



Photo of Ternice by Shanna Ann Schroeder

Enforcing the Indian Child Welfare Act: Oglala Sioux Tribe

v.

Van Hunnik

December 12, 2014

Stephen L. Pevar

14th National Indian Nations Conference
Agua Caliente Band of Cahuilla Indians
Reservation

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. Congress found that state judges and social workers were often biased against Indians and ignorant of tribal values and customs. 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 stripped 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: 2010

1. State's population: 814,000.
2. 8.9% of the population is American Indian or Alaska Native.
3. But 52.5% of the children in foster care are American Indian or Alaska Native, only 30% are white.
4. Thus, an Indian child is 11 times more likely to be placed in 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

OGJALA 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,

Civ. No. 13-5620

CLASS ACTION COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

Plaintiffs,

vs.

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

Defendants.

1 STATE OF SOUTH DAKOTA }
2 COUNTY OF PENNINGTON } SS.

IN CIRCUIT COURT
JUVENILE DIVISION
SEVENTH JUDICIAL CIRCUIT

3
4 The People of the State of
5 South Dakota in the Interest of,

COURT FILE NO. All-

6 Child(ren), and concerning

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9 Respondent(s).

11 BEFORE: THE HONORABLE WALLY EKLAND
12 Circuit Court Judge
13 Pennington County Courthouse
Rapid City, South Dakota
October 20, 2011

14 APPEARANCES:

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

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EXHIBIT
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1 *****PROCEEDINGS*****

2 MS. UTTER: Judge, the next matter for the court is in

3 the matter of the children. I understand that parents

4 are present here and the mother, , is here and

5 sir, are you ?

6 RESPONDENT FATHER: Yeah.

7 MS. UTTER: And the father, , is here. I

8 believe you are father to , is that correct?

9 RESPONDENT FATHER: Yep.

10 MS. UTTER: Both parents of are here, and in

11 this case we're asking the court to also grant custody. The

12 emergency temporary custody was taken when the parents were --

13 the father was arrested for DUI and the mother was intoxicated

14 and unable to care for the child. The three year-old child or

15 approximately three-year-old child -- three-and-a-half-year old

16 child basically was in the car with them, so the Department of

17 Social Services obtained emergency temporary custody based on

18 that.

19 And yesterday we learned that there was an 11-year old

20 son in the home. His father is unknown at this time but we'll

21 find out, and so we're requesting the court also authorize

22 temporary custody of the 11-year old.

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

24 RESPONDENT FATHER: What can we say?

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

---KATHRYN DI MAIO *** RPR *** OFFICIAL REPORTER---

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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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---KATHRYN DI MAIO *** RPR *** OFFICIAL REPORTER---

STATE OF SOUTH DAKOTA }
COUNTY OF PENNINGTON } SS.
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: Abuse & Neglect

The above-captioned matter having come on for Temporary Custody on the 20th day of October, 2011; the Honorable Wally Ekland, presiding; the State of South Dakota being represented by its Deputy State's Attorney Roxie Frickson Jennifer B. Utter; the South Dakota Department of Social Services being represented by its designated agent(s), Amanda R; the Respondent mother (m/o) appearing in person; the Respondent father (f/o) 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) were 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 parent or Indian custodian 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 child(ren) 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
Restraints
 Department of Social Services custody for 48 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(s) or custodian(s) (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 that parent child [REDACTED] is hereby added to the list of children and removed custody of DSS
added to the list of children and removed custody of DSS
since law enforcement is unable to assist by any means
ABUSED OR NEGLECTED CHILDREN MAY NOT BE DETAINED OR JAILED, Passaway

Dated this 20 day of October, 2011.
BY THE COURT:
Wally Ekland
The Honorable Wally Ekland
Judge of the Circuit Court
President Ekland, JD
is sworn to before
10/20/11
Roxie Frickson, Deputy State's Attorney
By Amanda R

ATTEST:
Ranee Thurman, Clerk of Courts
By [Signature]
(SFAT)

- ✓ “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.”

