

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.E.S. V.A.S. and H.M.S., Minors, by their legal
guardians Timothy P. Donn and Anne
L. Donn,

Plaintiffs,

Case No. 1:15-cv-982
Hon. JANET T. NEFF

HON. LARRY J. NELSON, in his official
capacity as a Leelanau County Family Court
Judge, MATTHEW W. FEIL, in his official
capacity as Tribal Prosecutor for the Grand
Traverse Band of Ottawa and Chippewa
Indians, and HELEN COOK, in her official
capacity as Supervisor of Anishinaabek
Family Services for the Grand Traverse Band
of Ottawa and Chippewa Indians,

Defendants.

Mark D. Fiddler, MN # 0197853
FIDDLER LAW OFFICE, P.A.
Attorney for Plaintiffs
6800 France Avenue South, Suite 190
Edina, MN 55435
Phone: 612-822-4095
Fax: 612-822-4096

NEWMARK STORMS LAW OFFICE LLC
Jeffrey S. Storms, MN # 0387240
100 South Fifth Street, Suite 2100
Minneapolis, MN 55402
Phone: 612-455-7055
Fax: 612-455-7051

Joseph T. Hubbell (P41996)
Leelanau County Prosecuting Attorney
8527 E. Government Center Drive, Suite 202
Suttons Bay, MI 49682
Phone: 231-256-9872
Fax: 231-256-0133

John Petoskey (P41499)
General Counsel, Grand Traverse Band
Of Ottawa and Chippewa Indians
Attorneys for Defendants Feil and Cook
Fredericks, Peebles and Morgan LLP
2848 Setterboro Road
Peshawbestown, MI 49682
Phone: 231-271-6391

Michele A. Bostic (P74776)
Assistant General Counsel, Grand Traverse Band
Of Ottawa and Chippewa Indians
Attorneys for Defendants Feil and Cook
2605 N. West Bay Shore Drive
Peshawbestown, MI 49682
Phone: 231-534-7978

William Rastetter (P26170)
Attorneys for Defendants Feil and Cook
Olson, Bzdok & Howard, P.C.
420 East Front Street
Traverse City, MI 49686
Phone: 231-946-0044

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**DEFENDANT LARRY NELSON'S ANSWER TO PLAINTIFFS' FIRST
AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

NOW COMES Joseph T. Hubbell, attorney of record on behalf of Defendant
Hon. Larry J. Nelson, and for an answer to Plaintiffs' Complaint states as follows:

1. This is a complaint for declaratory and injunctive relief challenging the
constitutionality of certain provisions of the Michigan Indian Family Preservation Act
(MIFPA), MCL 712B.1 – 712B.41, Michigan's state corollary and complement to the
Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63.

ANSWER:

Answering paragraph 1, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

2. Plaintiffs allege that MCL 712B.7(3)-(5), the MIFPA transfer provisions, are facially unconstitutional and unconstitutional as applied to Plaintiffs under the Fourteenth Amendment to the United States Constitution.

ANSWER:

Answering paragraph 2, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

3. The chief goal of this lawsuit is to prevent the transfer of Plaintiffs' adoption proceedings to tribal court.

ANSWER:

Answering paragraph 3, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

Parties

4. Plaintiffs C.E.S., V.A.S., and H.M.S. (collectively, "the Children") are all under the age of eighteen years old, and range in age from nine to twelve. At no time relevant hereto did they domicile within or reside on an Indian reservation.

ANSWER:

Answering paragraph 4, Defendant Nelson admits the allegation contained in paragraph 4.

5. As of the date of this filing, Timothy P. Donn and Anne L. Donn (the “Donns”) are the legal guardians of C.E.S., V.A.S., and H.M.S. per the Leelanau County Circuit Court’s December 13, 2013 Orders Placing Child After Consent.

