UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.E.S., V.A.S., and H.M.S., Minors, by Next Friends Timothy P. Donn and Anne L. Donn, Plaintiffs, v. Hon. Larry J. Nelson, in his official capacity as a Leelanau County Family Court Judge, Matthew 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.	Case No. 1:15-cv-982 HON. Janet T. Neff

BRIEF IN SUPPORT OF MOTION FOR APPOINTMENT OF NEXT FRIENDS ON BEHALF OF MINOR PLAINTIFFS

Plaintiffs submit the following brief pursuant to W.D. Mich. LCivR 7.1(a) in support of their Motion for Appointment as "Next Friends" on Behalf of Minor Plaintiffs. The Court should appoint Timothy P. Donn and Anne L. Donn (the "Donns") as Next Friends in order to pursue the above-captioned litigation on behalf of Plaintiffs C.E.S., V.A.S., and H.M.S. (the "Children"), who are all minors and incapable of maintaining their own legal action. Because the Children are minors, they lack the legal capacity to sue in their own right. As discussed below, the Donns are not just the best adults to represent the Children's liberty interests in their adoptive placement; they are the only adults willing and able to represent the Children's *actual* interests in

the matter. Therefore, the Children properly appear before this Court through their Next Friends, whose authority and legal capacity derives directly from Rule 17(c) of Federal Rules of Civil Procedure.

Background

1. The recommendation for adoptive placement with the Donns and the Tribe's eleventh-hour-transfer

The Children initially left their biological mother's home in 2009 under the terms of a voluntary guardianship.[1] Their mother, A.M., was in a psychotic state and left the children with child protection.[2] C.E.S. moved in with the Donns in 2009 and the Donns were appointed limited guardianship powers over C.E.S.[3] V.A.S. and H.M.S. then moved in with the Donns under limited guardianship in 2010.[4] The Donns became a licensed foster home in 2010, so that the Children could continue living together in their home.[5] Thus, the Donns became their foster parents at that time.[6]

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.[7] The Donns made the decision to adopt the Children, and the Michigan Department of Human Services Michigan Children's Institute (MCI) issued its Consent to Adoption Decision on December 6, 2013, recommending that the Children be placed for adoption with the Donns.[8] MCI took into consideration that the preference of the Children was to be adopted by and remain with the

[1] ECF Doc. No. 35, First Amended Verified Complaint for Declaratory and Injunctive Relief ("Amended Complaint") ¶ 25.
[2] *Id.*
[3] *Id.* at ¶¶ 5, 25.
[4] *Id.*
[5] *Id.* at ¶ 5.
[6] *Id.*
[7] *Id.* at ¶ 30.
[8] *Id.*

Donns.[9] The state-appointed Guardian ad Litem, then attorney Michael Long ("Long"), similarly recommended that the Children remain in the Donn home for adoption.[10] On December 13, 2013, the circuit court issued Orders Placing Child After Consent, terminating MCI's jurisdiction over the Children, and naming the Donns adoptive parents, whereby the Court granted the Donns broad, guardian-type powers: "The adoptive parent(s) may consent to all medical, surgical, dental, optical, psychological, educational, and related services provided to the adoptee."[11]

The Grand Traverse Band of Ottawa and Chippewa Indians (the "Tribe"), after declining to intervene and/or accept transfer of the Children's adoption proceedings on two prior occasions, sought an eleventh hour transfer of the Children's adoption to Tribal Court on December 23, 2013 (i.e., over three years after the Children first began residing with the Donns), pursuant to MCL 712B.7(3)-(5).[12] The circuit court refused the transfer, finding on February 7, 2014, that "good cause" existed to deny the transfer.[13] The circuit court's findings included that the Children 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.[14]

2. The appellate court condones the late transfer.

The Michigan appellate court reversed the circuit court on March 19, 2015, holding, in part, that the best interests of the children is not a consideration as to whether "good cause" existed not to transfer pursuant to MCL 712B.7(5)(b) and that no consideration must be given as to the timeliness of the transfer request - a not unreasonable reading of MCL 712B, but also a

[9] *Id.*; *see also* ECF Doc. No. 27, Declaration of Jeffrey Storms, Ex. B, Consent to Adoption Decision at 6.
[10] Consent to Adoption Decision at 6.
[11] Amended Complaint ¶ 5.
[12] Amended Complaint ¶¶ 33, 36, and 42.
[13] *Id.* ¶¶ 43, 44, 46.
[14] *Id.* ¶ 45; *see also In re Spears*, No. 320584, 309 Mich. App. 658, 2015 WL 1258102 (Mich. Ct. App. Mar. 19, 2015) (no pinpoint citations available on Westlaw version).

violation of the minor Children's clearly established liberty interest in their own familial association and equal protection rights under the U.S. Constitution.[15] Shortly thereafter, on March 26, 2015, Long was discharged as the Children's guardian ad litem and the Court appointed attorney Cheryl Gore Follette ("Follette").[16]

