IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30630

Miles Allen Melius and Tori Lynn Melius,
Plaintiffs and Appellees
vs.
Lakota Songer,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
GREGORY COUNTY

THE HONORABLE BOBBI RANK

Circuit Court Judge

APPELLANT'S BRIEF

NOTICE OF APPEAL FILED February 23, 2024

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PRELIMINARY STATEMENT

Citations to the Clerk's Index with be "27 CI" followed by the document page number and line number. Because this case was not formally consolidated, the Clerk's Index for 26CIV22-000005 (Songer v. Melius) will be cited as "05" along with the reference to the Clerk's Index and for 26CIV22000027 (Melius v. Songer/Melius) will be cited as "27" along with the reference to the Clerk's Index. Citations to the trial transcript will be "TT," followed by the page number and line number.

Petitioners/Appellees Miles and Tori Melius will be referred to as "Miles," "Tori," or "the Melius'." Respondent/Appellant Lakota Songer will be referred to as "Lakota." The minor child will be referred to by her initials "B.M."

JURISDICTIONAL STATEMENT

Notice of Appeal was timely filed on February 23, 2024 per SDCL §15-26A-3(2),(4) and §15-26A-7. This appeal is from a final Order, the Circuit Court's "Order After Custody Trial" dated January 11, 2024, as well as the trial courts "Findings of Fact and Conclusions of Law."

STATEMENT OF LEGAL ISSUES

1. Whether the trial court abused its discretion when it ordered alternating weekends and alternating holiday visitation and regular phone calls for the

previous guardians after finding Appellant Father Lakota Songer a fit parent and granting him sole legal and physical custody.

Held: The circuit court entered Findings and Conclusions, and an Order, granting nonparents Miles and Tori Melius substantial visitation based on a "best interest" standard.

SDCL §25-5-29
25 U.S.C. §1902
Clough v. Nez, 2008 SD 125, ¶9

2. Whether the trial court abused its discretion when it ordered Appellant Father to continue to utilize the previous guardian's family member's unlicensed daycare for child care.

Held: The circuit court entered Findings and Conclusions, and an Order, ordering Lakota Songer to attend the home daycare of Tori Melius' mother.

SDCL §25-5-7.1 and 7.2
Van Driel v. Van Driel, 525 N.W.2d 37

3. Whether the trial court abused its discretion when it ordered Appellant Father Lakota Songer to pay attorney fees for the delay in the trial for not making known his tribal affiliation when the Indian Child Welfare Act places the burden of notification on the party seeking the involuntary placement and the court.

Held: The circuit court entered Findings and Conclusions, and an Order, ordering Lakota Songer to pay attorney fees for failing to make his tribal affiliation, and the potential for the Indian Child Welfare Act to apply to this case, to the trial court.

25 U.S.C. §1911(c)

STANDARD OF REVIEW

An appeal from a circuit court's decision concerning custody of children is scrutinized using an

"abuse of discretion" standard. Evens v. Evens, 2020 SD 62; Shelstad v. Shelstad, 2019 SD 24, ¶20. An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable. Taylor v. Taylor, 2019 SD 27, ¶14.

Regarding Findings of Fact and Conclusions of Law on review, the standard was stated:

> "Findings of Fact, whether based on oral or documentary evidence, may not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Estate of Henderson v. Estate of Henderson, 2012 SD 80, ¶9, 823 NW2d 363, 366 (*quoting* SDCL §15-6-52(a)). "Conclusions of law are reviewed under a de novo standard, 'with no deference to the trial court's conclusions of law." Id. (*quoting* Detmers v. Costner, 2012 SD 35, ¶9, 814 NW2d 146, 149).

Koopman v. City of Edgemont, 2020 SD 37, ¶13.

In State v. Grassrope, 2022 SD 10, this Court stated:

> "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. US Gypsum Co., 333 US 364, 395, 68 S. Ct. 525, 542 (1948) (internal quotation marks omitted).

Grassrope, at ¶7.

STATEMENT OF THE CASE

On or about January 12, 2022, Lakota Songer initiated a paternity action against Cheryl Melius by personal

service. (26CIV22-000005). (05 SR 1, 2,3) After paternity was established, Lakota filed a Motion for Immediate Temporary Custody on April 28, 2022. (05 SR 15). On or about May 27, 2022, Miles and Tori Melius filed and served a Complaint for nonparent custody against both Lakota Songer and Cheryl Melius. (26CIV22-000005). (27 CI 13). On June 7, 2022, a
hearing was held on Lakota Songer's Motion. The trial court also heard the Melius' Motion to Join. (27 CI 16). Cheryl Melius was also present. The trial court consolidated the files and awarded Miles and Tori Melius interim custody and granted Lakota Songer parenting time on a step-up schedule. (05 SR 46).

A custody evaluation was ordered, for which Cheryl declined to participate. On February 24, 2023, Melius' filed a Motion for Ex Parte Emergency Custody. (27 CI 65). After a hearing on March 1, 2023, the trial court denied the motion. (27 CI 91).

On or about June 19, 2023, Erin Nielsen-Ogdahl provided her confidential child custody evaluation and recommendations. She recommended Miles and Tori Melius be granted custody of the minor child.

On July 25, 2023, counsel for Lakota Songer notified the trial court and counsel of the application

of the Indian Child Welfare Act. At the trial court's direction, the parties submitted briefs regarding ICWA. (27 CI 117, 121, 124).

A custody trial was held on August 30 and 31, 2023. The parties submitted closing arguments in writing. (27 CI 242). On October 10, 2023, the trial court issued an oral decision. (27 CI 270). The parties then submitted Findings of Fact and Conclusions of Law. (27 CI 278, 287). The trial court

issued its final Findings of Fact and Conclusions of Law and Order. (27 CI 297). The trial court gave the parties additional time to make an argument concerning the award of attorney fees against Lakota Songer and entered the Order Awarding Attorney Fees on January 29, 2024. (27 CI 351).

Lakota filed his Notice of Appeal on February 23, 2024 (27 CI 358).

STATEMENT OF FACTS

Defendant Cheryl Melius (Cheryl) and Appellant Lakota Songer (Lakota) were in a consensual relationship. (FF 3). Their only child, B.M. was born to Cheryl on October 30, 2021. (FF 3). At the time of B.M.'s birth, the parties were no longer in a relationship. (FF 3).

Lakota resides in Gregory, South Dakota, which is thirty-six (36) miles from Winner and, at the time of trial, worked north of Winner at Jorgenson Land and Cattle. (FF 6).

Lakota is an enrolled member of the Rosebud Sioux Tribe ("the Tribe"), and B.M. is eligible for enrollment in the Tribe. (FF 5). The Indian Child Welfare Act ("ICWA") applies to these proceedings. (FF 5).

Cheryl Melius resides in the Gregory area. Cheryl was present at trial but did not actively participate in the proceedings.

Petitioner Miles Melius is Cheryl Melius' brother, and Tori is Miles' wife. (FF 4). The Melius' reside outside of Winner. (FF 6).

After telling Lakota that he was the father of B.M. and allowing limited contact with her, Cheryl subsequently began withholding contact of B.M. by Lakota.

When B.M. was around two months old, she was diagnosed with failure to thrive while in Cheryl's sole custody and care. (FF 8). The Department of Social Services, Child Protection Services, initiated an abuse and neglect assessment. (FF 8). Cheryl then voluntarily placed B.M. with Melius'. (FF 8). The Department of Social Services (DSS) never commenced formal abuse and neglect proceedings.

DSS was not involved in either of the above-captioned proceedings. (FF 15).

In January of 2022, when B.M. was three months old, Lakota filed a paternity action against Cheryl. (26CIV22-5) and (FF 9). Lakota's paternity was established in April of 2022. (FF 9).

The Melius' initially allowed some contact between Lakota and B.M., but they subsequently withheld contact. (FF 10). Lakota made two contacts with Tori Melius directly after one of the visits between Lakota and B.M. Tori did not respond to either of Lakota's contacts. At the hearing, Tori testified that she was terrified of losing B.M. (FF 10). Tori made a conscious effort to deny Lakota time with B.M. (TT 213:12).

At trial, Tori testified it was her and Miles' plan from the beginning to maintain custody of Brynlee. (TT 214:18-20).

Q. Before you even knew how committed or not Lakota would be, you'd already made up your mind that you were going to try to keep [B.M.] - - custody of [B.M.]; right?

A. Because I - -

Q. That's yes or no.

A. Yes.

Q. Okay. Now I'm going to ask you why. Why?

A. Why? Because of back then it was the level of care that I feared she was going to receive by him and his family.

Q. Because of the standard of care?

A. Yes.

(TT 214: 21-215:9).

On April 28, 2022, after receiving official determination of paternity, Lakota filed a Motion for Immediate Temporary Custody. (FF 11). (CI 15).

On May 27, 2022, Melius' filed a third-party custody action against Lakota and Cheryl (26CIV22-27) and a Motion to Join for Custody and to Order Custody Evaluation. 26CIV22-5. (FF 12) (CI 19).

On June 7, 2022, a hearing was held on Lakota's Motion for Immediate Temporary Custody and Melius' Motion to Join. (FF 13). (CI 15).

The trial court allowed Melius' to intervene in the custody matter. B.M. failed to thrive under Cheryl's care and there had been a substantial improvement in B.M.'s well-being since being in Melius' care. (FF 17).

Both Melius' and Cheryl had denied contact between B.M. and Lakota, through no fault of Lakota. (FF 17). Lakota had consistently pursued a parental relationship with B.M. (FF 65). The only time Lakota did not have

contact with B.M. was because of the actions of Cheryl or the Melius'. (FF 65).

In its bench decision, the trial court stated:

> "And so since the child has been in Tori Melius' custody, she did initially make contact and offer for this - - for Lakota to have visits with the child. . . She refused to answer two of his inquiries and yet there was some implication that had he kept asking, that she would have given him visitation. I don't find that to be the case." (CI 51, 5:17-6:2).

At the June 7, 2022, temporary custody hearing, the court granted temporary custody to Melius' and granted Lakota visitation pursuant to a stepped-up visitation schedule. (FF 16).

One of the reasons the court did not place B.M. with Lakota was due to his living situation. Lakota had his mother, Donna Songer (Donna), along with an adult brother, five other children of various ages, and multiple pets living in his home, which created space and safety issues if B.M. were immediately placed in his care. (FF 18).

Donna had recently relocated from Dallas, South Dakota, where she lived with her husband, to care for the five Native American children placed in her care through a kinship placement by the Department of Social Services, Child Protection Services (CPS). (TT 309:5 - 310:5).

The trial court presided over the related CPS case and expressed potential safety concerns as well as knowledge of

a current protection order related to one of the parents of the children. The trial court had entered the protection order between the children in Donna's home and their father. (CI 51, 11:20-24).

The court ordered that no other persons reside in Lakota's home during the pendency of the proceedings to allow Lakota to develop a bond with B.M. during the interim period before the custody trial. (FF 19). Donna and the children, along with Lakota's brother, immediately moved to a separate home in the area.

The June 7, 2022, visitation schedule ultimately resulted in Lakota having parenting time with B.M. every weekend and for two overnights per week on Monday and Wednesday beginning September, 2022. (FF 20). Beginning in September, 2023, Lakota had B.M. in his care for four overnights every week. (CI 51).

Although the Court did not issue a formal order of consolidation of the cases at the time, the trial court ordered consolidation of the files for clarity and completeness of the record as the case concluded. (FF 14).

On February 24, 2023, while the custody evaluation was pending, Melius' brought a Motion for *Ex Parte* Emergency Custody. (FF 22). The motion was based on an affidavit which alleged various issues, including diaper rashes and

other cleanliness concerns; that Lakota had threatened suicide in February of 2023; and that B.M. was primarily in the care of Donna rather than Lakota. (FF 22).

Lakota's former girlfriend, Chelsea Medrano (Medrano), with whom he had just had a child, submitted an affidavit on behalf of Melius' in support of their motion. (FF 23). The motion requested immediate custody with Melius' and supervised visitation by Lakota. (FF 24). A hearing on the motion for *ex parte* custody was held on March 1, 2023. (FF 25). Tori and Medrano testified at the hearing. (FF 25). The court questioned Medrano's credibility at the time of the hearing due, in part, to her Facebook posts only two days earlier praising Lakota as a great father. (FF 26). The court gave little weight to her testimony and affidavit. The court determined that the issues raised in the *ex parte* motion were not emergencies affecting the safety of B.M. and that any issues would need to be further developed through evidence at the custody trial. (FF 27).

On July 6, 2023, Melius' brought a Motion for Contempt due to Lakota removing B.M. from Teri's daycare and having Medrano spend the night with him at times. (FF 29). These issues were heard at the trial. The trial court had ordered Lakota to leave B.M. in daycare with Tori's mother. (CI 49). Lakota later testified he did remove B.M. from the

daycare and that he had Medrano stay with him on a few occasions when B.M. was not in his care. (TT 349:23 - 350:3).

The custody evaluation was subsequently completed. The recommendation by the evaluator, Erin Nielsen Ogdahl (Nielsen Ogdahl), was for Melius' to have legal and physical custody of B.M. and Lakota having only limited contact with her. (FF 28).

On July 25, 2023, three days before the scheduled custody trial, Lakota, through counsel, notified the trial court that she had been advised of Lakota's tribal status. As a result of the late disclosure, the trial was rescheduled to provide proper notice to Rosebud Sioux Tribe under ICWA. (FF 30). Lakota was ordered to provide statutory notice to the Rosebud Sioux Tribe ICWA office, which he did. (CI 135).

The rescheduled custody trial was held on August 30-31, 2023. In addition to the parties and Tori Melius' mother, Melius' called two expert witnesses - custody evaluator, Erin Nielsen Ogdahl (Ogdahl) and ICWA Qualified Expert Witness, Luke Yellow Robe (Yellow Robe). (FF 31). In addition to Lakota and Donna, Lakota called ICWA Qualified Expert, Renee Bear Stops. (FF 35). Lakota also called Nikki Kavanaugh with the Southeast Family Support Program, which

is a part of the Division of Developmental Disabilities. (TT 297).

Both Ogdahl and Yellow Robe gave great weight to Medrano's Affidavit that was submitted with the motion for *ex parte* custody. (FF 31). Melius' did not call Medrano as a witness at the custody trial, nor did they explain her absence. (FF 32).

Yellow Robe's recommendation was unsupported by the record and does not comply with ICWA. (FF 61). Nielsen Ogdahl used the incorrect analysis for the custody evaluation. The trial court found:

Ogdahl's analysis of Lakota's presumptive right to custody was inadequate. In reviewing the entirety of the report and testimony, this Court determines that she evaluated this case as if it was a custody dispute between natural parents and did not fully recognize Lakota's presumptive rights as the natural parent. She gave every benefit of the doubt to the Petitioners even though B.M. had been in Lakota's home four overnights a week since September, 2022. (FF 62).

During cross-examination with Nielsen-Ogdahl, she clearly explained her rationale:

Q. And I think there's several places in the report that says that [B.M.] is doing great; right?

A. Yes. Overall I think that she's doing well.

Q. And you attribute that consistently to Tori and Miles' care; correct?

A. Yes.

Q. When she's been in Lakota's care more than half the time for a year?

A. Correct. (TT 91: 6-14).

Q. Do you understand why it looks like you give Miles and Tori credit for everything good about [B.M.], she's growing like a weed, she's developmentally on target, all this stuff and then when it comes to the diaper rash, for example, or whatever else, that's all on Lakota. Do you see why that's how I look at this report?