ANSWER:

Answering paragraph 5, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

6. The Donns relationship to the Children amounts to a “like fiduciary” pursuant to Fed. R. Civ. P. 17(c)(1)(D), and the Donns should be permitted to sue or defend on behalf of the Children as a result. However, to ensure that standing and representation is beyond all dispute in this matter, the Donns bring this First Amended Verified Complaint for Declaratory and Injunctive relief as proposed “next friends” pursuant to Fed. R. Civ. P. 17(c)(2). The Donns shall file a motion seeking the Court’s approval for next friend status.

ANSWER:

Answering paragraph 6, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

7. Defendant Hon. Larry J. Nelson is a Leelanau County Family Court Judge, who is actively enforcing the unconstitutional provisions of MCL 712B.7(3)-(5) by way of his September 21, 2015 Order to Transfer Case to Tribal Court.

ANSWER:

Answering paragraph 7, Defendant Nelson admits he is the Leelanau County Family Court Judge, but he denies the remaining allegations as untrue.

8. Defendant Helen Cook is the Anishinaabek Family Services Supervisor for the Grand Traverse Band of Ottawa and Chippewa Indians who is the finality authority to enforce her tribe's unconstitutional, statutory right to transfer a proceedings pursuant to MCL 712B.7(3).

ANSWER:

Answering paragraph 8, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

9. Defendant Matthew Feil is the Tribal Prosecutor for the Grand Traverse Band of Ottawa and Chippewa Indians, who has and is enforcing his tribe's unconstitutional, statutory right to transfer proceedings pursuant to MCL 712B.7(3).

ANSWER:

Answering paragraph 9, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

10. None of the named Defendants were parties to the state court adoption proceedings.

ANSWER:

Answering paragraph 10, Defendant Nelson admits he was not a party to any state court adoption proceedings but as to the remaining allegations, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

Jurisdiction and Venue

11. This Court has original jurisdiction pursuant to 28 U.S.C. § 1331, 42 U.S.C.

§§1983,1988, and the federal common law jurisdictional doctrine established in *Ex parte Young*, 209 U.S. 123 (1908), to redress the deprivation under color of state law of rights secured by the federal constitution.

ANSWER:

Answering paragraph 11, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

12. This Court also has jurisdiction under 28 U.S.C. §§ 1331, 2201 over Plaintiffs' facial challenges to MCL 712B.7(3) – (5).

ANSWER:

Answering paragraph 12, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

13. The relevant acts and omissions occurred, and are likely to continue, in the State of Michigan; therefore, venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2).

ANSWER:

Answering paragraph 13, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

14. Plaintiffs seek a temporary restraining order followed by a preliminary injunction, enjoining the transfer of the Children's adoption case from state to tribal court and enjoining Defendants from removing the children from the Donn's home.

ANSWER:

Answering paragraph 14, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

ICWA's Transfer Provisions

15. ICWA states that:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, **in the absence of good cause to the contrary**, shall transfer such proceeding to the

jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b) (emphasis added).

ANSWER:

Answering paragraph 15, Defendant Nelson submits that no answer is required.

16. The Bureau of Indian Affairs (BIA), in their initial interpretation of good cause not to transfer under § 1911(b) of ICWA, identified the proceedings being at an “advanced stage” as an example of “good cause.” Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,590 (Nov. 26, 1979) (Guidelines for state courts).¹

ANSWER:

Answering paragraph 16, Defendant Nelson submits that no answer is required.

17. Commentary to Guideline C.1 (emphasis added) identifies that “gaming” the system is particularly disfavored and emblematic of a good cause not to transfer:

Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions.

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the

¹ Plaintiffs recognize that new guidelines have allowed these Due Process concerns to fall by the wayside.

opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption cause by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trail [sic] is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be a tactic to wear down the other side by requiring the case to be tried twice. **The Act was not intended to authorize such tactics and the “good cause” provision is ample authority for the court to prevent them.**

ANSWER:

Answering paragraph 17, Defendant Nelson submits that no answer is required.

18. Commentary to Guideline C.3 (emphasis added) also states:

The timeliness of the petition for transfer, discussed at length in the commentary to section C.1, is listed as a factor to be considered. **Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays.** Long periods of uncertainty concerning the future are generally regarded as **harmful to the well-being of children.** For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

ANSWER:

Answering paragraph 18, Defendant Nelson submits that no answer is required.

