UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

AARIN NYGAARD, and TERRANCE STANLEY, Petitioners, vs. TRICIA TAYLOR; TED TAYLOR, JR.; JESSICA DUCHENEAUX; ED DUCHENEAUX; CHEYENNE RIVER SIOUX TRIBAL COURT; BRENDA CLAYMORE, in her official capacity as Chief Judge, Cheyenne River Sioux Tribal Court of Appeals; FRANK POMMERSHEIM, in his official capacity as Chief Justice; THE SOUTH DAKOTA DEPARTMENT OF SOCIAL SERVICES; TODD WALDO, in his official capacity as Social Worker; and JENNY FARLEE, in her official capacity as Social Worker; Respondents.	3:19-cv-03016-RAL **MEMORANDUM OF RESPONDENTS SOUTH DEPARTMENT OF SOCIAL SERVICES, TODD WALDO, AND JENNY FARLEE, IN SUPPORT OF THEIR RULE 12 MOTIONS TO DISMISS**

Petitioners have filed an amended petition for habeas corpus relief pursuant to 25 U.S.C.A. § 1303. *See Doc. 8.* This proceeding by statutory definition seeks "… to test the legality of his detention by an order of an Indian tribe." *See 25 U.S.C.A. § 1303.* The detention referred to is the detention of minor children C.S.N. and T.R.S.

The substantive relief sought in the amended petition is an order that C.S.N. and T.R.S. be immediately released to the Petitioners in accordance with orders previously entered by North Dakota courts. The moving Respondents are the South Dakota Department of Social Services

(DSS) and former DSS employees Todd Waldo (Waldo) and Jenny Farlee (Farlee) in their official capacities as Social Workers[1].

The claims for relief against the Respondents DSS, Waldo, and Farlee are as follows:

- That DSS "detained" C.S.N. and T.R.S. since November, 2014, after their biological mother Tricia was arrested for parental kidnapping and have refused to return the children to the Petitioners who are the legal and rightful custodians of the children. (*Doc. 8, ¶ 1*)
- Petitioners allege that the children are currently under the care and control of the Respondents and their agents. (*Doc. 8, ¶ 3*)
- That DSS is a state agency responsible for the "placement" of the children in the care of Ted Taylor, Jr., without notice to Petitioners. (*Doc. 8, ¶ 19*)
- That Waldo and Farlee were Social Workers assigned to the minor children and are responsible for the placement of C.S.N. and T.R.S. in Ted Taylor, Jr.'s custody. (*Doc. 8, ¶ 20*)
- That DSS prepared a "Present Danger Plan" dated November 26, 2014, regarding the care of the children. (*Doc. 8, ¶ 46*)
- That, at a hearing, Ted Taylor testified that he applied for "custody" of the children with DSS and that he was granted temporary custody. (*Doc. 8, ¶ 47*)

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[1] The term "Social Worker", as utilized, is improper. Employees of DSS in the capacity of Waldo and Farlee at the time were referred to as "Child Protection Workers" and employed by the Division of Child Protection Services. The term "Social Worker" was abandoned some years ago for various reasons.

- That the "Respondents" have deprived Petitioners of the liberty interest of raising and educating their children without due process of law and have deprived the minor children of the same, in direct violation of North Dakota court orders. (*Doc. 8, ¶¶ 80, 81*)

The facts as plead by Plaintiffs in their petition and which are supported by them with exhibits from the substantial record made in this case (there are numerous references in the amended petition to various findings which are contradictory or which seem to lack support in the record or in the law), include but are not necessarily limited to:

- Neither DSS, Waldo, nor Farlee ever had custody of the children C.S.N. and T.R.S.
- Neither DSS, Waldo, nor Farlee ever gave, conferred, or granted custody to anyone and never had the power to do so.
- That when law enforcement officers were going to arrest and transport the children's mother – with whom the children had been residing – the DSS through Waldo and Farlee did prepare a safety plan to determine whether it was safe to leave the children where they had been living previously with Ted Taylor, Jr.
- Neither DSS, Waldo, nor Farlee ever approved or disapproved of any party in this action being granted legal custody by anyone.
- Neither DSS, Waldo, nor Farlee participated, in any way, in the North Dakota actions to determine custody.
- Since the last involvement by DSS, Waldo, and Farlee in November, 2014, there have been multiple court orders addressing and, in many cases, determining custody that did not involve any of the DSS Respondents.

- Neither DSS, Waldo, nor Farlee take any position on the ultimate custody issue as to who should have custody and how that custody should be limited, if at all, regarding these children.
- Even if this Court granted habeas corpus relief in favor of the Petitioners and against these moving Respondents, there is nothing whatsoever these moving Respondents could do to comply with such an order or change whatever the current custody relationship may be. Both the tribal court and the North Dakota courts made decisions to exercise their jurisdiction over custody of these children. That decision was not based on any grant of custody given or conferred by the DSS Respondents to those courts. This alone shows the futility of permitting a claim to go forward against the DSS Respondents.