A. Yes, I hear your point. (TT 128:24 - 129:6).

Ogdahl and Yellow Robe gave serious weight to Medrano's Affidavit, even though she did not testify at trial, and they gave little credit to Lakota as a parent even though B.M. had spent more than half the time with Lakota since September of 2022. (FF 60). Yellow Robe was a qualified expert witness under ICWA and recommended not only that Melius' receive custody, but that Melius' should unilaterally decide what type of contact, if any, Lakota should have with B.M. (FF 61). The trial court found that

this recommendation was unsupported by the record and did not comply with ICWA. (FF 61).

Melius' presented evidence about B.M.'s diaper rashes in Lakota's care and asserted Lakota does not timely change her diapers. (FF 33). Teri, B.M.'s daycare provider, testified the diaper rashes were among the worst she had seen. (FF 34). One rash was serious enough it resulted in a trip to the emergency room. (FF 34).

There was also testimony, however, that B.M. had sensitive skin making her more susceptible to diaper rashes. (FF 36). Moreover, the diaper rashes significantly improved between March of 2023 and August of 2023. (FF 37). During this period, B.M. was in Lakota's custody at least four nights a week, demonstrating to the trial court that Lakota was capable of addressing the diaper rashes. (FF 38). Lakota also testified he was reluctant to change B.M.'s diapers when he first cared for her alone. (FF 35). Lakota's Qualified Expert Witness, Renee Bear Stops, acknowledged the diaper rashes were a concern. (FF 35).

Melius' alleged that Lakota threatened to kill himself in February 2023 during a dispute with Medrano. (FF 43). Lakota admitted to law enforcement that he had gotten into a dispute with Medrano and that he made the suicidal statement, but he denied being suicidal. (FF 43). Lakota

"had a bad day" in February of 2023, but there is no other credible evidence of suicidal or violent tendencies toward the child. (FF 44). Lakota had been attending counseling. (FF 44).

Lakota removed B.M. from daycare in May of 2023, in disobedience of the trial court's order, after Teri told him she was going to start charging him. (FF 45). After the abrupt removal from her long-term daycare, Tori testified B.M. started acting out, hitting, eating her diaper and having other behaviors. (FF 46). Melius' also alleged that Donna is providing all the care for B.M. rather than Lakota, that there are a number of people living in her home and that Lakota did not have a bed for B.M. to sleep in. (FF 47). B.M. was not primarily in Donna's care. (FF 48).

Melius' further alleged that Lakota did not have a proper bed for B.M., that his home was not properly child-proofed, and that he does not feed B.M. nutritious food but, rather, feeds her foods like pizza. (FF 49). Lakota provides B.M. proper food and cooks for her. (FF 50). Lakota has his own home and has maintained employment. (FF 51). Lakota had been using a Pack 'N Play for B.M. to sleep in but had reconditioned a crib into a toddler bed by the time of trial. (FF 51).

Lakota's home was not sufficiently child proofed when the custody evaluator was present, and there was some evidence Lakota was not utilizing the correct car seat. (FF 52). However, Lakota had made progress in regard to safety issues regarding the child, and there was no evidence of an immediate danger to the child. (FF 53).

Melius' also alleged that B.M. was regularly filthy dirty when returned to them by Lakota. (FF 55). However, the pictures presented by Melius' to support this allegation, which presumably are the worst Petitioners could find, did not show an extreme level of uncleanliness. (FF 56).

Lakota testified that the Melius' did not support the relationship between him and B.M., that they sought reasons to complain about him and his parenting skills and that they were exaggerating the issues.

Lakota is buying a four-bedroom house on a contract for deed. (TT 348:13-18). At the time of trial, Lakota was in counseling. (TT 325:23-25). He has been consistently employed. Lakota does not abuse substances and he has limited criminal history. (FF 54).(TT 353:4-354:10). Lakota cooks meals for B.M. She likes green peppers, cucumbers, bananas and apples. (TT 357:21-22).

Lakota described B.M. as "beautiful, loving, happy little girl." (TT 360:19-20). They "read books, we play, go to the park. She loves the book thing that I have on my phone where it sounds out the vowels to her of each word and she would try but won't get it exactly since she's still young." (TT 361:9-12). She has a toy kitchen, she finger paints, they go to the park and play on the trampoline. (TT 361:16-22).

Nielsen-Ogdahl testified there are no developmental or intellectual concerns regarding B.M. (TT 87:1). She was "doing well", a healthy child who has "come a long way from the start" when she was diagnosed with failure to thrive. (TT 87:7-12). She is "growing like a weed." (TT 87:10-12).

Bear Stops, Lakota's ICWA expert, was a credible witness, and although she acknowledged some concerns, her opinion remained that Lakota should be granted custody of B.M. and that such custody would not result in serious emotional and physical damage to B.M. (FF 63). Bear Stops testified that issues raised regarding child proofing, a bed, cleanliness, and diaper rashes could be remedied, and that Native American culture supported Lakota reaching out to his family and the community for support. (FF 64). Lakota and his mother had sought out resources to assist in remedying the concerns. (FF 64).

Kavanaugh had been working with Lakota since 2014 as a family support person. (TT 298:2). Kavanaugh quantified Lakota's disability as "mild" and testified he is "at the upper end of the range" of people who qualify for the program. (TT 300:13-17). Through Kavanaugh, Lakota would be able to receive support or parenting skills, diet and nutrition, cooking skills and other independent living skills. (TT 301:6-12).

Lakota has consistently attempted to establish a relationship with B.M., and the only time he has been out of contact with her was through the actions of Cheryl or the Melius' before the June 2022 hearing. (FF 65).

B.M. is bonded to Lakota. (FF 66). She refers to him as "dada" and is excited to see him at the exchanges. (FF 66). The trial court found that B.M. is also bonded to the Melius', and some ongoing contact with them is in B.M.'s best interests. (FF 67).

Lakota and Donna testified about the family's connection to Native American culture as well as cultural activities in which they have been involved. (FF 68).

The Melius' met their initial burden to seek custody of B.M. because they had served as primary caretakers of her and they had formed a significant bond. (CL 8). SDCL §25-5-29. The Melius' did not rebut Lakota's presumptive

right to custody after considering the statutory factors. (CL 9). SDCL §25-5-29. No extraordinary circumstances exist to rebut Lakota's presumption of the right to custody. SDCL §25-5-30.

Under ICWA, the Melius' failed to show by clear and convincing evidence that continued custody of the child by Lakota is likely to result in serious emotional or physical damage to B.M. (CL 14, 15, 18, 19).

Lakota's actions and growing maturity throughout these proceedings show a bond between him and B.M. and a willingness and effort to be her parent. (FF 57). While Lakota may have a lower overall IQ and lower socioeconomic status than Melius', these issues do not prevent him from being able to adequately parent B.M.(FF 58).

While Lakota is at times not a perfect parent, after consideration of the evidence as a whole, B.M. should be placed in Lakota's sole legal and physical custody. (FF 69).

ARGUMENT

ISSUE 1: Whether the trial court abused its discretion when it ordered alternating weekends and alternating holiday visitation and regular phone calls for the previous guardians after finding Appellant Father Lakota Songer a fit parent and granting him sole legal and physical custody.

The Melius' filed a nonparent custody complaint for custody/guardianship of B.M. against parents, Lakota Songer and Cheryl Melius. Due to Lakota's status as an enrolled member of the Rosebud Sioux Tribe, the trial court was required to consider both SDCL §25-5-29 *et. seq.*, the nonparent custody statutes, and 25 USC §1902, the federal Indian Child Welfare Act (ICWA). The trial court concluded that Melius' failed to meet their burden for nonparent custody under both the statutory scheme and federal law. Despite concluding that Melius' failed to meet their burden, the trial court erroneously granted Melius' request for substantial visitation with B.M.

Nonparent Visitation under SDCL §25-5

Under South Dakota law, for a trial court to consider granting custody to a nonparent, the nonparent must first show she has served as primary caretaker, she is closely bonded with the child as a parental figure or that she has formed a significant and substantial bond with the child. SDCL §25-5-29. If a nonparent proves one of those factors, she must then rebut a parent's presumptive, constitutionally-protected, right to custody. To rebut that presumption, the nonparent must prove unfitness or gross misconduct of the parents or the existence of extraordinary circumstances under SDCL §25-5-30.

Because of a parent's superior right to parent his child, it is only when the nonparent meets one of these requirements that the trial court considers the best interest of the child under the Fuerstenburg factors. In this case, since the trial court did not find unfitness, gross misconduct or the existence of extraordinary circumstances, the trial court was not required to consider the Fuestenburg "best interest" factors.

The trial court concluded the Melius' met their preliminary burden, which is outlined in the first sentence of SDCL §25-5-29, to file a nonparent custody action, because they proved they were closely bonded to B.M. and had formed a significant and substantial relationship with her. (CL 17). This burden is the initial hurdle for nonparents; it simply opens the door for nonparents to initiate a new action or intervene in a custody action.

However, the trial court found and concluded the Melius' failed to rebut the presumption of Lakota's presumptive right to custody. The trial court found Lakota to be a fit parent, found that gross misconduct had not been committed and found that no extraordinary circumstances existed to rebut Lakota's parental custody presumption in the following Conclusions of Law:

19. Petitioners have also failed to establish, by clear and convincing evidence, that Lakota abandoned or persistently neglected the child, forfeited his parental rights to Cheryl or Petitioners, or abdicated his parental responsibilities. (CL 19).

20. Petitioners have failed to prove, by clear and convincing evidence, any extraordinary circumstances under SDCL 25-5-30.

Because of these conclusions, the nonparent custody inquiry ended and Lakota was granted legal and physical custody of B.M. The trial court did not, and could not, consider the "best interest" factors under Fuerstenburg.

Nonparent Visitation under ICWA

The placement of B.M. in the home of Miles and Tori Melius is a "foster care placement" under ICWA. (25 USC 1903)(1)(i)). (CL 13).

13. This third-party custody proceeding best meets the definition of a foster care placement under ICWA (25USC §1903(1)(i). *See In re: Guardianship of Elíza W.*, 938 NW2d 307 (Neb. 2020). This definition of foster care placement in ICWA references any action removing a child from her parent for temporary custody in the house of a guardian or conservator, where the parent cannot have the child returned on demand. 25 USC §1903(1)(i). In South Dakota, there are no substantive differences between a third-party child "custody" case and a third party "guardianship" over a child. *See* SDCL 25-5-34; SDCL §29a-5-106 and 106.1; *In re: Guardianship of S.M.N.*, 2010 SD 31. It would be an absurd result, and against the Congressional intention behind ICWA, to remove ICWA protections from Indian children and parents simply because of the label attached to the proceeding.

Under ICWA, a nonparent seeking placement of a child must prove by clear and convincing evidence that continued custody of the child by the parent would result in serious physical or emotional detriment to the child. (25 U.S.C. §1912(f)).

The trial court correctly concluded that placement of B.M would not result in serious physical or emotional detriment to the child in Conclusion of Law 18:

> 18. However, the Petitioners have failed to present clear and convincing evidence that continued custody by Lakota would result in serious emotional and physical damage to [B.M.].

Lakota asserts that by this legal conclusion, only he has the authority to determine whether third parties may exercise visitation with B.M. By the trial court granting the Melius' substantial visitation with B.M., it removes Lakota's decision-making authority concerning with whom B.M. has contact, her movements and other important decisions parents make regarding their children during the time she is under the care of others.

Nonparent Visitation

Based on the above conclusions, the trial court erred when it ordered substantial and regular visitation between B.M. and the Melius' based on a "best interest" standard under state or federal law. It was error for the trial

court to even consider B.M.'s "best interests" under state law. A consideration of best interest should not have entered the trial court's equation under the circumstances of this case. The Melius' did not overcome the burden required for consideration of what is in B.M.'s best interest. Having found that Lakota is a fit parent, that gross misconduct had not been committed by him and that extraordinary circumstances did not exist to place custody of B.M. with a nonparent, the trial court is limited in its interference in Lakota's custodial decisions concerning B.M., including with whom B.M. has an ongoing relationship.

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme Court]." Troxel v. Granville, 530 U.S. 57, at 65, 120 S.Ct. 2054 at 2060, 147 L.Ed.2d 49 (2000); Howlett v. Stellingwerf, 2018 SD 19, ¶13. "Natural parents have a fundamental right to the care, custody, and control of their children." Veldheer v. Peterson, 2012 S.D. 86, ¶ 19, 824 NW2d at 93.

The Due Process Clause of the United States Constitution protects parents' rights to generally raise their children as they wish. Clough v. Nez, 2008 SD 125,

¶9, *citing* Medearis v. Whiting, 2005 SD 42, ¶17, 695 N.W.2d 226, 230-31 (citing Troxel v. Granville, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)) (noting, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"). Id.

In Clough, this Court concluded "[u]ltimately, in order to grant a nonparent visitation rights with a minor child over the objections of a parent, a clear showing of gross misconduct, unfitness, or other extraordinary circumstances affecting the welfare of the child is required." Clough, *citing* D.G. v. D.M.K., 1996 SD 144, ¶46, 557 N.W.2d 235, 243 (citing Cooper v. Merkel, 470 N.W.2d 253, 255-56 (S.D.1991)).

The factors in Clough for nonparent visitation are the same factors required for nonparent custody. In this case, because the trial court concluded that Melius' did not overcome the required burden under SDCL §§25-5-29 and 30, the trial court had no authority to order visitation between the Melius' and B.M. "[A] court may not presume that visitation with a nonparent is in the best interests of a fit parent's child." Id. at ¶18, 695 N.W.2d at 231 (citing Troxel, 530 U.S. at 69, 120 S.Ct. at 2062).

Further, the burden of disproving that a nonparent's visitation would be in the best interests of the child may not be placed upon a fit parent. Id.

Other than the above authority, no other authority is in place under which the trial court may order nonparent visitation to the Melius'. The only other visitation statute in South Dakota for nonparents is SDCL §25-4-52, the grandparent visitation statute.

For argument purposes only, in comparing the requirements of SDCL §25-4-52 with the trial court's consideration of nonparent visitation ordered in this case, the trial court did not consider the necessary factors.

SDCL §25-4-52, the grandparent visitation statute, reads in part:

> The circuit court may grant grandparents reasonable rights of visitation with their grandchild, with or without petition by the grandparents, if the visitation is in the best interests of the grandchild and:
>
> (1) If the visitation will not significantly interfere with the parent- child relationship; or
>
> (2) If the parent or custodian of the grandchild has denied or prevented the grandparent reasonable opportunity to visit the grandchild.

Related to the factors in the grandparent visitation statute, it is important to note that the trial court found the Melius' had taken steps to undermine Lakota's parental

rights. This conduct is in direct contravention of §25-4-52(1) because the Melius' did not support Lakota's role as B.M.'s father. Tori Melius acknowledged denying Lakota time with B.M. because she was "terrified" of losing her and they continued to seek out minor and/or fabricated problems such as the issue with Lakota feeding B.M. pizza.