MIFPA Eviscerates Good Cause Protections for Transfers

19. The Michigan Legislature enacted MIFPA, effective January 2, 2013.

ANSWER:

Answering paragraph 19, Defendant Nelson admits.

20. In doing so, the Michigan Legislature severely limited the scope of what could be held to constitute “good cause” to preclude a transfer.

ANSWER:

Answering paragraph 20, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

21. MCL 712B.7(3) states:

In any state court child custody proceeding, for an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, **in the absence of good cause to the contrary**, shall transfer the proceeding to the Indian tribe’s jurisdiction, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe, provided that the transfer is subject to declination by the tribal court of the Indian tribe.

(emphasis added).

ANSWER:

Answering paragraph 21, Defendant Nelson submits that no answer is required.

22. MCL 712B.7(4) limits “good cause” by stating: “When a court makes a good cause determination under this section, adequacy of the tribe, tribal court, or tribal social services shall not be considered.”

ANSWER:

Answering paragraph 22, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

23. MCL 712B.7(5) more severely limits “good cause” by stating:

(5) A court may determine that good cause not to transfer a case to tribal court exists **only** if the person opposing the transfer shows **by clear and convincing evidence that either of the following applies:**

(a) The Indian tribe does not have a tribal court.

(b) The requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate.

ANSWER:

Answering paragraph 23, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

24. The Michigan Court of Appeals has held: “we conclude that the plain language of MCL 712B.7(5)(b) does not permit the circuit court to consider either the timeliness of the request or its possible effect on the child’s best interest in determining where there exists “good cause not to transfer a case to tribal court” In re Spears, 309 Mich. App. 658, appeal denied, 497 Mich 1040, 863 N.W.2d 140 (2015).

ANSWER:

Answering paragraph 24, Defendant Nelson submits that no answer is required.

The Children Are Placed in the Care of the Donns

25. The Children initially left their biological mother's home in 2009 under the terms of a voluntary guardianship. Their mother, A.M., was in a psychotic state and left the children with child protection stating, "I can't do this anymore." Mother was subsequently committed for treatment. Their father, J.K., has a history of domestic violence and faced allegations of sexual abuse.

ANSWER:

Answering paragraph 25, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the as to the truth of the allegations and leave Plaintiffs to their proof thereon.

26. The Children have not been in a birth parent's home since February 2009.

ANSWER:

Answering paragraph 26, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the as to the truth of the allegations and leave Plaintiffs to their proof thereon.

27. C.E.S. was the first of the Children to be placed with the Donns in February 2009.

ANSWER:

Answering paragraph 27, Defendant Nelson admits the allegation.

28. V.A.S. and H.M.S. were initially placed with another family, but also moved in with the Donns in March 2010.

ANSWER:

Answering paragraph 28, Defendant Nelson admits the allegation.

29. The Children remained with the Donns as the State moved the case into foster care in August 2010 due to physical neglect.

ANSWER:

Answering paragraph 29, Defendant Nelson admits the allegation.

30. Child Protective Services determined that neither of the Children's biological parents was capable of caring for the Children due to substance abuse and domestic violence.

ANSWER:

Answering paragraph 30, Defendant Nelson admits the allegation.

31. The Children have lived with the Donns since.

ANSWER:

Answering paragraph 31, Defendant Nelson admits the allegation.

The Tribe Refuses a Transfer

32. In September 2010, the Children's mother requested transfer of the case to tribal court.

ANSWER:

Answering paragraph 32, Defendant Nelson admits the allegation.

33. The Tribe declined intervention in 2010 on grounds that the Children were not eligible for tribal membership.

ANSWER:

Answering paragraph 33, Defendant Nelson admits the allegation.

34. The Tribe filed a notice of intervention in December 2011, finding at that time that the Children were enrolled members or eligible for membership in the Tribe.

ANSWER:

Answering paragraph 34, Defendant Nelson admits the allegation.