As the Court in its Opinion and Order of September 24, 2021 (Doc. 69) mentioned numerous times, there have been court orders which have been either ignored or left unenforced. The legal issue here relates to the enforcement of orders from North Dakota courts and the Cheyenne River Sioux Tribal Court. These Respondents take no position on the resolution of those disputes.

ARGUMENT AND AUTHORITY

The petition for habeas corpus relief as against DSS, Waldo, and Farlee fails to state a claim upon which relief can be granted against them.

In the long, tortured history of this case, there have been numerous efforts in various courts to determine who should have custody of the involved children. DSS, Waldo, and Farlee

have been involved in very few, if any, of those hearings. Determining and awarding custody is a matter for the courts and not for the Department of Social Services.

Neither DSS, Waldo, nor Farlee had any power or authority to grant or take custody from any party to this action. Furthermore, they never did so. If this Court were to enter an order granting the relief sought by Petitioners, neither DSS, Waldo, nor Farlee could comply since they do not control custody of the children in question.

It is difficult to prove a negative, but if there is a statute giving DSS, Waldo, or Farlee the power to make a custody decision, then presumably some party will bring that forward to the Court.

Without having custody of the children, DSS, Waldo, and Farlee are not proper Respondents, and no relief could be granted as against them. This was recognized in an action involving parties seeking relief under 25 U.S.C.A. § 1303 in *Wells v. Philbrick*, 486 F.Supp. 807 (D.S.D. 1980). There, the Court for the Central Division determined that a writ of habeas corpus must be directed to a person or entity having custody of a prisoner or a person otherwise detained. In *Wells*, plaintiff was an enrolled member of the Crow Creek Sioux Tribe, and the defendants were members of that tribe's council – i.e. the governing party of an Indian tribe. The dispute arose from a custody dispute between plaintiff and his wife. In denying the sought-after habeas relief, the Court stated:

> Plaintiff himself concedes in his complaint that his children are "in the custody of Patricia Wells," who is not named as a party to this action. Thus, any order directed to any of the named Respondents [Tribe's council] would be utterly lacking in effect, since without custody of the children, they would be unable to produce them before this Court. *Id. 809.*

A brief but concise statement of the facts relating to the involvement of DSS Respondents here reflects that in November, 2017, the two children were located on the Cheyenne River Sioux Reservation with their mother. Their mother was arrested and taken into custody by law enforcement for violation of the Parental Kidnapping Protection Act, and the children were staying with relatives. After being contacted by those law enforcement agents, the DSS Respondents did a safety plan or initial family assessment not to determine custody but to determine whether it was safe for the children to continue to reside with Tricia Taylor's relatives. Repeated references are made in the complaint and the attached documents to Tricia Taylor's brother, Ted Taylor, Jr., then seeking custody from the Cheyenne River Sioux tribal court after Tricia Taylor granted him custody of the children. Had Mr. Taylor received "custody" from the DSS Respondents, certainly an order granting legal custody from the tribal court would not have been necessary. Further, since that point, custody of the children has been determined by various court orders and not by any of the DSS Respondents.

The DSS Respondent were not and never are in the position of "granting" or conferring custody on anyone. *See various provisions of SDCL 26-7A and 26-8A.*

For example, see the definition of "custodian" in SDCL 26-7A-1(11) – no mention made of DSS or DSS employees; SDCL26-7A-1(14) defining "deprivation of custody" as a transfer of custody of a child "by the Court" from the child's parents, guardians, or other custodian to another person, agency, department, or institution. Throughout the history of this case, the proposition that custody must be determined by a court has been recognized, and the parties have availed themselves of the courts in North Dakota and on the Cheyenne River Sioux Reservation to gain custody.

The ultimate issue that the parties seek to have this Court resolve is custody of the children or, at a minimum, which of the courts involved has power to grant custody. Throughout the history of this case, there have been numerous issues addressed by the Court which bear on question of jurisdiction and the power to affect custody of the children, including the Parental Kidnapping Prevention Act 28 U.S.C.A. § 1738, whether the Indian Child Welfare Act applies, whether tribal court remedies have been fully exhausted, etc.

When recounting the history of this case and the involvement of various courts, this Court correctly acknowledged in its order that the tribal court granted temporary custody of the children to a non-parent relative. (*Doc. 69, p. 29*).

There is an exception to the actual physical custody requirement for habeas relief, and this Court discussed that exception in its Opinion and Order dated September 24, 2021 (*Doc. 69*).