Lakota rejects that SDCL §25-4-52 should extend to nonparents other than grandparents; he simply points out that, even assuming this statute was extended to other nonparents, the standard is never simply the "best interest" standard the trial court utilized in this case.

At trial, Lakota expressed understanding about the importance of a continuing relationship between B.M. and the Melius' despite the Melius' conduct. However, the trial court had no authority to make a comprehensive visitation schedule; the details of B.M.'s interaction with others should be left to the sole discretion of Lakota.

This Court should find the circuit court's conclusion to award the Melius' substantial visitation rights was unjustified pursuant to both state and federal law.

ISSUE II: Whether the trial court abused its discretion when it ordered Appellant Father to continue to utilize the previous guardian's family member's unlicensed daycare for child care.

Because the issue of child care was not a dispute between two parents, and because Lakota was granted legal and physical custody of B.M., the trial court had no authority to grant the Melius' request for B.M. to continue daycare at Tori Melius' mother's home daycare.

Lakota resides approximately thirty miles from Winner, where the daycare is located. As sole custodian of B.M., Lakota has a right to make day to day decisions related to her. Even if this would have been a contest between two parents, without an order to the contrary, Lakota would have a right to make the decision about B.M.'s childcare.

> SDCL §25-5-7.2.
> Residential parent to make routine decisions concerning child.
>
> During the time a child, over whom the court has ordered joint legal custody to both parents, resides with either parent, that parent shall decide all routine matters concerning the child.
>
> In a custody matter where two parents have joint custody, either joint legal or joint physical custody, if the parties cannot agree, a court may grant one parent the decision-making responsibility for certain matters.
>
> SDCL §25-5-7.1.
>
> Joint legal custody order--Factors for court's consideration--Joint physical custody.
>
> In any custody dispute between parents, the court may order joint legal custody so that both parents retain full parental rights and responsibilities with respect to their child and so that both parents must confer on, and participate in, major decisions affecting the

> welfare of the child. In ordering joint legal custody, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those aspects between the parties based on the best interest of the child. If it appears to the court to be in the best interest of the child, the court may order, or the parties may agree, how any such responsibility shall be divided. Such areas of responsibility may include the child's primary physical residence, child care, education, extracurricular activities, medical and dental care, religious instruction, the child's use of motor vehicles, and any other responsibilities which the court finds unique to a particular family or in the best interest of the child. If the court awards joint legal custody, it may also order joint physical custody in such proportions as are in the best interests of the child, notwithstanding the objection of either parent.

This Court has recognized that "[e]ssentially, joint legal custody is designed to ensure that major decisions affecting a child's welfare shall be considered jointly by the parents even after the breakup of the family." Van Driel v. Van Driel, 525 N.W.2d 37, 40 (S.D.1994). The Melius' are not the parents and they, nor the trial court, has the authority to determine where B.M. attends daycare.

In this case, because the trial court concluded Lakota was a fit parent, qualified to be B.M.'s sole legal and physical custodian, it was an abuse of discretion for the trial court to direct where B.M. attends daycare.

ISSUE 3: Whether the trial court abused its discretion when it ordered Appellant Father Lakota Songer to pay attorney fees for the delay in the trial for not making known his tribal affiliation when the Indian

Child Welfare Act places the burden of notification on the party seeking the involuntary placement and the court.

The trial court correctly concluded the application of ICWA to this case. Just days before trial, Lakota, through counsel, advised the trial court of the probable relevance of ICWA. As a result of the late notice, the trial court awarded the Melius' attorney fees, in addition for attorney fees for removing B.M. from Tori's mother's daycare. The trial court concluded:

> 25. Lakota should be responsible for reasonable attorney fees for the contempt action as well as attorney's fees directly tied to the delay in advising the Court and counsel of his tribal enrollment, thereby causing the trial to be postponed.

The trial court accurately opined about Lakota's level of functioning:

> 58. Lakota may have a lower overall IQ and lower socioeconomic status than the Petitioners. However, these issues do not prevent him from being able to adequately parent Brynlee. (FF 58).

Lakota, as a lay person with a "lower overall IQ an lower socioeconomic status" cannot be expected to be aware of a federal law related to his heritage. The fact the issue incidentally surfaced a few days before trial between Lakota and his counsel cannot be laid at the feet of Lakota, especially under the following circumstances.

The trial court had placed Native American children in a "kinship" placement with Lakota's mother, Donna Songer.

At the initial hearing, after paternity was established, when the trial court was issuing its bench decision on prospective parenting time for Lakota, stated:

> "Now, this Court - I can't just ignore things that are part of public record. I am aware because I entered the order that there is a protection order in place between those children, a lot of those children living in your home and the father. If there is any violation of that protection order, you are going to inform your attorney and your attorney is going to inform the attorneys for the other parties because that is a dangerous situation that they have a right to know. Do you understand?" (SR 51:11-12).

25 U.S.C. §1912(a) reads, in part:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, **the party seeking the foster care placement** of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention

Miles and Tori Melius, as well as the trial court, knew, or should have known, that Lakota Songer is a Native American male, who was potentially an enrolled member of the Rosebud Sioux Tribe. Therefore, through counsel, they should have considered that ICWA applied to this case. When initiating their nonparent custody case, it was incumbent upon the Melius' to consider whether ICWA applied and take the necessary steps to either confirm or refute this consideration. Arguably, when initiating any case involving the removal of children from a parent's custody in South

Dakota, ICWA should be considered. In this case, the area in which the parties reside, should also prompt parties, through counsel, to consider whether ICWA applies to the case. The trial court was aware of the kinship placement of the Native American children in Donna Songer's home.

To place the burden of making known Lakota's tribal affiliation on him is contrary to federal law and it was an abuse of discretion for the trial court to award attorney fees, essentially financially penalizing Lakota for an obligation which was the Melius' obligation.

CONCLUSION

Lakota Songer respectfully requests that this Court grant his appeal in that it direct the circuit court to modify it's Order After Custody Trial by removing any orders related to the visitation rights of Miles and Tori Melius and related to directing him concerning child care services. Lakota further respectfully requests this Court direct the circuit court to reduce its award against him for fees related to the Indian Child Welfare Act notification in the Order Awarding Attorney Fees.

WAIVER OF ORAL ARGUMENT

Unless the Court desires Oral Argument, Lakota Songer waives his right to the same.

DATED this 1st day of July 2024.

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APPENDIX

CERTIFICATE OF COMPLIANCE

The undersigned, RoseAnn Wendell, attorney for the Appellant in the above-captioned matter, hereby certifies pursuant to SDCL 15-26A-66(b)(4) that the Appellant's Brief was completed in Courier New typeface, 12 point, and according to the word-processing system used to prepare the brief, Microsoft Word 365, it contained 7,466 words.

DATED this 1st day of July 2024.

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CERTIFICATE OF FILING

I, RoseAnn Wendell certify that I have filed the Appellant's Brief and transmitted those to the South Dakota Supreme Court electronically and with electronic service via email upon the following on this the 8th day of July 2024:

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CERTIFICATE OF SERVICE

The undersigned hereby certified that two copies of the Appellant's Brief was delivered to the Appellee's counsel of record by enclosing the same in an envelope, securely sealed and mailed to the address listed below:

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF GREGORY	)	SIXTH JUDICIAL CIRCUIT

MILES MELIUS and TORI MELIUS, Petitioners, v. LAKOTA SONGER and CHERYL MELIUS, Respondents.	26CIV22-27 26CIV22-5 **FINDINGS OF FACT and CONCLUSIONS OF LAW ON MOTION FOR CUSTODY AND REQUEST FOR ATTORNEY'S FEES**

THIS MATTER came on for hearing on August 30-31, 2023, at the Gregory County Courthouse in Burke, South Dakota. The Petitioners, Miles and Tori Melius ("the Petitioners"), were present in person and with their attorney, Dava Wermers. The Defendant, Lakota Songer ("Lakota"), appeared in person and with his attorney, RoseAnn Wendell. The Defendant, Cheryl Melius ("Cheryl"), appeared pro se and was aligned with the Petitioners but opted not to participate in the hearing.

The parties submitted closing arguments in writing, and on October 10, 2023, the Court issued its oral findings of fact and conclusions of law and order, and allowed the parties to submit their written findings, conclusions, and proposed orders. The Court, after fully considering the evidence presented at hearing and the parties' written submission and findings and conclusions, hereby issues the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. The Court's oral findings, conclusions, and order issued on the record on October 10, 2023, are incorporated herein as if set forth in full. If there is any inconsistency between this Court's oral and written findings, conclusions, and order, the written document shall control.

2. Any Finding of Fact more properly designated as a Conclusion of Law shall be so designated, and vice versa.

3. Cheryl and Lakota were in a consensual relationship, and Brynlee Melius ("Brynlee") was born to Cheryl on October 30, 2021. At the time of Brynlee's birth, Cheryl was no longer in a relationship with Lakota.

4. Petitioner Miles Melius is Cheryl's brother, and Tori is Miles' wife.

5. Lakota is an enrolled member of the Rosebud Sioux Tribe ("the Tribe"), and Brynlee is eligible for enrollment in the Tribe. The Indian Child Welfare Act ("ICWA") applies to these proceedings.

6. Lakota resides in Burke, South Dakota, which is thirty-six (36) miles from Winner but works north of Winner at Jorgenson Land and Cattle. The Petitioners reside outside of Winner.

7. After telling Lakota that he was the father of Brynlee and allowing limited contact with her, Cheryl subsequently began withholding contact of Brynlee by Lakota.

8. When Brynlee was around two months old, she was diagnosed with failure to thrive while in Cheryl's sole custody and care. The Department of Social Services, Child Protection Services, initiated an abuse and neglect assessment. Cheryl then placed Brynlee with the Petitioners.

9. In January of 2022, Lakota filed a paternity action against Cheryl (26CIV22-5). Lakota's paternity was established in April of 2022.

10. Although Petitioners allowed some initial contact between Lakota and Brynlee, they subsequently withheld contact. Tori testified that she was terrified of losing Brynlee.

11. On April 28, 2022, Lakota filed a Motion for Immediate Temporary Custody.

12. On May 27, 2022, the Petitioners filed a third-party custody action against Lakota and Cheryl (26CIV22-27) and a motion to intervene in 26CIV22-5.

13. On June 7, 2022, a hearing was held on Lakota's motion for temporary custody and the Petitioners' motion to intervene.

14. The Court allowed the Petitioners to intervene in 26CIV22-5. Although the Court did not issue a formal order of consolidation of 26CIV22-27 and 22-5, the cases have been consolidated as a practical matter. Various pleadings and orders regarding custody and visitation of Brynlee have been filed in either file, and the Court orders consolidation of the files for clarity and completeness of the record.

15. Abuse and neglect proceedings were never commenced, and the Department of Social Services was not involved in either of the above-captioned proceedings.

16. At the June 7, 2022, temporary custody hearing, the Court granted temporary custody to the Petitioners and granted Lakota visitation pursuant to a stepped-up visitation schedule.

17. The Court determined that Brynlee failed to thrive under Cheryl's care and that there had been a substantial improvement in Brynlee's well-being since being in the Petitioners' care. The Court further determined, however, that both the Petitioners and Cheryl had denied contact between Brynlee and Lakota, through no fault of Lakota's.

18. However, the Court also found that Lakota had his mother, adult brother, five other children of various ages, and multiple pets living in his home, which created space and safety issues if Brynlee were immediately placed in his care.

19. The Court ordered that other persons were not to live in Lakota's home during the pendency of the proceedings to allow Lakota to develop a bond with Brynlee during the interim period before the custody trial.

20. The June 7, 2022, visitation schedule ultimately resulted in Lakota having parenting time with Brynlee every weekend and for two overnights per week on Monday and Wednesday. Beginning in September of 2022, Lakota had Brynlee in his care four overnights a week.

21. Lakota was to return Brynlee to daycare at the home of Teri Tracy ("Teri"), who is Tori's mother.

22. On February 24, 2023, while the custody evaluation was pending, the Petitioners brought a Motion for Ex Parte Emergency Custody. The motion was based on an affidavit which alleged various concerns, including diaper rashes and other cleanliness concerns; that Lakota had threatened suicide in February of 2023; and that Brynlee was primarily in the care of Donna rather than Lakota.

23. Lakota's former girlfriend, Chelsea Medrano ("Medrano"), with whom he had just had a child, submitted an affidavit on behalf of the Petitioners in support of their motion.

24. The motion requested immediate custody with Petitioners and supervised visitation by Lakota.

25. A hearing on the motion for ex parte custody was held on March 1, 2023, with Lakota and his counsel present. Tori and Medrano testified at the hearing. No one ordered a transcript of that hearing.

26. The Court questioned Medrano's credibility at the time of the motions hearing due in part to her Facebook posts only two days earlier praising Lakota as a great father. The Court gave little weight to her testimony and affidavit.

27. The Court determined that the issues raised at the ex parte motions hearing were not emergencies affecting the safety of Brynlee and that any issues would need to be further developed through evidence at the custody trial.

28. The custody evaluation was subsequently completed and recommended that the Petitioners have legal and physical custody of Brynlee, with Lakota having only limited contact with her. It also recommended that Lakota have a parental capacity evaluation and parenting classes.

29. On July 6, 2023, the Petitioners brought a Motion for Contempt due to Lakota removing Brynlee from Teri's daycare and having Medrano spend the night with him at times.

30. Lakota, through counsel, did not disclose his tribal status to the Petitioners until July 25, 2023, which was three days before the first scheduled custody trial date. As a result of the late disclosure, the trial had to be rescheduled to provide proper notice to the Tribe under ICWA.

31. At the rescheduled custody trial on August 30-31, 2023, custody evaluator Erin Nielsen Ogdahl ("Ogdahl") and ICWA Qualified Expert Witness, Luke Yellow Robe, ("Yellow Robe") both gave great weight to Medrano's affidavit submitted before the motion for ex parte custody.

32. Petitioners did not call Medrano as a witness at the custody trial, nor did they explain her absence.

33. At trial, the Petitioners presented evidence about Brynlee's diaper rashes in Lakota's care and asserted Lakota does not timely change her diapers.

34. Teri, Brynlee's daycare provider, testified the diaper rashes were amongst the worst she had seen. One rash was serious enough it resulted in a trip to the emergency room.

35. All parties, including Lakota's Qualified Expert Witness, Renee Bear Stops, acknowledged that the diaper rashes were a concern, and Lakota testified that he was reluctant to change Brynlee's diapers when he first cared for her alone.

36. There was also testimony, however, that Brynlee had sensitive skin making her more susceptible to diaper rashes.

37. Moreover, the diaper rashes significantly improved between March of 2023 and August of 2023. During this period, Brynlee was in Lakota's custody at least four nights a week, demonstrating to the Court that Lakota was capable of addressing the diaper rashes.

38. In August of 2022, Donna and Lakota took Brynlee to the emergency room with a concern she had been sexually assaulted. Tori was called to the hospital because she was the temporary guardian and had to consent to any treatment. Donna and Lakota were asked to leave the hospital, and Brynlee was released to Tori.

39. At the hospital, the concern about sexual assault was alleviated but Brynlee did have a high fever. Donna and Lakota had a difficult time articulating what medications Brynlee had been given for the fever.