The Donns filed an Application for Leave to Appeal to the Michigan Supreme Court, which was denied on or about June 5, 2015.[17] The Donns then filed a Motion to Deny Transfer and Request Stay of Proceedings, so they could address constitutional issues related to the transfer provisions that were previously not litigated because of the case's posture.[18] The Tribe made an Application for Leave to Appeal, while also making a motion for immediate consideration to lift the stay.[19] The Donns filed leave for discretionary appeal, arguing their constitutional concerns.[20] On September 14, 2015, the appellate court ordered that the stay be lifted and denied the appellate application as unnecessary.[21]

3. Post-appellate proceedings

On September 21, 2015, the circuit court ordered this matter transferred to tribal court.[22] Plaintiffs filed the above-captioned action on September 29, 2015, and the Court granted an *ex parte* temporary restraining order, stating that the Children were not to be removed from the Donn's home prior to an October 21, 2015 hearing on Plaintiffs' Motion for Preliminary

[15] *In re Spears*, 2015 WL 1258102.
[16] ECF Doc. No. 14-6, Affidavit of Matthew Feil, Ex. 5, Order After Post-termination Review Permanency Planning Hearing (3/26/15) at 4.
[17] Amended Complaint ¶ 50.
[18] *Id.* ¶ 51.
[19] *Id.* ¶ 53.
[20] *Id.*
[21] *Id.* ¶ 54.
[22] *Id.* ¶ 55; *see also* ECF Doc. No. 14-5, Feil Aff. Ex. 4.

Injunction.[23] The Donns initially alleged that they were bringing this action as the Children's guardians.[24]

The Tribal court accepted transfer of the Children's adoption proceedings on October 1, 2015.[25] Also on October 1, 2015, the Tribe appointed Follette Attorney/ Guardian Ad Litem/Lawyer-Guardian Ad Litem.[26] The Tribal order appointing Follete expressly notes that: "This appointment will be for purpose of representation in the family division of the GTB Tribal Court only, unless otherwise ordered by the judge."[27] The Tribe argued in response to Plaintiffs' motion for preliminary injunction that: (1) the Donns did not have standing because they were not guardians; (2) that the Children were previously wards of the State and are now wards of the Tribe; and (3) the Children's guardian ad litem is the proper party to bring suit on behalf of the Children, not the Donns.[28]

Plaintiffs filed an amended complaint on October 21, 2015, whereby the Donns seek to represent the interests of the Children as "next friends."[29] The Children maintain today that they wish to be adopted by the Donns.[30] In this case, Plaintiffs seek injunctive and declaratory relief under the common law doctrine of *Ex parte Young*, 209 U.S. 123 (1908), alleging that the above-named Defendants, in their official capacities, are violating their Fourteenth Amendment rights.[31]

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[23] ECF Doc. No. 8, Temporary Restraining Order.
[24] ECF Doc. No. 1, Complaint.
[25] *Id.*
[26] ECF Doc. No. 14-7, Feil Aff., Ex. 6.
[27] *Id.*
[28] ECF Doc. No. 14, Tribal Defendants' Response to Plaintiffs' Motion for Preliminary Injunction at 5-6.
[29] Amended Complaint.
[30] Affidavit of Mark D. Fiddler (Nov. 2, 2015).
[31] *See* Amended Complaint.

Argument

1. Federal Rule of Civil Procedure 17(c) Allows the Children to Appear in this Litigation through Next Friends.

Rule 17(c) of the Federal Rules of Civil Procedure provides minors with access to the federal courts. Rule 17(c)(1) states that general guardians, committees, conservators, or like fiduciaries may sue or defend on behalf of minors or incompetent persons. Since not all minors have such legal representatives, Fed. R. Civ. P. 17(c) "'gives a federal court power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent person where that representative is unable, unwilling or refuses to act or has interests which conflict with those of the infant or incompetent.'" *Elliot v. Carcieri*, 608 F.3d 77, 85 (1st Cir. 2010) (quoting *Ad Hoc Comm. of Concerned Teachers v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 29 (2d Cir. 1989)). If a minor does not have a legal representative, they "may sue by a next friend or by a guardian ad litem." Fed. R. Civ. P. 17(c)(2). Rule 17(c)(2) further requires that "[t]he court **must** appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." (emphasis added). Thus, Rule 17(c) ensures that minors seeking to vindicate federal claims may sue in federal court, either by a duly appointed general representative or by a next friend or guardian ad litem.[32]

A next friend is "[a] person who appears in a lawsuit to act for the benefit of an incompetent or minor party, who is not a party to the lawsuit and not appointed as a guardian…." *In re Myers*, 350 B.R. 760, 762 (Bankr. N.D. Ohio 2006) (quoting Black's Law Dictionary, 1070 (8th ed. 2004)). "There are no special requirements for the person suing as next friend." 6A

[32] Plaintiffs allege in their amended complaint that the Donns' legal relationship to the Children amounts to a "like fiduciary" status. It is Plaintiffs' understanding that the Tribal Defendants dispute this. Given the number of issues already at issue in this litigation, Plaintiffs are not seeking standing on this ground, and are instead asking the Court to exercise its broad discretion to appoint the Donns as Next Friends.

Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1572 at 683-84 (3d ed. 2010). "The decision as to whether to appoint a next friend or guardian ad litem rests with the sound discretion of the district court and will not be disturbed unless there has been an abuse of its authority." *In re Kloian*, 179 Fed. Appx. 262, 265 (6th Cir. 2006) (quoting *Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989)).

2. Neither the Tribe nor the Guardian ad Litem are suitable representatives for the Children in this litigation.

Plaintiffs anticipate the Tribal Defendants will argue that the Tribe is the Children's duly "appointed representative" for purposes of representing them in these proceedings. But here, the Tribe's interests are in clear conflict with the actual, stated interests of the Children. Rule 17(c) permits "appointment of a next friend or guardian ad litem 'when it appears that the minor's general representative has interests which may conflict with those of the person he is supposed to represent.'" *See Developmental Disabilities Advocacy Center, Inc. v. Melton*, 689 F.2d 281, 285 (1st Cir. 1982) (quoting *Hoffert v. General Motors Corp.*, 656 F.2d 161, 164 (5th Cir. 1981)). The Children allege that the Tribe, in its very capacity as their legal guardian, is harming them in violation of their constitutional rights. The Tribe is thus precluded from representing the Named Plaintiffs in this matter because Plaintiffs have brought suit challenging tribal actions, and because its prosecutor and human services director are defendants in this suit. It is thus untenable for the Tribe to assume it could represent the Children in a suit against its own tribal officials.

Although the Named Plaintiffs have a Guardian ad Litem representing their *best interests* in those proceedings (not the Plaintiffs themselves), GALs are not "duly appointed representatives" authorized *to sue* for purposes of Rule 17(c). As discussed above, the Follette's role as the tribal GAL is limited to representing the Children in tribal court. The role of the GAL is not to represent the child's wishes, but advocate for the "*best interests*" of the children. Under

tribal law, "[f]or children under the age of fourteen (14), the guardian ad litem shall make a determination as to the best interests of the child *regardless of whether that determination reflects the wishes of the child*." G.T.B.C. § 108 (D)(2) (emphasis added). The Children have already made their wishes known — that the state court-approved permanency plan of adoption by the Donns not be re-litigated. Since the GAL is appointed by the Tribe and is statutorily prohibited from advocating for the children's wishes *per se*, she has as a clear conflict of interest precluding her from suing the Defendants in this case. *See Elliott*, 608 F.3d at 87 (holding where state law did not confer general authority on guardians ad litem to represent the children outside family court proceedings, the children's guardians ad litem cannot be considered the children's general guardians, like fiduciaries or duly appointed Rule 17(c) representatives). Even if the Tribe were to take legal action to expand Follette's role under a tribal court order, Follette would still be an improper representative due to her conflict of interest.

3. The Donns are appropriate representatives.

The Donns remain the only persons with the capacity, knowledge, and experience with the Children to represent and advocate for their rights in these proceedings. There is no doubt that they are "dedicated to the best interests of" the Children. *See Franklin v. Francis*, 144 F.3d 429, 432 (6th Cir. 1998) (looking to such dedication in assessing the appropriateness of proposed next friend). They have lived with and protected the Children for close to six years. They have previously been appointed by the Michigan circuit court as limited guardians and have been granted broad, general guardian-like powers by the circuit court after MCI consented to the Donns' adoption. As the affidavit of Mark Fiddler indicates, they have interests in adopting the children, an adoption tentatively approved by the State of Michigan, and the children share that

interest. Mr. Fiddler has interviewed the children privately to ensure the absence of a conflict. None exists. They should be appointed the Children's Next Friends.

4. Rule 17(c) requires this Court ensure that the Children's right to pursue their federal claims is protected.

Should the Court determine that the Donns were inappropriate next friends, Rule 17(c) requires the Court to appoint another suitable friend or otherwise ensure that the Children are not deprived of access to the Court and justice. *Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989) ("we have found no case … holding that a court may decline to appoint a guardian with the result of allowing the child's interests to go *un*protected") (emphasis in original); *Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984) (finding reversible error where lower court failed to appoint next friend or guardian ad litem under Rule 17(c) for minor or to otherwise ensure that infant's right to vindicate his statutory and constitutional claims was protected). Accordingly, if the Court were to determine that the Donns were not suited to serve as next friends, the proper remedy would be for the Court to allow Plaintiffs to seek another proposed next friend. [33]

Conclusion

The Tribe and the tribal appointed guardian ad litem are conflicted given the nature of this litigation. As a result, the Children have no proper representative to pursue this litigation on their behalf. The Donns are best suited to represent the Children's interests. The Children have been entrusted to the Donns for nearly six years by the State of Michigan, and the record establishes that the Donn's interests are aligned with the Children's. Accordingly, the Donns should be appointed next friends in order to pursue this litigation on the Children's behalf.

[33] Because the Donns are well suited to represent the Children's interests, no party should incur the expense associated with appointing a federal-court-appointed guardian ad litem. *See* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1572 at 686-87 (collecting cases standing for the proposition that the guardian ad litem is usually paid for by plaintiff or shifted to the opposing party if plaintiff is successful).

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