Given the discussion of habeas relief under 25 U.S.C.A. § 1303 contained in this Court's Opinion and Order (*Doc. 69*) and its analysis of the 8th Circuit decision in *DeMent v. Oglala Sioux Tribal Court,* 874 F.2d 510 (8th Cir. 1989), it is still apparent that no relief could be granted against the DSS Respondents here, and this petition should be dismissed as against the DSS Respondents for failure to state a claim upon which relief can be granted.

This Court lacks subject matter jurisdiction in regard to the claims asserted against the DSS Respondents.

The discussion of subject matter jurisdiction by this Court in its Opinion and Order, Doc. 69 – beginning at pg. 26, confirms that although certain issues exist as to whether this Court may have subject matter jurisdiction over the dispute as it relates to the Tribal Respondents, there really is no issue as to the DSS Respondents. Two issues that the Court has ordered resolved

through further motions and briefing are whether the Parental Kidnapping Protection Act extends to tribes and whether the tribal court has jurisdiction over the custody issues. *See Doc. 69, p. 46.* It is impossible to envision any set of circumstances where the DSS Respondents could affect the resolution of those issues. Although that also supports the argument for dismissal based on failure to state a claim against the DSS Respondents, it likewise supports the contention that a proper application of 25 U.S.C. § 1303 does not extend this Court's subject matter jurisdiction over the DSS Respondents under these circumstances.

DSS Respondents are not persons required to be joined in this action in order for this Court to grant relief.

Should any of the other parties take the position that the DSS Respondents are persons required to be joined as Respondents in order for this Court to grant relief pursuant to FRCP 19, such a position would be erroneous. Nothing in the record reflects that in the absence of the DSS Respondents, the Court could not accord complete relief among the existing parties. Further, the DSS Respondents claim no interest relating to the subject of the action and disposing of this action in the absence of the DSS Respondents would not expose them to multiple liabilities.

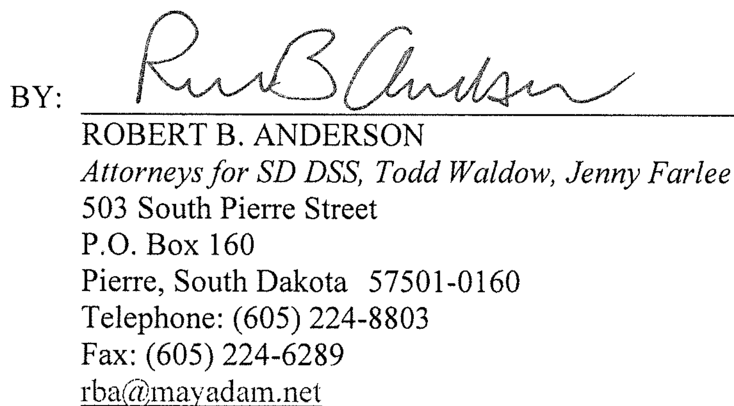
If the argument is ever advanced that the DSS Respondents are necessary for resolution of the action, it would not be founded in fact or law. If the Court would later determine that parties were necessary, the Court could resolve the issue by adding the DSS Respondents so that the matter could be fully adjudicated pursuant to FRCP 21.

CONCLUSION

Some court must ultimately determine who has custody over the children involved. The DSS Respondents have no power, ability, or obligation to do so. The DSS Respondents' Motion should be granted both for failure to state a claim and lack of subject matter jurisdiction.

Dated this 4th day of January, 2022.

MAY, ADAM, GERDES & THOMPSON LLP



BY: ______________________________

ROBERT B. ANDERSON
Attorneys for SD DSS, Todd Waldow, Jenny Farlee
503 South Pierre Street
P.O. Box 160
Pierre, South Dakota 57501-0160
Telephone: (605) 224-8803
Fax: (605) 224-6289
rba@mayadam.net

CERTIFICATE OF SERVICE

Robert B. Anderson, of May, Adam, Gerdes & Thompson LLP, hereby certifies that on this 4th day of January, 2022, he electronically filed and served the foregoing through the CM/ECF file and serve system which will automatically send email notification of such filing to the following counsel of record, to-wit:

Gunderson, Palmer, Nelson & Ashmore, LLP
Marty Jackley mjackley@gpna.com
Stacy Hegge shegge@gpna.com

O'Keeffe, O'Brien, Lyson & Foss, Ltd.
Sarah Aaberg sarah@okeeffeattorneys.com
Tracy Lyson tracy@okeeffeattorneys.com

Attorneys for Petitioners

Steven J. Gunn, Attorney at Law
Steven J. Gunn sjgunn37@gmail.com
Attorneys for CRST Court, Brenda Claymore, Frank Pommersheim, and CRST Court of Appeals

ROBERT B. ANDERSON