40. Donna and Lakota are overly sensitive about sexual abuse based on some family history, as well as Donna's mistrust of Miles and Tori Melius. Donna and Lakota overreacted in taking Brynlee to the hospital for that issue and should have advised hospital staff of Brynlee's fever. There was no evidence of actual physical or sexual abuse of Brynlee.

41. There was also evidence that Brynlee had lice at one point, which was treated. There was also evidence that at one point Brynlee was in a car seat which did not match her age.

42. Lakota admitted that he had Medrano stay overnight in violation of the Court's June 2022 order.

43. The Petitioners alleged that Lakota threatened to kill himself in February 2023 during a dispute with Medrano. Lakota admitted to law enforcement that he had gotten into a dispute with Medrano and that he made the suicidal statement, but he denied being suicidal.

44. It is clear Lakota had a bad day in February of 2023, but there is no other credible evidence of suicidal or violent tendencies toward the child. Lakota also testified that he is obtaining counseling.

45. Lakota removed Brynlee from daycare in May of 2023, in disobedience of the Court's order, after Teri told him she was going to start charging him.

46. After the abrupt removal from her long-term daycare, Brynlee started acting out, hitting, eating her diaper and having other behaviors.

47. The Petitioners also alleged that Donna is providing all the care for Brynlee, that there are a number of people living in her home and that there is no bed for Brynlee to sleep in.

48. Based upon the evidence presented, the Court finds that Brynlee is not primarily in Donna's care.

49. Petitioners further alleged that Lakota did not have a proper bed for Brynlee, that his home was not properly child-proofed, and that he does not feed Brynlee nutritious food but, rather, feeds her foods like pizza.

50. Lakota provides Brynlee proper food and cooks for her. Brynlee's previous physical health concerns, specifically failure to thrive, have improved since she has been out of Cheryl's custody.

51. Lakota has his own home and has maintained employment. Lakota was using a Pack 'N Play but had reconditioned a crib into a toddler bed by the time of trial.

52. Lakota's home was not sufficiently child proofed when the custody evaluator was present, and there is some evidence Lakota was not utilizing the correct car seat.

53. However, Lakota has made progress in regard to safety issues regarding the child, and there was no evidence of an immediate danger to the child.

54. There is no evidence Lakota abuses substances, and he has limited criminal history.

55. The Petitioners also alleged that Brynlee was regularly filthy dirty when returned to them by Lakota.

56. The pictures presented by the Petitioners to support this allegation, which presumably are the worst Petitioners could find, do not show an extreme level of uncleanliness.

57. Lakota's actions and growing maturity throughout these proceedings show a bond between him and Brynlee and a willingness and effort to be her parent.

58. Lakota may have a lower overall IQ and lower socioeconomic status than the Petitioners. However, these issues do not prevent him from being able to adequately parent Brynlee.

59. The Petitioners provided Lakota with a feeding schedule and assisted in providing consistent daycare for Brynlee and assistance with a car seat.

60. Ogdahl and Yellow Robe gave serious weight to Medrano's Affidavit, even though she did not testify at trial, and they gave little credit to Lakota as a parent even though Brynlee had spent more than half the time with Lakota since September of 2022.

61. Yellow Robe was a qualified expert witness under ICWA and recommended not only that the Petitioners receive custody, but that the Petitioners should unilaterally decide what type of contact, if any, Lakota should have with Brynlee. This recommendation is unsupported by the record and does not comply with ICWA.[1]

[1] Allowing the Petitioners to cut off all contact between Brynlee and Lakota would in effect be a termination of parental rights, which would require proof beyond a reasonable doubt that continued custody of Brynlee by

62. Ogdahl's analysis of Lakota's presumptive right to custody was inadequate. In reviewing the entirety of her report and testimony, this Court determines that she evaluated this case as if it was a custody dispute between natural parents and did not fully recognize Lakota's presumptive rights as the natural parent. She gave every benefit of the doubt to the Petitioners.

63. Bear Stops was a credible witness, and although she acknowledged some concerns, her opinion remained that Lakota should be granted custody of Brynlee and that such custody would not result in serious emotional and physical damage to Brynlee.

64. Bear Stops testified that issues raised regarding child proofing, a bed, cleanliness, and diaper rashes could be remedied, and that Native American culture supported Lakota reaching out to his family and the community for support. There was evidence that Lakota and his mother had sought some of these resources.

65. Lakota has consistently attempted to establish a relationship with Brynlee, and the only time he has been out of contact with her was through the actions of Cheryl or the Petitioners before the June 2022 hearing.

66. Brynlee is bonded to Lakota. She refers to him as "dada" and is excited to see him at the exchanges.

67. Brynlee is also bonded to the Petitioners, and some ongoing contact with them is in Brynlee's best interests.

68. Lakota and Donna testified about the family's connection to Native American culture as well as cultural activities in which they have been involved.

Lakota was likely to result in serious emotional or physical damage to the child. *In re: A.A.*, 2021 S.D. 66, ¶ 40. This is not a termination proceeding, and the evidence presented does not even approach that standard.

69. The evidence establishes that Lakota is at times not a perfect parent. However, the Court must look at the evidence as a whole rather than parse out every individual incident.

CONCLUSIONS OF LAW

1. This Court has personal and subject matter jurisdiction over the law and the parties in this case.
2. Proper notice was provided to all parties to the proceeding and the Tribe. The Tribe received proper notice of the custody hearing date and did not appear.
3. The controlling law in this case is SDCL §25-5-29 et seq. and ICWA and its implementing regulations. In order to be granted permanent custody of Brylee, Petitioners must satisfy their burden of proof under both state and federal law.
4. ICWA applies because Lakota is an enrolled member of the Tribe and, pursuant to the Tribe's law, Brynlee is eligible for enrollment.
5. ICWA applies to both state and private actors initiating involuntary custody proceedings. *Haaland v. Brackeen*, 143 S.Ct. 1609, 1632-33 (2023).
6. Lakota's tribal status was not brought to the Court's or Petitioners' attention until shortly before the custody trial was scheduled the first time, which resulted in a delay of the trial and for which the Court ascribes fault to Lakota.
7. Biological parents have a fundamental liberty interest in the care, custody, and control of their children. *Howlett v. Stellingwerf*, 2018 S.D. 19, ¶ 13. Because parents have this fundamental constitutional right, "Disputes between parents and [third parties] are *not contests between equals*." *Id.* at ¶ 14 (emphasis added). The South Dakota Supreme Court has cautioned circuit courts that they cannot grant custody to non-parents "simply because they may be better custodians." *Veldheer v. Peterson*, 2012 S.D. 86, ¶ 31 (*citing Meldrum v. Novotny*, 2002 S.D. 15, ¶ 57). The "fundamental liberty interest in natural parents in the care, custody, and management

of their children does not evaporate simply because they have not been model parents." *In re: S.M.N.*, 2010 S.D. 31 at ¶ 17 (citation omitted).

8. Third parties may seek custody of a child if they: (a) have served as a primary caretaker; (b) have closely bonded as a parental figure; or (c) have otherwise formed a significant and substantial relationship. SDCL 25-5-29.

9. Assuming third parties satisfy this initial burden, they must then go on to rebut the parent's presumptive right to custody. The presumption can be rebutted by clear and convincing proof: (a) That the parent has abandoned or persistently neglected the child; (b) That the parent has forfeited her parental rights over the child to a third party; (c) That the parent has abdicated her parental rights and responsibilities; or (d) That other extraordinary circumstances exist which, if custody is awarded to the parent, would result in serious detriment to the child. Id. *See also In re: Guardianship of A.L.T. and S.J.T.*, 2006 S.D. 28, ¶ 39; *In re: S.M.N., T.D.N., T.L.N.*, 2010 S.D. 31, ¶ 21; *Veldheer,* 2012 S.D. 86 at ¶ 31.

10. Whenever there is proof of one of more of the following extraordinary circumstances, serious detriment to the child may exist: (1) The likelihood of serious physical or emotional harm to the child if placed in the parent's custody; (2) The extended, unjustifiable absence of parental custody; (3) The provision of the child's physical, emotional, and other needs by persons other than the parent over a significant period of time; (4) The existence of a bonded relationship between the child and the person other than the parent sufficient to cause significant emotional harm to the child in the event of a change in custody; (5) The substantial enhancement of the child's well-being while under the care of a person other than the parent; (6) The extent of the parent's delay in seeking to reacquire custody of the child; (7) The demonstrated quality of the parent's commitment to raising the child; (8) The likely degree of stability and security in the child's future with the parent; (9) The extent to which the child's right to an education would be impaired while in the custody of the parent; or (10) Any other extraordinary circumstance that would substantially and adversely impact the welfare of the child. SDCL 25-5-30.

11. Third parties are not specifically required to establish that the parent is "unfit" to overcome the presumption if extraordinary circumstances exist. *Veldheer*, 2012 S.D. 86, ¶ 25; *Howlett*, 2018 S.D. 19 at ¶¶ 14-15. The line between "unfitness" and "extraordinary circumstances" is a thin one anyway. *Id.* (Unfitness inherent when there are other extraordinary circumstances); *Beach v. Coisman*, 2012 S.D. 31, ¶ 8 (Non-parent must prove, by clear and convincing evidence, any of the following: a) Gross misconduct; b) Unfitness; or c) Other extraordinary circumstances resulting in serious detriment to the children).

12. If the third parties rebut the parent's presumptive right to custody, then the Court conducts the best interest of the child analysis through application of the *Fuerstenberg* factors. *Id.* at ¶ 31; *Howlett*, at ¶ 20. Many of the extraordinary circumstances and *Furstenberg* factors overlap, but the extraordinary circumstances analysis must be completed first. *Howlett* at ¶ 20.

13. This third-party custody proceeding best meets the definition of a foster care placement under ICWA (25 U.S.C. § 1903(1)(i)). *See In re: Guardianship of Eliza W.*, 938 N.W.2d 307 (Neb. 2020). The definition of foster care placement in ICWA references any action removing a child from her parent for temporary custody in the home of a guardian or conservator, where the parent cannot have the child returned on demand. 25 U.S.C. § 1903(1)(i). In South Dakota, there are no substantive differences between a third-party child "custody" case and a third party "guardianship" over a child. *See* SDCL 25-5-34; 29A-5-106; 29A-5-106.1; *In re: Guardianship of S.M.N.*, 2010 S.D. 31. It would be an absurd result, and against the Congressional intention behind ICWA, to remove ICWA protections from Indian children and parents simply because of the label attached to the proceeding.

14. To establish a foster care placement under ICWA, the Petitioners must show by clear and convincing evidence, including testimony from a Qualified Expert Witness under ICWA,

that continued custody of the child by Lakota is likely to result in serious emotional or physical damage to the child.

15. Petitioners must also establish by clear and convincing evidence that active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have been provided to Lakota and have been unsuccessful.

16. Clear and convincing evidence is "more than a mere preponderance but not beyond a reasonable doubt. Evidence is clear and convincing if it is so clear, direct and weighty and convincing as to enable a judge...to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Irvin v. City of Sioux Falls*, 2006 S.D. 20, ¶ 9 (citation omitted).

17. The Petitioners satisfy the preliminary requirements under SDCL §25-5-29 because they have established by clear and convincing evidence of a being closely bonded with Brynlee as parental figures and have formed a significant and substantial relationship with the child.

70. The Petitioners have established by clear and convincing evidence that they have provided remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, as that requirement applies in the context of this proceeding. They provided Lakota with a feeding schedule, car seat assistance, and arranged consistent daycare for Brynlee.

18. However, the Petitioners have failed to present clear and convincing evidence that continued custody by Lakota would result in serious emotional and physical damage to Brynlee.

19. Petitioners have also failed to establish, by clear and convincing evidence, that Lakota abandoned or persistently neglected the child, forfeited his parental rights to Cheryl or Petitioners, or abdicated his parental responsibilities.

20. Petitioners have failed to prove, by clear and convincing evidence, any extraordinary circumstances under SDCL 25-5-30.

21. Because Miles and Tori Melius did not meet the high burden of proof of clear and convincing evidence to overcome Lakota's presumptive right to custody, the Court need not evaluate the *Fuerstenburg* factors.

22. Although the Petitioners did not meet their final burden of persuasion to overcome Lakota's presumptive right to custody, they did meet their initial burden of production that they have closely bonded as a parental figure and formed a significant and substantial relationship with Brynlee. It would be adverse to Brynlee's best interests for all contact with Petitioners to cease, and there should be ongoing contact with them through a transition plan.

23. It is also clear that the abrupt removal of Brynlee from Teri's daycare had an adverse effect on her and that her remaining in that daycare for a period of time would be in her best interests.

24. Lakota was aware of the Court's previous orders regarding not having overnight visitors in his home and keeping Brynlee in daycare and knowingly and contumaciously violated those orders and hence was in contempt of those previous orders.

25. Lakota should be responsible for reasonable attorney fees for the contempt action as well as attorney's fees directly tied to the delay in advising the Court and counsel of his tribal enrollment, thereby causing the trial to be postponed.

26. Because Lakota has had the opportunity to establish his own home and form a bond with Brynlee, the reasoning for the Court's June 2022 order prohibiting overnight visitors has been alleviated, and that will not be imposed in orders going forward.

27. Because the Court has determined that the Petitioners have failed to meet their burden under ICWA, and that proper placement is with Brynlee's parent, Lakota, it need not consider the Petitioners' argument that a non-Indian extended family member can be a preferred placement under 25 U.S.C. § 1915(b)(i).

Dated this 11th day of January, 2024.

Bobbi J Rank

Bobbi J. Rank
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF GREGORY	)	SIXTH JUDICIAL CIRCUIT

MILES MELIUS and TORI MELIUS, Petitioners, v. LAKOTA SONGER and CHERYL MELIUS, Respondents.	26CIV22-27 26CIV22-5 **ORDER AFTER CUSTODY TRIAL**

THIS MATTER came on for hearing on August 30 and August 31, 2023, at the Gregory County Courthouse in Burke, South Dakota. The Plaintiffs, Miles and Tori Melius were present in person and with their attorney, Dava Wermers. The Defendant, Lakota Songer (Lakota), appeared in person and with his attorney, RoseAnn Wendell. The Defendant, Cheryl Melius (Cheryl), appeared pro se but did not participate in the proceedings. The Court, after hearing the testimony of the parties and witnesses, reviewing exhibits and being fully advised, and having made Findings of Fact and Conclusions of Law which are incorporated herein as if set forth in full, it is now

ORDERED that Lakota Songer shall have legal and physical custody of the minor child, Brynlee Melius, whose date of birth is October 31, 2021; it is further

ORDERED that Miles and Tori shall have visitation with Brynlee alternating weekends from Friday through Sunday and two overnights during the week as agreed upon by the parties until June 1, 2024; it is further

ORDERED that effective June 1, 2024, the overnight visits during the week for Miles and Tori shall reduce to one overnight visit during the week, with the alternating weekend visitation to remain the same; it is further

ORDERED that effective October 1, 2024, the overnight visit during the week for Miles and Tori shall be eliminated, with the alternating weekend visitation to remain the same; it is further

ORDERED that Miles and Tori and Lakota shall alternate holidays and birthdays pursuant to the South Dakota Parenting Guidelines, with Lakota as parent one and Miles and Tori as parent two; it is further

ORDERED that Brynlee shall continue to go to Terri Tracy's daycare in Winner until at least December 31, 2024, unless otherwise agreed by the parties, with Lakota and Miles and Tori sharing the cost of the daycare; it is further

ORDERED that effective January 1, 2025, Lakota may move Brynlee to a different daycare and will then be responsible for 100% of the daycare cost; it is further

ORDERED that, in the event Lakota is unavailable to care for Brynlee during his custody days, Miles and Tori shall be given the first opportunity to care for her until December 31, 2024; it is further

ORDERED that Cheryl Melius shall not have unsupervised visitation with Brynlee while Brynlee is in Miles and Tori's care; it is further

ORDERED that Miles and Tori shall be allowed Facetime or phone contact with Brynlee before bedtime for four nights per week while not exercising their visitation; it is further

ORDERED that both parties, and their immediate relatives, shall avoid disparaging the other party; it is further

ORDERED that Lakota shall have ten calendar days from today's date to file written objection, if any, to any items of attorney's fees submitted on the Petitioners' itemization previously provided.