35. The Children became enrolled members of the Tribe in February 2012.

ANSWER:

Answering paragraph 35, Defendant Nelson admits the allegation.

36. In February 2012, the mother sought to transfer the case to tribal court, which the Michigan circuit court granted, but the tribal court denied the transfer, holding, in part, that it would not be in the best interests of the Children.

ANSWER:

Answering paragraph 36, Defendant Nelson admits the allegation.

37. The Children's mother voluntarily released her parental rights on April 16, 2012.

ANSWER:

Answering paragraph 37, Defendant Nelson admits the allegation.

38. The parental rights of the Children's father were terminated on April 18, 2012.

ANSWER:

Answering paragraph 38, Defendant Nelson admits the allegation.

The Tribe Seeks Transfer at the Eleventh Hour

39. Following the Tribe's refusal of the transfer order, the circuit court ordered that the Children remain with the Donns, pending an assessment and recommendation by the Michigan Children's Institute (MCI) for permanent adoptive placement of the Children with the Donns.

ANSWER:

Answering paragraph 39, Defendant Nelson admits the allegation.

40. The Tribe maintained throughout this process that its preference was for the Children to be placed with the paternal grandmother in Missouri, in accordance with ICWA's preference provisions. *See* 25 U.S.C. § 1915(a).

ANSWER:

Answering paragraph 40, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

41. On December 6, 2013, the MCI recommended adoptive placement with the Donns, who filed a petition for adoption on December 13, 2013. MCI advised the children's paternal grandmother, C.K., who also wanted to adopt the children, that she had a right to challenge this decision in state court.

ANSWER:

Answering paragraph 41, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

42. The Tribe – over three years after the Children began living with the Donns and over three years after its first opportunity to intervene and transfer – sought transfer of the proceedings to its tribal court December 23, 2013.

ANSWER:

Answering paragraph 42, Defendant Nelson admits the “Tribe” sought transfer of the proceedings in December 2013, as to the remaining allegations, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

43. The circuit court conducted a hearing on February 6, 2014, and held that “good cause” did exist to deny transfer.

ANSWER:

Answering paragraph 43, Defendant Nelson admits the allegation.

44. The circuit court reasoned that the “undue hardship” provision of MCL 712B.7(5)(b) was applicable, and found “clear and convincing evidence that hardship to the parties; to wit, the three children, would occur if this transfer were granted.”

ANSWER:

Answering paragraph 44, Defendant Nelson admits the allegation.

45. The circuit court also made specific findings that the minors were undergoing stress, needed permanency, and should not be required to endure being out of a parental home any longer given their five year ordeal.

ANSWER:

Answering paragraph 45, Defendant Nelson admits the allegation.

46. The circuit court entered its order on February 7, 2014, denying the motion to transfer, and staying all proceedings pending the exhaustion of appellate remedies.

ANSWER:

Answering paragraph 46, Defendant Nelson admits the allegation.

**The Appellate Court Finds that MIFPA
Has No Regard for the Rights of the Children**

47. The Michigan Court of Appeals published its opinion on this matter on March 19, 2015.

ANSWER:

Answering paragraph 47, Defendant Nelson admits the allegation.

48. The appellate court framed the issue as:

May a circuit court find ‘good cause not to transfer a case to tribal court’ under MCL 712B.7(5)(b) on the basis of ‘undue hardship’ to an Indian child or children as a result of delay in the proceedings resulting from the transfer of a long-pending case to tribal court? Stated otherwise, does MCL 712B.7(5)(b) permit a circuit court to deny a request to transfer an Indian child custody proceeding to a tribal court based on the timeliness of the request or the effect the transfer may have on the child’s best interests?

ANSWER:

Answering paragraph 48, Defendant Nelson admits the allegation.

49. The appellate court reversed the circuit court, finding, in part, that the best interests of children is not a consideration in determining whether there is “good cause”

not to transfer a case to a tribal court and that there is no consideration that must be given as to the timeliness of the transfer request.

ANSWER:

Answering paragraph 49, Defendant Nelson admits the allegation.

