarding the basis for the emergency removal and the continued need for state custody of their children."

The Rights of Indians and Tribes

By Stephen L. Pevar (Oxford Univ. Press 2012)

www.therightsofindiansandtribes.com

$25.00 (free shipping)