Dated this 11th day of January, 2024.

Bobbi J Rank

Bobbi J. Rank
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF GREGORY	)	SIXTH JUDICIAL CIRCUIT

MILES MELIUS and TORI MELIUS, Petitioners, v. LAKOTA SONGER and CHERYL MELIUS, Respondents.	26CIV22-00027 **FINDINGS OF FACT and CONCLUSIONS OF LAW** **(Proposed by Lakota Songer)**

THIS MATTER came on for hearing on August 30 and August 31, 2023, at the Gregory County Courthouse in Burke, South Dakota. The Plaintiffs, Miles and Tori Melius were present in person and with their attorney, Dava Wermers. The Defendant, Lakota Songer (Lakota), appeared in person and with his attorney, RoseAnn Wendell. The Defendant, Cheryl Melius (Cheryl), appeared pro se but did not participate in the proceedings. The Court, after hearing the testimony of the parties and witnesses, reviewing exhibits and being fully advised, now makes the following:

FINDINGS OF FACT

1. Brynlee Melius was born on October 31, 2021, to Cheryl Melius while she was in a consensual relationship with Lakota Songer. At the time of her birth, Cheryl was no longer in a relationship with Lakota Songer, an enrolled member of the Rosebud Sioux Tribe.
2. Lakota resides in Burke, South Dakota, which is thirty-six (36) miles from Winner. Miles and Tori Melius reside outside of Winner.
3. Cheryl had previously told Lakota he was the father of the child and she allowed him limited contact with Brynlee prior to denying his paternity, at which time she began withholding contact between them.
4. When Brynlee was around two months old, she was diagnosed with Failure to Thrive while in Cheryl's sole custody and care. The Department of Social

Services, Child Protection Services, initiated an abuse and neglect assessment. Cheryl placed Brynlee with her brother, Miles Melius and his wife, Tori.

5. In January, 2022, Lakota filed a paternity action. Lakota's paternity was established in April, 2022. On April 28, 2023, Lakota filed a Motion for Immediate Temporary Custody, which alleged that Brynlee was currently not in the care of either of her parents and that Lakota should be granted temporary custody of her.
6. In May, 2022, Miles and Tori Melius filed a non-parent custody action against Lakota and Cheryl. Miles and Tori Melius continued to withhold contact between Lakota and Brynlee. Tori testified at trial she withheld contact because she was terrified of losing Brynlee.
7. In June, 2022, a hearing was held on Lakota's Motion. The Court granted temporary custody to Miles and Tori Melius and Lakota was granted visitation pursuant to a stepped-up visitation schedule.
8. The Court ordered a custody evaluation. The Court also required Lakota to remove his mother, Donna Songer, and the children in her care through a DSS kinship placement, from his home and that Brynlee remain at the daycare of Tori Melius' mother, Teri Tracy (Tracy) in Winner. Beginning September, 2022, Lakota had Brynlee in his care four overnights a week.
9. In February, 2023, while the custody evaluation was pending, Miles and Tori Melius brought a Motion for Ex Parte Emergency Custody. The Motion was based on an affidavit which alleged various concerns, including diaper rashes and other cleanliness concerns; that Lakota had threatened suicide in February, 2023, and that Brynlee was primarily in the care of Donna rather than Lakota. At the hearing on March 1, 2023, the Court denied the motion and ordered the schedule, which the Court had temporarily discontinued, to resume.
10. Lakota's former girlfriend, Chelsea Medrano (Medrano), with whom he had just had a child, submitted an affidavit on behalf of Miles and Tori Melius in support of their motion, alleging Lakota was not Brynlee's primary caretaker, among

other things. She also testified at the hearing in March. The Court did not find Medrano's testimony credible, in part because she had made a Facebook post a few days prior about Lakota being a great father. Miles and Tori Melius did not call Medrano to testify at the custody trial.

11. The custody evaluation recommended Miles and Tori Melius have legal and physical custody of Brynlee with Lakota having only limited contact with her.
12. The initial trial date was July, 2023. However, shortly before the trial, Lakota, through counsel, advised the Court and counsel of his tribal enrollment status. This fact necessitated a delay in the trial so the Tribe could be notified pursuant to ICWA.
13. At the custody trial, custody evaluator, Erin Nielsen Ogdahl (Nielsen-Ogdahl), and Miles and Tori Melius' ICWA Qualified Expert Witness, Luke Yellow Robe (Yellow Robe), both gave great weight to Medrano's affidavit and previous testimony. The Court does not. Her credibility was seriously damaged by the entry of the Facebook post regarding Lakota's parenting.
14. Nielsen-Ogdahl recommended Miles and Tori Melius have legal and physical custody of Brynlee with Lakota having very limited time with her.
15. At trial, Miles and Tori Melius presented evidence about Brynlee's diaper rashes in Lakota's care and asserted Lakota does not timely change her diapers.
16. Ms. Tracy, Brynlee's daycare provider, testified the diaper rashes were amongst the worst she had seen. One rash was serious enough it resulted in a trip to the emergency room.
17. All parties, including Lakota's Qualified Expert Witness, Renee Bear Stops, acknowledged the diaper rashes were a concern. There were competing allegations about whether the rash was from Lakota's care or whether Brynlee had a skin condition which exacerbated the rash. Lakota testified he was reluctant to change Brynlee's diapers when he first cared for her alone.
18. The diaper rash has significantly improved since February 2023 so, regardless of the basis of the rash, it has been successfully addressed.

19. Miles and Tori Melius also presented evidence of Lakota's care of Brynlee. Specifically, in August, 2022, Donna and Lakota took Brynlee to the emergency room with a concern she had been sexually assaulted. Tori was called to the hospital because she was the temporary guardian and she had to consent to any treatment. Donna and Lakota were asked to leave the hospital and Brynlee was released to Tori.
20. At the hospital, the concern about sexual assault was alleviated but Brynlee did have a high fever. Donna and Lakota had a difficult time articulating what Brynlee had been given for the fever.
21. Donna and Lakota are overly sensitive about sexual abuse based on some family history as well as Donna's mistrust of Miles and Tori Melius. They had no basis for this concern and acted too hastily in taking her to the hospital. Further, neither Donna or Lakota advised the hospital of Brynlee's fever prior to being asked to leave, which does raise a concern to the Court.
22. Miles and Tori Melius further alleged that Lakota threatened to kill himself in February 2023 during a dispute with Medrano. The allegation by Medrano was that Lakota punched the dash of the vehicle and threatened to kill himself.
23. Lakota admitted to law enforcement that he had gotten into a dispute with Medrano and that he made the suicidal statement but denied being suicidal. There is no evidence he was suicidal or violent, other than by punching the dash. It is clear Lakota had a bad day but there is no evidence of other threats to himself or to Brynlee. Lakota continues to be in counseling.
24. Lakota removed Brynlee from daycare in May, 2023, in disobedience of the Court's order, after Teri Tracy told him she was going to start charging him because he could not afford to pay her.
25. Brynlee started acting out, hitting, eating her diaper and having other behaviors around the time she was removed from daycare.

26. On July 6, 2023, Miles and Tori Melius brought a Motion for Contempt for Lakota removing Brynlee from the Tracy daycare and for having persons spend the night at his home when Brynlee is in his care.
27. Lakota acknowledged removing Brynlee from the daycare due to the cost. He also acknowledged that Medrano stayed overnight with him at times.
28. Miles and Tori Melius also alleged that Donna is providing all the care for Brynlee, that there are a number of people living in her home and that there is no bed for Brynlee to sleep in. There was no evidence presented to support the allegation that Brynlee is primarily in Donna's care.
29. Miles and Tori Melius further alleged that Lakota did not have a proper bed for Brynlee, that his home was not properly child-proofed, that he did not utilize the correct car seat and that he does not feed Brynlee nutritious food but, rather, feeds her foods like pizza. Miles and Tori Melius also alleged that Brynlee was terribly filthy dirty when returned to them by Lakota.
30. The Melius' presented no pictures or other evidence to support the allegation that Brynlee was regularly filthy dirty when she was returned to them.
31. Lakota provides Brynlee proper food and he cooks for her. Brynlee's previous physical health concerns, specifically failure to thrive, has improved since she has been out of Cheryl's custody.
32. Miles and Tori Melius made several unsupported allegations regarding Lakota. Lakota alleged Miles and Tori Melius were engaging in behavior, or having it done by others, to surveille Lakota, his activities and his care of Brynlee.
33. It is clear that Miles and Tori Melius received ongoing information from community members about Lakota and Brynlee, but whether they requested that people keep them informed or not is unclear. Regardless, it is evident that Miles and Tori Melius never supported Lakota successfully parenting Brynlee. It was always the desire of Miles and Tori Melius to maintain custody of Brynlee. Throughout this case, they were quick to find and point out fault in Lakota's

parenting and lifestyle and slow to support his parenting, recognize his parental rights, give him credit or assist him in bettering himself as a parent.

34. Miles and Tori Melius and, ultimately, Nielsen Ogdahl and Yellow Robe, attributed every problem or concern with Brynlee to Lakota. Instead of undertaking efforts to support Lakota as a parent, they documented and reported Lakota's faults. Their conduct is a violation of their obligation under ICWA to engage in active efforts to provide remedial services and rehabilitative programs to prevent the breakup of this Native American family. 25USC §1912(d).
35. Lakota has his own home and he has maintained employment. Lakota was using a Pack 'N Play but he had reconditioned her crib into a toddler bed by the time of trial. Lakota's home was not sufficiently child proofed when the custody evaluator was present but there was no immediate danger. There is some evidence Lakota was not utilizing the correct car seat.
36. There is no evidence Lakota abuses substances. He has limited criminal history.
37. Brynlee is bonded to Lakota. She refers to him as "dada" and she is excited to see him at the exchanges.
38. Lakota and Donna testified about the family's connection to Native American culture as well as the cultural activities in which they have been involved. Miles and Tori Melius did not present any evidence concerning their support of the Native American culture.
39. It was not Lakota's responsibility to know his Native American heritage or tribal enrollment was relevant to this case. It is the responsibility of the party seeking the foster care placement of an Indian child to notify the Indian child's tribe of the proceedings. 25USC§1912(b).
40. Miles and Tori Melius were in positions to consider ICWA's potential application to this case when they filed the non-parent custody matter. For one thing, they knew Lakota's mother, Donna, had a kinship placement of Native American children.

41. Miles and Tori Melius testified they did not believe Lakota wanted to be a parent. Lakota's actions and the bond between him and Brynlee show otherwise. Lakota has gained some maturity throughout these proceedings.
42. There was reference to Lakota being at a lower mental capacity and lower socioeconomic status than Miles and Tori Melius. These are not standards utilized by the Court to determine the outcome of this case.
43. Nielsen Ogdahl and Yellow Robe gave serious weight to Medrano's Affidavit and they both gave little credit to Lakota even though Brynlee had spent more than half the time with him since September, 2022.
44. Yellow Robe recommended that Miles and Tori Melius decide what type of contact, if any, Lakota should have with Brynlee; this recommendation is unsupported in the record.
45. Nielsen Ogdahl's analysis of Lakota's presumptive right to custody was inadequate. She appears to have improperly evaluated this case as though custody was being decided between two parents.
46. Bear Stops testified that, while there were some concerns, Lakota should be granted custody of Brynlee.

CONCLUSIONS OF LAW

1. This Court has personal and subject matter jurisdiction over the law and the parties in this case.
2. The controlling law in this case is SDCL §25-5-29 and 30 and 25USC §1912(b), the Indian Child Welfare Act.
3. The Indian Child Welfare Act (ICWA) applies to this case because Lakota is an enrolled member of the Rosebud Sioux Tribe and, pursuant to the Tribe's law, Brynlee is eligible for enrollment.
4. Lakota's tribal status was not brought to the Court's attention until shortly before the custody trial was scheduled the first time, which resulted in a delay of the trial. Fault for this delay should not be ascribed to Lakota because pursuant to

USC25 §1912, it is the responsibility of the party seeking the involuntary placement of a child to consider whether ICWA may be applicable.

5. Rosebud Sioux Tribe's ICWA office was properly notified of the new trial date but never appeared in the case.
6. ICWA applies because this type of child custody proceeding meets the definition of a foster care placement pursuant to 25 USC §1903(1)(i).
7. Parents have a fundamental liberty interest in the care, custody and control of their children. This fundamental liberty interest in natural parents does not evaporate simply because they have not been model parents. In the Matter of SMN, 2010 SD 31.
8. In order to prevail under both state and federal law, Miles and Tori Melius must show by clear and convincing evidence, including testimony from a Qualified Expert Witness under ICWA, that continued custody of the child by Lakota is likely to result in serious emotional or physical damage to the child.
9. Miles and Tori Melius are also required to establish by clear and convincing evidence that active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have been provided and have been unsuccessful. Clear and convincing evidence is more than a mere preponderance but not beyond a reasonable doubt. Evidence is clear and convincing if it is so clear, direct and weighty and convincing as to enable a judge to come to a clear conviction without hesitancy of the truth of the precise facts in issue. Irvin v. City of Sioux Falls, 2006 SD 20 ¶9.
10. Miles and Tori Melius satisfy the preliminary requirement under SDCL §25-5-29 because they have closely bonded with the child as parental figures and have formed a significant and substantial relationship with the child.
11. Miles and Tori Melius have failed to provide clear and convincing evidence that continued custody by Lakota would result in serious emotional and physical damage to Brynlee. Further, Miles and Tori Melius took affirmative action during the pendency of this case against Lakota's constitutional right to parent Brynlee.

The goal of Miles and Tori Melius, from the beginning, was to retain permanent custody of Brynlee. They did not provide active efforts to Lakota to assist him in parenting Brynlee.

12. Because Miles and Tori Melius did not meet the high burden of proof of clear and convincing evidence, the Court did not evaluate the Fuerstenburg factors.
13. Miles and Tori Melius have a positive bond with Brynlee and should maintain a limited relationship with her. It is in Brynlee's best interest for her contact with Miles and Tori Melius to be reduced through a transition plan. Since Lakota has been found to be a fit and proper parent, he should not be required to provide visitation as though Miles and Tori Melius were Brynlee's parent or grandparent.
14. Any Finding of Fact improperly labeled as a Conclusion of Law shall be a Finding of Fact, and *vice versa*.