50. The Donns filed an Application for Leave to Appeal to the Michigan Supreme Court, which was denied on or about June 5, 2015.

ANSWER:

Answering paragraph 50, Defendant Nelson admits the allegation.

51. The Donns then filed a Motion to Deny Transfer and Request Stay of Proceedings, so they could address constitutional issues related to the MIFPA transfer provisions that were previously not litigated because of the case's posture.

ANSWER:

Answering paragraph 51, Defendant Nelson admits the allegation.

52. The circuit court granted the Donns' motion to stay on July 2, 2015.

ANSWER:

Answering paragraph 52, Defendant Nelson admits the allegation.

53. The Tribe made an Application for Leave to Appeal, while also making a motion for immediate consideration to lift the stay. The Donns then filed leave for discretionary appeal, arguing among other things the appellate court needed to hear for the first time their constitutional concerns that were not previously raised as they were the prevailing party (and respondents) in the prior appeal; this thus precluded the Donns from being able to seek declaratory relief at the state court level.

ANSWER:

Answering paragraph 53, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

54. On September 14, 2015, the appellate court ordered that the stay be lifted, and denied the appellate application as unnecessary at that point.

ANSWER:

Answering paragraph 54, Defendant Nelson admits the allegation.

55. On September 21, 2015, the circuit court ordered this matter transferred to tribal court.

ANSWER:

Answering paragraph 55, Defendant Nelson admits the allegation.

56. As a result of the transfer, the Children can be removed from the Donn home at any moment.

ANSWER:

Answering paragraph 56, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

Count I

(All Defendants – Procedural Due Process, 42 U.S.C. §§ 1983, 1988)

57. Plaintiffs incorporate by reference all preceding allegations as if fully stated herein.

ANSWER:

Answering paragraph 57, Defendant Nelson incorporates by reference 1 through 56 as if fully set forth herein.

58. The Fourteenth Amendment to the United States Constitution precludes any State from “depriving any person of life, liberty, or property, without the due process of law.” U.S. Const. amend. XIV, § 1.

ANSWER:

Answering paragraph 58, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

59. The Children have a well-established liberty interest in familial association.

ANSWER:

Answering paragraph 59, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

60. The Children were deprived of this liberty interest without the opportunity to be heard.

ANSWER:

Answering paragraph 60, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

61. MCL 712B.7(3)-(5) facially does not allow children the right to be heard.

ANSWER:

Answering paragraph 61, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief to the truth of the allegations and leaves Plaintiffs to their proof thereon.

62. The appellate court did not allow the transfer's effect on the Children to be considered.

ANSWER:

Answering paragraph 62, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

63. MCL 712B.7(3)-(5), facially and as applied, deprives the Children of their Due Process rights under the Fourteenth Amendment.

ANSWER:

Answering paragraph 63, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

64. Defendants, acting under the color of state law, are depriving Plaintiffs of their rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

ANSWER:

Answering paragraph 64, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

65. Plaintiffs are entitled to their costs, including their reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988.

ANSWER:

Answering paragraph 65, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

66. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and Fed. R. Civ. P. 57, Plaintiffs seek a declaratory judgment that MCL 712B.7(3)-(5), violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ANSWER:

Answering paragraph 66, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

67. Plaintiffs have no other adequate remedy at law.

ANSWER:

Answering paragraph 67, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

Count II

(All Defendants – Substantive Due Process, 42 U.S.C. §§ 1983, 1988)

68. Plaintiffs incorporate by reference all preceding allegations as if set forth fully herein.

ANSWER:

Answering paragraph 68, Defendant Nelson incorporates by reference 1 through 67 as if fully set forth herein.

69. The Children have a fundamental liberty interest in familial association and their personal well-being.

ANSWER:

Answering paragraph 69, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

70. MCL 712B.7(3)-(5) fails to account for those fundamental liberty interests by precluding children from being heard, by not accounting for their best interests, and by not accounting for their personal well-being.

ANSWER:

Answering paragraph 70, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

71. MCL 712B.7(3)-(5) deprives the Children of their Due Process rights under the Fourteenth Amendment, and is not narrowly tailored to serve a compelling state interest.