Facts: Violations of Due Process

1. Although the State has filed a Petition accusing the parents of abuse and neglect, the parents were not given a copy of this Petition prior to or during the 48-hour hearing.
2. Attached to the Petition is an Affidavit from a case worker. Parents were not given a copy of the Affidavit prior to or during the hearing.
3. Parents were not told that they could challenge the Petition and were prohibited from offering evidence.

Due Process Allegations (cont.)

4. Parents were not permitted to confront and cross-examine the case worker who signed the Affidavit.
5. Indigent parents were not offered appointed counsel.
6. The court based its decision on the Petition and Affidavit filed prior to the hearing by the state, and no evidence was submitted during the hearing.
7. Since January 2010, parents lost 100% of these hearings. The next hearing was 60 days later.

Facts: Violations of Section 1922 of ICWA

Section 1922 of ICWA addresses the situation where an Indian child outside the reservation needs immediate, emergency protection from harm.

Section 1922 allows the state to remove an Indian child from the home in an emergency based on *state* standards for removal. However, at the very first hearing, federal protections kick in.

Violations of Section 1922 of ICWA (cont.)

At the first hearing, the state judge “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.*” Sec. 1922 (emphasis added). This is a tougher standard than “best interests of the child.”

Thus, if the state cannot prove at the hearing that the child faces imminent physical damage or harm, the parents have a right to take their child home.

Seven Precedent-Setting Rulings

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.”

Precedent-Setting 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.

Precedent-Setting Rulings (cont.)

3. Does Sec. 1922 “defer” ICWA’s standards until later in the process, as the Defendants claimed, or require the State to meet a higher standard of proof *at* the 48-hour hearing, as we claimed?

The Court ruled in our favor and held that:

(a) Section 1922 requires the state court to determine at the 48-hour hearing that *continued* removal is necessary to prevent “imminent physical damage or harm.”

(b) Section 1922 also requires the state court to order Social Services to immediately return the child to the home as soon as the emergency has ended.

Precedent-Setting Rulings (cont.)

4. Are Indian parents entitled to receive meaningful *notice* at the initial hearing, including copies of the Petition and ICWA Affidavit?

The Court held that Indian parents have a right to notice of the charges against them, including copies of the Petition and the Affidavit: “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.”

Precedent-Setting Rulings (cont.)

5. Does it violate the rights of Indian parents to be forced to wait 60 days or longer for a hearing when they can challenge the Petition?

The Court held that if parents are required to wait 60 days or longer before they can challenge the Petition, this would violate the Due Process Clause.

Precedent-Setting Rulings (cont.)

6. Must the state produce records of other 48-hour hearings, even though those records 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 records of every third 48-hour hearing held since Jan. 1, 2010, as we requested.

Precedent-Setting Rulings (cont.)

7. Would it violate the Due Process Clause if Indian parents are being coerced into waiving their federal rights?

“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.”

Our Motions for Summary Judgment: Section 1922

1. We are asking the Court to hold as a matter of law that, in violation of ICWA's Section 1922, the defendants have consistently:
 - (a) Failed to determine at the 48-hour hearing that continued custody is necessary "to prevent imminent physical damage or harm to the child."
 - (b) Failed to order Social Services to immediately return the child to the home as soon as the emergency has ended.

Our Motions for Summary Judgment: Due Process

2. We are asking the Court to hold as a matter of law that, in violation of the Due Process Clause, the defendants have consistently:
 - (a) Failed to provide adequate notice of the charges.
 - (b) Failed to permit parents to present evidence in their defense;
 - (c) Failed to permit parents to confront and cross-examine the state's witnesses;

Motions for Summary Judgment

- (d) Failed to appoint counsel to represent the parents in the 48-hour hearing; and
- (e) Failed to base the court's custody decision on evidence introduced during the hearing.

We are asking the Court to enter an order immediately halting all further violations.

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 our motions for summary judgment except for the right to counsel, which DOJ doesn't discuss.