Honorable Bobbi Rank
Circuit Court Judge

INDIAN CHILD WELFARE ACT OF 1978

[Public Law 95–608, Approved November 8, 1978, 92 Stat. 3069, 25 U.S.C. 1901 et seq.]

[As Amended Through P.L. 104–297, Enacted October 11, 1996]

AN ACT To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That [25 U.S.C. 1901 note] this Act may be cited as the "Indian Child Welfare Act of 1978".

SEC. 2. [25 U.S.C. 1901] Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

SEC. 3. [25 U.S.C. 1902] The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards

[1] So in law. Probably should be "Tribes".

for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

SEC. 4. [25 U.S.C. 1903] For the purposes of this Act, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7[1] of the Alaska Native Claims Settlement Act (85 Stat. 688, 689);

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or

[1] The term "Regional Corporation" is defined in section 3(g) of the Alaska Native Claims Settlement Act.

under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

TITLE I—CHILD CUSTODY PROCEEDINGS

SEC. 101. [25 U.S.C. 1911] (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) 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.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

SEC. 102. [25 U.S.C. 1912] (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 [1] (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

[1] This Act is commonly referred to as the "Snyder Act", which is included in this compilation.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

SEC. 103. [25 U.S.C. 1913] (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

SEC. 104. [25 U.S.C. 1914] Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act.

SEC. 105. [25 U.S.C. 1915] (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be

given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

SEC. 106. [25 U.S.C. 1916] (a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

SEC. 107. [25 U.S.C. 1917] Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

SEC. 108. [25 U.S.C. 1918] (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 [1] (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b)(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

SEC. 109. [25 U.S.C. 1919] (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

[1] This Act is codified in the U.S. Code as 18 U.S.C. 1162, which is included in this compilation.

(b) Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

SEC. 110. [25 U.S.C. 1920] Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

SEC. 111. [25 U.S.C. 1921] In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

SEC. 112. [25 U.S.C. 1922] Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved 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 and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

SEC. 113. [25 U.S.C. 1923] None of the provisions of this title, except sections 101(a), 108, and 109, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

SEC. 201. [25 U.S.C. 1931] (a) The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall

be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV–B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV–B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

SEC. 202. [25 U.S.C. 1932] The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

SEC. 203. [25 U.S.C. 1933] (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare[1], and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare[1]: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended.

SEC. 204. [25 U.S.C. 1934] For the purposes of sections 202 and 203 of this title, the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401).

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. [25 U.S.C. 1951] (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

[1] Pursuant to section 509(b) of P.L. 96-88, 93 Stat. 695, any reference to the Department of Health, Education and Welfare and the Secretary of Health, Education, and Welfare shall be deemed to refer to the Department of Health and Human Services and the Secretary of Health and Human Services.

SEC. 302. [25 U.S.C. 1952] Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act.

TITLE IV—MISCELLANEOUS

SEC. 401. [25 U.S.C. 1961] (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare [1], a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs [2] of the United States House of Representatives within two years from the date of this Act. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

SEC. 402. [25 U.S.C. 1962] Within sixty days after enactment of this Act, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this Act, together with committee reports and an explanation of the provisions of this Act.

SEC. 403. [25 U.S.C. 1963] If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.

[1] Pursuant to section 509(b) of P.L. 96–88, 93 Stat. 695, any reference to the Department of Health, Education and Welfare and the Secretary of Health, Education, and Welfare shall be deemed to refer to the Department of Health and Human Services and the Secretary of Health and Human Services.

[2] The Committee on Interior and Insular Affairs was renamed the Committee on Natural Resources in the 103rd Congress (H. Res. 5, Jan. 5, 1993), which was then renamed the Committee on Resources in the 104th Congress (P.L. 104–14, sec. 1(a), Jun. 3, 1995).

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 30630 and 30642

Miles Allen Melius and Tori Lynn Melius,
Plaintiffs and Appellees,

vs.

Lakota Songer,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
GREGORY COUNTY, SOUTH DAKOTA

THE HONORABLE BOBBI RANK,
PRESIDING JUDGE

APPELLEE'S BRIEF AND REQUEST FOR ORAL ARGUMENT

Notice of Appeal filed
February 23, 2024

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PRELIMINARY STATEMENT

Reference in this brief to the settled record will be noted by the letters, SR, followed by the page number of the record referred to. Reference to Findings of Fact will be referred to as FOF and references to Conclusions of Law will be referred to as COL, followed by the appropriate number for the finding or conclusion. Because this case was not formally consolidated the Settled Record for 26CIV.22-05 will be cited as "SR05" and the Settled Record for 26CIV22-27 will be cited as "SR27". Citations to the Motions hearing transcript for the hearing held on June 7, 2022, will be "MH1 TR", followed by the page number. Citations to the Bench Decision transcript for the hearing held on June 7, 2022, will be "BD1 TR" followed by the page number and line number. Citations to the Motions hearing transcript for Emergency Custody will be "MHE TR" followed by the page number. Citations to the trial transcript will be "TT" followed by the page number. Citations to the Bench Decision for the trial will be referred to as "BD TT" followed by the page number. Citations to Exhibits for the emergency custody motion will be referred to as "EXH EC" followed by the exhibit number. Citations to Exhibits for the trial will be referred to as "EXH TR" followed by the exhibit number.

Petitioners/Appellees Miles and Tori Melius will be referred to as Miles, Tori or the Melius'. Respondent/Appellant Lakota Songer will be referred to as Lakota. The minor child will be referred to by her initials BM. All testifying witnesses will be referred to by their first names.

JURISDICTIONAL STATEMENT

Notice of Appeal was timely filed on February 23, 2024, per SDCL §15-26A-3(2), (4) and §15-26A-7. This appeal is from a final order, the Circuit Court's "Order After

Custody Trial" dated January 11, 2024, as well as the trial courts "Findings of Fact and Conclusions of Law."

STATEMENT OF LEGAL ISSUES

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED ALTERNATING WEEKENDS AND REGULAR PHONE CALLS FOR THE PREVIOUS GUARDIANS AFTER FINDING APPELLANT FATHER LAKOTA SONGER A FIT PARENT AND GRANTING HIM SOLE LEGAL AND PHYSICAL CUSTODY?

Trial Court: The circuit court entered Findings of Fact and Conclusions of Law and an Order, granting nonparents Miles and Tori Melius visitation because the court found extraordinary circumstances for an award of visitation to a nonparent.

Most Relevant Case Authority and Statutory Authority

Clough v. Nez, 2008 SD 125, 759 N.W.2d 297
Medearis v. Whiting, 2005 SD 42, 695 N.W. 2d 226
Troxel v. Granville, 530 U.S 57, 120 S.Ct 2054, 147 L.Ed 2d 49 (2000)
SDCL 25-5-29
SDCL 25-5-30

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT FATHER TO CONTINUE TO UTILIZE THE PREVIOUS GUARDIANS' FAMILY MEMBER'S DAYCARE FOR CHILDCARE?

Trial Court: The circuit court entered Findings of Fact and Conclusions of Law and an Order, ordering Lakota Songer to continue using Teri Tracy as the daycare provider for BM.

Most Relevant Case Authority and Statutory Authority

Troxel v. Granville, 530 U.S 57, 120 S.Ct 2054, 147 L.Ed 2d 49 (2000)
Blow v. Lottman, 75 SD 127, 59 N.W.2d 825

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT FATHER LAKOTA SONGER TO PAY ATTORNEY FEES FOR THE DELAY IN THE TRIAL FOR NOT MAKING IT KNOWN HIS TRIBAL AFFILIATIONS WHEN THE INDIAN CHILD WELFARE ACT PLACES THE BURDEN OF NOTIFICATION ON THE PARTY SEEKING THE INVOLUNTARY PLACEMENT AND THE COURT.

Trial Court: The circuit court entered Findings of Fact and Conclusions of Law and an Order, ordering Lakota Songer to pay attorney fees for his causing a delay in the trial on custody and for being held in contempt of court for violating a previous court order.

Most Relevant Case Authority and Statutory Authority

Osdoba v. Kelley-Osdoba, 2018 SD 43, 913 N.W.2d 496
Weber v. Weber, 2023 SD 64, 999 N.W.2d 230

APPELLEES STATEMENT OF LEGAL ISSUES

IV. WHETHER THE TRIAL COURT ERRED IN GRANTING APPELLANT, LAKOTA SONGER, CUSTODY OF THE MINOR CHILD WHEN THE MELIUS' ESTABLISHED EXTRAORDINARY CIRCUMSTANCES EXISTED WHICH WOULD RESULT IN THE SERIOUS DETRIMENT F THE CHILD IF CUSTODY WAS GRANTED TO APPELLANT AS SET FORTH IN SDCL 25-5-30.

Trial Court: The circuit court entered Findings of Fact and Conclusions of Law and an Order granting Lakota Songer legal and physical custody of BM subject to visitation rights of the Melius'.

Most Relevant Case Authority and Statutory Authority

Clough v. Nez, 2008 SD 125, 759 N.W.2d 297
Meldrum v. Novotny, 2002 SD 15, 640 N.W.2d 460
In Interests of A.D., 416 N.W.2d 264 (SD 1987)
SDCL 25-5-29
SDCL 25-5-30

V. WHETEHR THE TRIAL COURT ERRED AFTER CONSIDERATIONS OF ICWA IN GRANTING APPELLANT, LAKOTA SONGER, CUSTODY WHEN THE MELIUS' ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT THE CONTINUED CUSTODY OF BM BY LAKOTA WAS LIKELY TO RESULT IN SERIOUS EMOTIONAL OR PHYSICAL DAMAGE.

Trial Court: The circuit court entered Findings of Fact and Conclusions of Law and an order granting Lakota Songer legal and physical custody of BM subject to visitation rights of the Melius'.

Most Relevant Case Authority and Statutory Authority

25 U.S.C. §1902
25 U.S.C. §1912(e)

In Re Mahaney, 51 P.3d 776 (2002)

STANDARD OF REVIEW

An appeal from a circuit court's decision concerning custody of children giving the trial court broad discretion. The trial court's decision can only be reversed upon a clear showing of an abuse of discretion. Van Driel v. Van Driel, 525 N.W.2d 37, 39 (SD 1994). Abuse of discretion is defined as "...discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Billion v. Billion, 1996 SD 101, 553 N.W.2d 226, 229-230 (citing Parsons v. Parsons, 490 N.W. 2d 733, 736 (SD 1992). The term "abuse of discretion" requires a "fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable." Id. The Supreme Court will not determine if they would make the same ruling, but rather whether a judicial mind in view of the law and circumstances could have reasonably reached such a conclusion. Id. Constitutional questions are reviewed *de novo*. Medearis v. Whiting, 2005 SD 42, ¶14, 695 N.W.2d 226

Findings of Fact are reviewed under the clearly erroneous standard. A trial court's Findings will be overturned on appeal only when a complete review of the evidence leaves the court with a definite and firm conviction that a mistake has been made. Clough v. Nez, 2008 SD 125, ¶8, 759 N.W.2d 297. Statutory interpretation is a question of law which is reviewed *de novo*. Id. Conclusions of Law are reviewed by the Supreme Court under the *de novo* standard. Grode v. Grode, 1996 SD 15, ¶5; 543 NW2d 795. No deference is given to the trial court under this standard of review. Id.

STATEMENT OF THE CASE

The trial on this matter was held on August 30, 2023, and August 31, 2023. The parties submitted written closing arguments (SR27-242, 251) and proposed Findings of Fact and Conclusions of Law. (SR27-278, 299) The Trial Court issued a bench decision on October 10, 2023. (SR27-270) Findings of Fact and Conclusions of Law and an Order After Custody Trial were filed by Judge Bobbi Rank in 26CIV22-27 on January 11, 2024 (SR27-13, 328). The trial court also entered an Order Awarding Attorney Fees on January 29, 2024. (SR27-51) The Order After Custody Trial granted legal and physical custody of BM to Lakota subject to the visitation rights of the Melius'. (SR27-28) The Order Awarding Attorney Fees granted attorney fees to the Melius' in the amount of $3,992.59 based on finding Lakota in contempt of court for failing to abide by the Court's Order dated July 10, 2022 and for causing a delay in the holding of the trial held on August 30th and 31st, 2023 based on his failure to disclose that he was an enrolled member of a tribe, thereby triggering the Indian Child Welfare Act. (SR27-51)

Notice of Entry of Findings of Fact and Conclusions of Law was filed on February 9, 2024. (SR27-56) Notice of Entry of Order After Custody Trial was filed on February 9, 2024. (SR27-357) Notice of Entry of order Awarding Attorney's Fees was filed on February 9, 2024. (SR27-55) Lakota filed his Notice of Appeal on February 23, 2024. The Melius' filed their Notice of Review on March 5, 2024.

STATEMENT OF THE FACTS

Lakota filed a Summons and Complaint in 26CIV.22-05, on January 12, 2022. (SR05-1, 2) A motion for Immediate Temporary Custody was filed by Lakota on April 28, 2022. (SR05-15) The Melius' filed their Summons and Complaint in 26CIV.22-27.