ANSWER:

Answering paragraph 71, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

72. Defendants, acting under color of state law, are depriving Plaintiffs of their rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

ANSWER:

Answering paragraph 72, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

73. Plaintiffs are entitled to their costs, including their reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988.

ANSWER:

Answering paragraph 73, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

74. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and Fed. R. Civ. P. 57, Plaintiffs seek a declaratory judgment that MCL 712B.7(3)-(5), violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ANSWER:

Answering paragraph 74, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

75. Plaintiffs have no other adequate remedy at law.

ANSWER:

Answering paragraph 75, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

Count III

(All Defendants – Equal Protection, 42 U.S.C. §§ 1983, 1988)

76. Plaintiffs incorporate by reference all preceding allegations as if fully stated herein.

ANSWER:

Answering paragraph 74, Defendant Nelson incorporates by reference 1 through 75 as if fully set forth herein.

77. MCL 712B.7(3)-(5), facially and as applied, deprives Plaintiffs of Equal Protection under the Fourteenth Amendment by discriminating on the basis of race, national origin, and/or ethnicity.

ANSWER:

Answering paragraph 77, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

78. The transfer provisions of MCL 712B.7(3)-(5), on their face and as applied, discriminate on the basis of race, national origin, and/or ethnicity, do not relate to parents or children domiciled on Indian land, do not relate to Indian self-governance, and therefore these discriminatory provisions are subject to strict scrutiny.

ANSWER:

Answering paragraph 78, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

79. MCL 712B.7(3)-(5) fails strict scrutiny because it is not narrowly tailored to advance a compelling state interest.

ANSWER:

Answering paragraph 79, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

80. Defendants, acting under color of state law, are depriving Plaintiffs of their rights secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

ANSWER:

Answering paragraph 80, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

81. Plaintiffs are entitled to their costs, including their reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988.

ANSWER:

Answering paragraph 81, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

82. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and Fed. R. Civ. P. 57, Plaintiffs seek a declaratory judgment that MCL 712B.7(3)-(5) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

ANSWER:

Answering paragraph 82, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

83. Plaintiffs have no other adequate remedy at law.

ANSWER:

Answering paragraph 83, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

Count IV

(All Defendants – Temporary Restraining Order and Preliminary Injunction)

84. Plaintiffs incorporate by reference all preceding allegations as if fully stated herein.

ANSWER:

Answering paragraph 84, Defendant Nelson incorporates by reference 1 through 83 as if fully set forth herein.

85. In light of the Court's Order for Transfer, the Children can be taken from the Donns at any moment.

ANSWER:

Answering paragraph 85, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

86. Plaintiffs have no adequate remedy at law.

ANSWER:

Answering paragraph 86, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

87. Plaintiffs seek the entry of a temporary restraining order and preliminary injunction, enjoining Defendants and Defendants' officers, agents, servants, employees, attorneys, and other persons in active concert or participation with them from enforcing the September 21, 2015 transfer order and MCL 712B.7(3)-(5) and MCR 3.905 (C)(1),(4) as presently written.

ANSWER:

Answering paragraph 87, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

Count V
(All Defendants – Permanent Injunction)

88. Plaintiffs incorporate by reference all preceding allegations as if fully stated herein.

ANSWER:

Answering paragraph 88, Defendant Nelson incorporates by reference 1 through 87 as if fully set forth herein.

89. Plaintiffs seek the entry of a permanent injunction, enjoining Defendants and Defendants' officers, agents, servants, employees, attorneys, and other persons in active concert or participation with them from enforcing MCL 712B.7(3)-(5) and MCR 3.905 (C)(1),(4) as presently written.

ANSWER:

Answering paragraph 89, Defendant Nelson neither admits nor denies the allegation therein as he lacks sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiffs to their proof thereon.

WHEREFORE, Defendant Larry J. Nelson requests this Honorable Court dismiss him from this action.

Dated: November 2, 2015

_____/s/
Joseph T. Hubbell (P41996)
Attorney for Defendant