(SR27-1, 13) The Melius' filed a Motion for Custody and to Order Custody Evaluation (SR27-15) a Motion to Join 26CIV.22-05 (SR27, 16) and an Affidavit in Support of the Motion to Join, For Custody and To order Custody Evaluation on May 31, 2022 (SR27-19)

Cheryl Melius is the mother to BM, who was born out of wedlock on October 31, 2021. (SR27-13) Lakota Songer is the father of BM. (SR05-15) The parties were not in a relationship at the time of BM's birth. (FOF 3) The Department of Social Services became involved with Cheryl due to BM being diagnosed with failure to thrive. (FOF 8) BM was placed with her aunt and uncle, Miles and Tori Melius, by her mother, Cheryl Melius in February 2022. (FOF 8, SR27-19) This was a voluntary placement and ended the involvement with DSS. (FOF 15; MH1 TR-31-33)

Tori was solely responsible for taking BM to twice weekly medical appointments as required due to the failure to thrive diagnosis. (SR27-19; MH1 TR-94) From February 21, 2022 until the court hearing on June 7, 2022, the Melius' were responsible for 100% of BM's care. (MH1 TR-96) BM looked to the Melius' to provide all of her needs. (MH1 TR-96) The Melius' had been serving as BM's primary caretaker, have closely bonded with BM and have formed a significant and substantial relationship with BM. (BD1 TR-2; SR27-51) The Court granted the Melius' motion to join and ordered a custody evaluation between the Melius' and Lakota. (SR05-46)

The trial court granted the Melius' temporary legal and physical custody and found extraordinary circumstances by clear and convincing evidence. (BD1 TR-7; FOF 16) The trial court determined that there had been substantial improvement of BM while in the Melius's care. (FOF 17) The trial court determined that the living conditions of Lakota

created space and safety issues if BM were to be placed immediately into his care. (FOF 18) Lakota was given parenting time pursuant to a stepped up visitation schedule. (FOF 16; SR05-46) By September 2022, Lakota had BM in his care four overnights per week. (FOF 20)

Shortly after Lakota started having overnights with BM, he took BM to the ER with claims of sexual molestation. (SR27-146) The sexual assault allegation was alleviated but BM did have a high fever. (FOF 39) Donna and Lakota were not able to articulate what medications BM had been given for the fever. (FOF 39) Donna and Lakota overreacted in taking BM to the hospital for the sexual assault issue and was partially due to the mistrust of Miles and Tori Melius as there was no evidence of sexual abuse. (FOF 39) Lakota should have been more concerned about the fever and advised hospital staff of that. (FOF 39)

Upon Lakota having overnight visits with BM, she started being returned to the Melius' with diaper rashes. This has been a constant and ongoing issue throughout the pendency of the proceedings. (MHE 44) Lakota's care has been linked directly to the cause of BM's diaper rashes, which have been so extensive she has had to be seen at the emergency room upon her return to the Melius'. (MHE 45) The custody evaluator, Erin, had the opportunity to witness first hand no diaper rash prior to going to Lakota's for a weekend only to return with such a bad diaper rash less than 48 hours later that she had blisters and was bleeding. (MHE 17) The Melius' took BM to the emergency room the night she returned to their care. (MHE 6-8) The trial court received several pictures at trial on the extent of the diaper rashes that were occurring throughout the pendency of the proceedings. (SR27-159)

Melius' filed a motion for emergency custody due to several concerns and issues with Lakota and with having to take her to the ER with the diaper rash. (SR27-65) A supporting affidavit was filed along with photos of BM and an affidavit from Chelsea Medrano, Lakota's girlfriend. (SR27- 67, 72, 77) An order was immediately signed by the trial court. (SR27-66) A hearing was held on March 1, 2023 where additional testimony was heard from Ruth Galbraith, the treating ER nurse practitioner (MHE 4-15), Erin Nielsen Ogdahl (MHE 15-19), Chelsea Medrano (MHE 19-39), and Tori Melius. (MHE 44-49) At the conclusion of this hearing the trial court did not continue the emergency custody order. (SR27-91)

Chelsea Madrano, Lakota's girlfriend reached out to Tori after the incident on February 19, 2023, with Lakota. Chelsea provided an affidavit to the court detailing several issues and concerns about Lakota's care of BM and what has been occurring when he has BM for visits. (SR27-77) In particular, Chelsea detailed she had moved into Lakota's home in August 2022 while she was pregnant with Lakota's child. (SR27-77) Chelsea stated that BM does not stay overnight with Lakota because he does not have the mental capacity to do so. That she in fact is the one to take care of BM when they have her, Chelsea gives her baths, changes her diapers, etc. because Lakota does not. (SR27-77) Further, Chelsea explains what happened the night Lakota threatened suicide, that he was going to take the wheel from Donna and run the car off the road and kill himself. (SR27-77) Chelsea, Donna, Lakota and their 2-month-old daughter were in the car when this occurred. Chelsea detailed several concerns and issues she had with Lakota's ability to take care of BM. (SR27-77)

Chelsea testified at the emergency custody hearing on March 1, 2023. (MHEC TR 19-39) Chelsea confirmed the concerns she had for Lakota's ability to physically and mentally care for BM. Lakota will get overwhelmed easily (MHE TR 21), that when he would get upset, he would say he's just giving full custody of BM to Tori (MHE TR 21) and that when they were supposed to have BM they didn't, and she would usually be with Donna. (MHE TR 22) Chelsea testified at this hearing that she also did not like to have her daughter in the home with them because when Lakota would get mad he has said that he was going to punch her in the face and he has said that he wanted to throw her in the water when was giving her a bath. (MHE TR 25) Chelsea testified she would not allow Lakota to have their daughter alone together because of her concerns. (MHE TR 25)

On July 6, 2023, the Melius' brought a motion for contempt of court due to several violations of the Court's June 7, 2023, order, along with a supporting affidavit. (SR27-101, 104) The Trial court found that Lakota was in contempt of court for his failure to abide by the court orders on each of these matters. (FOF 42, 45; COL 24)

Trial was originally set in this matter for July 26th and 27th, 2023. (SR27-100) However, on July 25th at 12:09 pm an email was received by Lakota's attorney that was sent to the trial court and the Melius' attorney about Lakota being an enrolled member of the Rosebud Sioux Tribe and potential application of ICWA to this case. The parties were each required to research and prepare briefs if ICWA in fact applied to this particular matter. (SR27-117, 121, 124) The trial court determined ICWA applied. (COL 4) As a result, the trial court delayed the trial by one month in order to provide the tribe with notice as required under ICWA. (FOF 30) Notice was provided to the Rosebud Sioux Tribe. (SR27-135) The Rosebud Sioux Tribe did not participate in the proceedings. (COL 2)

Trial was scheduled and held on August 30-31, 2023. The Melius' called Teri Tracy, who is Tori's mother and BM's daycare provider. Teri testified that the diaper rashes BM was having to endure were amongst the worst she has seen and one was so bad it resulted in a trip to the emergency room. (FOF 34) Two experts testified on behalf of the Melius', Erin Nielson Ogdahl, the custody evaluator and Luke Yellow Robe, ICWA expert. (FOF 31) Both Tori and Miles also testified. Lakota called his mother, Donna, Nikki Kavanaugh with Southeast Family Support Program, Renee Bear Stops, an ICWA expert (FOF 35) and himself.

A custody evaluation was conducted by Erin Nielson-Ogdahl. (SR27-194) Erin did a thorough custody evaluation and knew from the beginning this was not a case between two equal parents and that there was in fact a different burden in place for the Melius' to have custody which were detailed in her report. (SR27-194; TT 77) Erin felt there were extraordinary circumstances that applied in this case and the reasons were detailed in her report. (SR27-194; TT 77)

Erin testified she felt BM was neglected in Lakota's and Donna's care. (TT 77). Specific instances of neglect and Erin's concerns were addressed throughout her report. (SR27-194) Erin testified given the seriousness of the concerns she had about the neglect in Lakota's home that Lakota should have limited contact with BM. (TT 80) For the past year, BM has been going back and forth between the Melius' and Lakota's nearly every other day and she needed the stability and structure in the Melius' home to get her back on track with her health and behavior. (TT 80)

Erin felt Lakota needed to have parenting classes and a parental fitness evaluation completed due to the number of concerns she had about Lakota and his ability to provide for

BM. (TT 81; FOF 28) Erin testified this is not something she would routinely recommend but given the number of questions on his ability, his knowledge, his life stability and the fact that there were more questions than answers at the completion of the report, she felt it would help provide the information necessary to go forward. (TT 81) Erin recommended Lakota also have a psychological evaluation. Erin testified she felt this was necessary because of the suicidal statements and his failure to talk to anyone about it, which causes concern for his stability. (TT 82)

Erin was of the belief that while it has caused some instability in BM continually going back and forth between Lakota and the Melius', this also allowed for the Melius' to essentially fix the issues that were repeatedly occurring in Lakota's care, such as the diaper rashes and the behaviors she was exhibiting at daycare. (TT 91) Erin's concern was that if BM was in Lakota's primary care that there would not be the ability for the Melius' to fix those problems and BM's conditions would worsen. (TT 92) Taking any one of the concerns that Erin detailed in her report may not be a basis for her recommendation, however, when taking all the concerns together, Erin concluded that she felt there were extraordinary circumstances to rebut Lakota's presumptive right to custody. (SR27-194; TT 134)

Luke Yellow Robe has been a qualified ICWA expert since 1997. (TT 238) Luke testified he was given approximately 13 documents to review in preparation for his testimony, including affidavits, affidavits from Lakota and family members, court pleadings along with the custody evaluation. (TT 238) Luke is a member of the Rosebud Sioux Tribe. Luke testified that he has concluded, based on his review of the documents provided that there would be serious harm if placed into Lakota's primary care. Specifically, he testified:

Q: What about in Lakota's care directly? Have you found anything in the record that would, in your opinion, cause serious or – serious harm if removed or if placed back into his care?

A: … even Cheryl (misstated and later corrected to Chelsea) has stated that Lakota is not in a position to parent his own child, that he doesn't want to parent his child, that he doesn't know how to parent his child…affidavits that I reviewed talked about the foster mother on how Tori had to take the child in after only 48 hours in Lakota's care, this baby's diaper rash was so severe that it actually could have been deemed child abuse, that the medical professionals were deeply concerned and checked off in their record that this was abuse and this was neglect…(TT 241)

Q: Did you have concerns in regard to the number and the length of the diaper rashes and the extensiveness of those diaper rashes then while – when they would get worse in Lakota's care?

A: I do have concerns because once again this wasn't an isolated incident. It seems to be something that basically is every time there's a visitation that he absolutely refuses to take care of his own little girl that leads to these diaper rashes and that is a concern. (TT 242)

Q: If you have a parent that is returning a child to daycare constantly having soiled their diaper to such an extent that it is up and down their back and legs, returning with moldy clothes or crusty face with snot in their nose, does that say anything about the type of care they are receiving while with the parent?

A: That's neglect. That's neglect. That's avoiding your responsibility to take care of the day-to-day responsibilities of having an infant.

Q: Would all these things in combination with one another cause serious emotional or physical damage to BM if returned to Lakota's care?

A: It would.

Luke felt Lakota has been unable to meet BM's basic needs and his actions also amounted to neglect. (TT 241-248) Both experts were able to identify these concerns and neglect as extraordinary circumstances that would likely result in serious detriment if custody was awarded to Lakota. (TT 27; TT 241-248)

Renee Bear Stops was Lakota's ICWA expert. (TT 269) Renee has been a qualified ICWA expert for six years. (TT 269) Renee was provided with affidavits, the home study, some pleadings, and a police report. (TT 271) Renee's opinion was that Lakota should be able to parent his child in a permanent capacity with the support of his extended family. (TT 271) Renee was asked by Lakota's attorney specifically if she read about the concerns on BM's diaper rashes. (TT 271) Renee's response was "well as far as the diaper rash, I know that's a huge concern in this case." (TT 272)

Lakota's own ICWA expert could hardly deny the concerning nature of the diaper rashes BM had. (FOF 35) When Renee was asked to look at the pictures provided as evidence, Exhibit 5 (SR27-159), and specifically asked about the severity of the diaper rash, Renee had to admit that a diaper rash of this magnitude would cause a child of this age considerable pain. (TT 280) Renee was asked numerous questions about BM's diaper rashes.

A: Well, most definitely the diaper rashes are concerning, yes.

Q: How about the fact that these diaper rashes are this bad and to this extent that continued for well over six months? Would that be of concern to you?

A: Yes

Q: Would it be of concern of whether or not this child is being neglected when they were getting worse in a parent's care?

A: yes

Q: So I am assuming that you're not aware of any of those facts: is that right?

A: Facts of what?

Q: that is what is occurring when she is in Lakota's home

A: If these are – I mean, correct.

Q. So, if that is in fact what the Court finds to be true, would that now cause you some concerns for serious emotional harm to this child or physical harm?

A. Yes (TT 281-282)

Donna was actively involved with Lakota when he had BM in his care and Renee was aware of that. (TT 283) When asked "what more does he need to have for support to know that that's not okay?" The only response Renee was able to give is "I don't know. You know, my opinion is that maybe someone – I mean, I don't have an opinion on that, but I believe it's concerning. I agree that it is very concerning." (TT 283-284)

Tori tried helping out where she could by providing Lakota with a place to initially have visits with BM (SR05-46), providing him with a feeding schedule, consistent daycare, and assistance with BM's car seat. (FOF 59) The trial court acknowledged that Lakota is at times not a perfect parent but the court has to look at the evidence as a whole rather than parse out every individual incident. (FOF 69) Lakota also admitted that Tori has tried helping him along quite a bit throughout this process. (TT398)

Lakota was asked about BM's continued diaper rashes when BM was in his care.

Q: So then how do you explain the continued diaper rashes as bad as they have been as shown in the exhibits continuing until February and March?

A: I have no answer to that.

Q: And how do you explain that in fact they are worse when they are in your care?

A: Well, during the wintertime we had plenty of snowstorms. One time we came back, it was after 6:00. I didn't get home until about 7;30 because there was – it was a bad blizzard and there was people all over the road and I was driving only about 20 miles an hour...and usually that's how it happens is that I will – sometimes I'll go grocery shopping with her and I won't have her diaper bag with me and we'll go for about an hour and half from picking her up to going home...(TT 385-386) This exchange occurred for some length and ended with the question:

Q: How do you explain all the other diaper rashes?

A: were you in my house at any of them times?

A: All the other times, I can't give you an answer. (TT 388)

The court determined that while there were some diaper rashes when with the Melius', they were worse while in Lakota's care and on more than one occasion did not change her diaper as much as he should have. (BD TT 14)

Lakota removed BM from Teri's daycare in May 2023 which was a violation of the trial court's order. (FOF 45) On days that the Melius' would have BM and take her to daycare, BM began having behavior issues at the daycare. BM started acting out, hitting others, eating her diaper and having other behaviors. (FOF 46) The trial court attributed this to the abrupt removal from her long-term daycare. (FOF 46) Lakota was asked several questions about his removal of BM from daycare and he admitted that he did not put any

consideration into what effect it may have on BM to pull her out of her regular routine and what she was used to. (TT 408)

Lakota never mentioned at any time in this case that he was an enrolled member of Rosebud Sioux Tribe, or any tribe. (TT 389) When asked in his initial paperwork with Erin what he marked as ethnicity he put white. (TT 78) The trial court recognized that the lack of disclosure from Lakota caused a delay in the trial and faulted Lakota for it. (COL 6) Lakota was in the best position to inform of his tribal status, and he failed to do so. (BD TT 6) Lakota points the finger at the Melius' that they should have known he was an Indian child and that ICWA applied. (BD TT 6)

Third parties may seek custody of a child if they: a) have served as a primary caretaker; b) have closely bonded as a parental figure; or c) have otherwise formed a significant and substantial relationship. SDCL 25-5-29 (COL 8) The Melius's met their initial burden under SDCL 25-5-29 by showing they have served as a primary caretaker to BM, they have closely bonded as a parental figure, and they have formed a significant and substantial relationship with BM. (FOF 67; COL 17) The trial court determined ICWA applied in this matter because Lakota is an enrolled member of a Tribe which makes BM eligible for enrollment. (COL 4)

A guardianship matter is an involuntary placement classified as a foster care placement under ICWA. (COL 5; TT 239) The trial court concluded that the Melius' did not meet their burden of rebutting Lakota's presumptive right to custody by clear and convincing evidence and that the continued custody by Lakota would result in serious emotional and physical damage to BM. (COL 18) The trial court did find the Melius' did establish by clear and convincing evidence that they provided remedial services and

rehabilitative programs by providing Lakota with a feeding schedule, car seat assistance, and arranged consistent daycare for BM. (COL 70) The trial court determined the Melius' failed to prove by clear and convincing evidence any extraordinary circumstances under SDCL 17. The trial court also specifically concluded that the Melius's did meet their initial burden as having closely bonded as a parental figure and has formed a significant and substantial relationship with BM and it would be against her best interests if all contact with them or the daycare was terminated. (COL 22-23)

ARGUMENT

ISSUE 1: WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED ALTERNATING WEEKENDS AND ALTERNATING HOLIDAY VISITATION AND REGULAR PHONE CALLS FOR THE PREVIOUS GUARDIANS AFTER FINDING APPELLANT FATHER LAKOTA SONGER A FIT PARENT AND GRANTING HIM SOLE LEGAL AND PHYSICAL CUSTODY.

SDCL 25-5-29 and 30 and 25 U.S.C. §1902, known as the Indian Child Welfare Act are the applicable statutes and federal law in this case. SDCL 25-5-29 provides:

> Except for proceedings under chapter 26-7A, 26-8A, 26-8B, or 26-8C, the court may allow any person other than the parent of a child to intervene or petition a court of competent jurisdiction for custody or visitation of any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship. It is presumed to be in the best interest of a child to be in the care, custody, and control of the child's parent, and the parent shall be afforded the constitutional protections as determined by the United States Supreme Court and the South Dakota Supreme Court. A parent's presumptive right to custody of his or her child may be rebutted by proof:
> (1) That the parent has abandoned or persistently neglected the child;
> (2) That the parent has forfeited or surrendered his or her parental rights over the child to any person other than the parent;
> (3) That the parent has abdicated his or her parental rights and responsibilities; or
> (4) That other extraordinary circumstances exist which, if custody is awarded to the parent, would result in serious detriment to the child.

SDCL 25-5-30 identifies what may constitute extraordinary circumstances which would result in serious detriment to the child.

> Serious detriment to a child may exist whenever there is proof of one or more of the following extraordinary circumstances:
> (1) The likelihood of serious physical or emotional harm to the child if placed in the parent's custody;
> (2) The extended, unjustifiable absence of parental custody;
> (3) The provision of the child's physical, emotional, and other needs by persons other than the parent over a significant period of time;
> (4) The existence of a bonded relationship between the child and the person other than the parent sufficient to cause significant emotional harm to the child in the event of a change in custody;
> (5) The substantial enhancement of the child's well-being while under the care of a person other than the parent;
> (6) The extent of the parent's delay in seeking to reacquire custody of the child;
> (7) The demonstrated quality of the parent's commitment to raising the child;
> (8) The likely degree of stability and security in the child's future with the parent;
> (9) The extent to which the child's right to an education would be impaired while in the custody of the parent; or
> (10) Any other extraordinary circumstance that would substantially and adversely impact the welfare of the child.

The Due Process Clause of the United States Constitution protects parent' rights to raise their children as they wish. Clough v. Nez, 2008 SD 125, ¶8, 759 N.W.2d 297, 301 (citing Medearis v. Whiting, 2005 SD 42, ¶17, 695 N.W.2d 226, 230-31 (citing Troxel v. Granville, 530 U.S. 57, 66, 120 S. Ct. 2054, 147, L.Ed. 2d 49 (2000)). A court cannot presume that visitation with a nonparent is in the best interests of a fit parent's child. Id. At ¶9. For a trial court to grant a nonparent visitation right over the objection of a parent, a clear showing of gross misconduct, unfitness, or other extraordinary circumstances affecting the welfare of the child is required. Id. Extraordinary circumstances are more than a simple showing that visitation would be in the best interests of the child. Id. At ¶10.

Nowhere in any of the trial court's findings does the trial court find Lakota is a fit parent. A finding of extraordinary circumstances is not contingent on finding a parent fit or unfit. Id. At ¶22. The special weight and presumption that is discussed in *Troxel* and *Medearis* is applicable to those situations involving a fit parent, however, the presumption disappears in situations where there are also extraordinary circumstances rebutting that parent's presumptive right to make those decisions relating to their child. Id.

The above statutes apply to visitation disputes as well as custody. Id. At ¶14. The current case is very similar to Clough v. Nez. Clough raised the child from birth until the time of hearing, which in that case was a period of four years. In Clough, that finding alone was sufficient to rebut Nez's presumptive rights as a parent under SDCL 25-5-29(4) and SDCL 25-5-30(3). The provision of the child's physical, emotional, and other needs by persons other than the parent over a significant period is an extraordinary circumstance. Additionally, in Clough the courts finding that Clough "has closely bonded as a parental figure with C.C. and has otherwise formed a significant and substantial relationship with C.C. " Determining that this finding also independently rebutted Nez's presumptive rights under SDCL5-29(4) and 25-5-30(4). Id. At ¶17.

In the present case there is no dispute that at least from February 2022 until the trial in August 2023, the Melius' provided for BM's physical, emotional and other needs and was placed in their temporary custody by the Court at the June 7, 2022, hearing. BM was born on October 31, 2021. (FOF 3)[1] While this is a period of just 18 months, given BM's age of

[1] The Finding of Fact states October 30, 2021, however testimony provided that BM was in fact born on October 31, 2021 at the initial motions hearing on June 7, 2022 by Cheryl Melius and the Complaint filed in both matters identifies that BM was born on October 31st not October 30th.

just 22 months on the date of trial, the eighteen months that BM was in the Melius' home is a significant period.

Miles testified to the closely bonded and significant relationship he has with BM. Specifically, he testified that when he gets home BM is always looking for him and grabbing her shoes so they can go out and play. (TT 149) Miles described his relationship with BM as very close. (TT 149) Miles also testified to the close and significant bond BM has with Tori. BM calls Tori mama. (TT 149) This is indicative of BM being closely bonded to Tori. Tori further testified given how close they are that it would be detrimental to her if she were no longer in BM's life daily. (TT 206)

Tori was the one responsible for all of BM's medical needs. Tori nursed BM back from the failure to thrive diagnosis. Tori was responsible for taking BM to twice weekly appointments to monitor her weight. (MH1 TR 9). Dr. Lisa Even, BM's primary doctor testified she had observed that BM was very well cared for and very loved. Further, Dr. Even testified that BM was doing very well in the Melius' care and her weight had increased to the 58th percentile and her heigh up to the approximately 25th percentile. (MH1 TR 10). Dr. Even was able to recognize the attachment Tori had with BM and testified to her concern of being taken out of the Melius' care because of that attachment and bond. (MH1 TR 12). The trial court made the specific find that there had been a substantial improvement in BM's well-being since being in the Melius' care. (FOF 17). The trial court made the finding that BM is bonded to the Melius' and some ongoing contact was in her best interests. (FOF 67).

Erin also talked with BM's medical provider, Dr. Lisa Even on May 18, 2023. Dr. Even reported that since being in the Melius' care, BM has been doing great. Dr. Even reported in her opinion it was in BM's best interests to stay with the Melius' because she has

a positive attachment to them, and it would be detrimental to BM if they did not continue in their role. (SR27-194, pg. 9).

Expert testimony is not required to establish serious detriment, the probability of emotional harm to a child can be made within ordinary experience. Id. At ¶18. The trial court finding the substantial bond between the Melius' and BM constituted extraordinary circumstances to rebut Lakota's parental presumption and the trial court appropriately began to focus on the best interest of BM.

Lakota told Erin that he did not feel the Melius' should have any contact with BM at all as Tori is always trying to text and asking to call. (SR27-194, pg. 5) At trial Lakota testified that he would not cut Miles and Tori out of BM's life, but he did feel differently about them previously. (TT 375) Lakota testified the Melius' should get visitation with BM like one weekend per month. (TT 375). Lakota admitted Tori has helped him along quite a bit throughout this process. (TT 398) Lakota's own testimony was that the Melius' should have time with BM. Therefore, the trial court did roughly defer to Lakota's determination of appropriate visitation. Which is similar to what also occurred in *Clough*. Id. At ¶¶25-26.

ICWA does not specifically address the ability of the courts to determine visitation for a nonparent. ICWA also does not specifically identify what constitutes serious detriment. There is no relevant analysis under ICWA for what requirements a court can impose on a parent for a non-parent. The trial court did not err in providing for ongoing contact between the Melius' and BM.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT FATHER TO CONTINUE TO UTILIZE THE PREVIOUS GUARDIANS' FAMILY MEMBER'S DAYCARE FOR CHILDCARE?

In Troxel v. Granville, it was noted that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of a parent to make decisions concerning the care, custody and control of their children." 530 US 57, 66, 120 S. Ct. 2054, 147 L.Ed.2d 49. The Supreme Court has noted that states are limited in intervening in a fit parent's decisions concerning child rearing: "...so long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. Id. At 68-69, 120 S.Ct. at 2061, 147 L.Ed.2d at 58.

The Supreme Court has held that the definition of "unfitness" should be interpreted broadly. Blow v. Lottman, 75 SD 127, 135, 59 N.W.2d 825, 827 (1953)

> A parent's disqualification results not only from a lack of ability but also from an unwillingness or from an indifferent lack of desire, as well, to rear a child spiritually, morally, mentally and physically according to the minimum standard the law condones. Thus, unfitness would follow from voluntary conduct bearing on a parent's cruelty, morals, extreme neglect, abandonment or any attitude or condition, created through marriage or otherwise, resulting in home surroundings below the minimum standards; and unfitness would also result from involuntary circumstances such as extreme poverty, physical or mental infirmity, or any other condition making it impossible for the parent to care for the child according to the minimum requirements. Id.

The trial court recognized the significant bond BM had not only with the Melius' but also to Teri and her husband by ordering the continued use of Teri's daycare for BM. (SR27-297) Teri was providing daycare for BM every day since shortly after her birth. Teri testified that she and BM were bonded, and it would be harmful physically, mentally and developmentally, to BM if she were no longer at the daycare. (TT 31)

Lakota removed BM from the daycare upon being told that he would have to begin paying for daycare services. (FOF 45) After this removal from her long-term daycare, BM started acting out, hitting, eating her diaper and having other behaviors. (FOF 46) Teri testified BM quit playing with the kids, she quit interacting with them, and she would be so exhausted after being at Lakota's she went back to taking morning naps. (TT 24-25) Teri expressed concern for BM being neglected while in Lakota's care. (TT 30) The trial court found that Lakota removing BM from the daycare was a violation of the courts prior order. (FOF 45)

Lakota's indifference to BM's best interests and bond with Teri and her husband at the daycare is clear by his actions and words. When asked if he had any consideration or thought as to what that may do to BM, his response was:

A: it's not that what it did to her. She's still young. She still don't understand everything like an adult would. She's—

Q: You don't think she understands not going to the home she's used to being in?

A: Yes, she understands –

A: Yes, she's a year and a half. She understands some things, not like she can't talk and tell us how we can talk and say why can't I go back to Teri's daycare.

Q: Did you put any consideration into what effect it may have on her to pull her out of her regular routine and what she's used to?

A: No, I did not.

(TT407-408) When asked about the behaviors BM started exhibiting right after she was pulled from Teri's daycare, the only response Lakota had was every child around their age group is going to hit. (TT 408) Lakota's unwillingness and indifference to BM and

what is best for her further shows his lack of understanding of the needs of a child and is also just plain cruel. The trial court did not err in ordering BM to continue at Teri's daycare. In the Court's final order, the trial court limited the time at Teri's daycare to at least December 31, 2024. Making this issue moot by the time a decision will be rendered.

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT FATHER LAKOTA SONGER TO PAY ATTORNEY FEES FOR THE DELAY IN THE TRIAL FOR NOT MAKING IT KNOWN HIS TRIBAL AFFILIATIONS WHEN THE INDIAN CHILD WELFARE ACT PLACES THE BURDEN OF NOTIFICATION ON THE PARTY SEEKING THE INVOLUNTARY PLACEMENT AND THE COURT.

Once again, Lakota is attempting to place the blame on someone other than himself and lays blame on the Melius' and the trial court that notice was not provided to the tribe. However, at no time did Lakota or his attorney make mention of the fact that Lakota was an enrolled member of any tribe, nor did he ever discuss any tribal cultures. Lakota testified at trial that he had not made any mention of this fact during the pendency of the proceedings. (TT 389) Erin also testified that Lakota identified his ethnicity on the custody evaluation paperwork as "white", he wrote in "white". (TT 78) Counsel points out in their Appellant Brief, finding of fact 58:

> Lakota may have a lower overall IQ and lower socioeconomic status than the Petitioners. However, these issues do not prevent him from being able to adequately parent Brynlee.

Further explaining in the brief "Lakota, as a lay person with a "lower overall IQ lower social economic status cannot be expected to be aware of a federal law related to his heritage." However, what is failed to be acknowledged, is Lakota did in fact disclose his heritage and status as an enrolled member of a tribe to his

attorney. At 12:09 pm on July 25, 2022, Attorney Wendell emailed the court with the following statement:

> I woke up in the middle of the night the other night thinking about this issue and then it went out of my head until I confirmed with Lakota a little bit ago. Lakota is an enrolled member of the Rosebud Sioux Tribe. I believe ICWA applies to this case. I believe ICWA is required to be following in this case. It is likely known in the area that the Songer children are Native American, and I think I had a previous conversation with Lakota about it but it had slipped my mind. Please advise."

An additional email from Attorney Wendell states:

> I agree and apologize for the late notice. My case – Lakota v. Cheryl – would not require the notice and I simply did not consider it when the Melius' filed their lawsuit. I will provide the court with authority as ordered.

(See attached email exchange Appendix 1)

Clearly, notice cannot be provided to the tribe if it is unknown that the member is enrolled in a tribe. Lakota's counsel knew he was an enrolled member of a tribe and failed to disclose this information to the trial court and opposing counsel until less than 24 hours before the trial was to commence. Upon notification by counsel of the possibility of ICWA applying in this present case, both parties were then ordered by the trial court to not only research whether ICWA applied, but also to brief the issue immediately so the trial court could decide if ICWA applied. (SR27-117, 121, 124)

Once determined that ICWA did in fact apply, the court was required to further delay the proceedings to provide the proper notice, and the parties could secure proper expert testimony for the trial. The delay and expense in the late disclosure by Lakota's counsel caused additional attorney fees to be incurred. As determined by the trial court "Lakota was clearly in the best position to inform of his tribal status, and he failed to do so. This has resulted in a delay of the trial. And to the extent that there were reasonable costs and

attorney fees which can be directly tied to the late notice and delay of the trial Lakota should be responsible for those." (BD TT 6) Notice was then properly provided to the Tribe. (SR-27-135)

When the trial court gave its oral decision, the trial court ordered attorney fees. The trial court required an itemized statement for each of the contempt findings and for the delay in the trial because of the late disclosure. (BD TT 26) The trial court informed the parties that Lakota would have the ability to challenge reasonableness within the 10 day timeframe. (BD TT 26) Lakota failed to raise any challenges to the reasonableness or to the fees being ordered.

Lakota failed to object to the order for attorney fees for either the finding of contempt or for the delay in trial. It is well established a matter will not be reviewed on appeal unless proper objection was made before the circuit court. Osdoba v. Kelley-Osdoba, 2018 SD 43, ¶23, 913 N.W.2d 496, 503 (citing Halbersma v. Halbersma, 2009 SD 98, ¶29, 775 N.W.2d 210, 220. The Supreme Court has further stated "an objection must be sufficiently specific to put the circuit court on notice of the alleged error, so it can correct it. Id. Lakota did not object to the order of attorney fees. Further, Lakota's own proposed findings of fact and conclusions of law did not object to the Court's order of attorney fees. However, even if he had, merely filing a proposed document is not sufficient. Id. Failure to argue an issue to the circuit court waives their ability to argue it on appeal. Weber v. Weber, 2023 SD 64, ¶23, 999 N.W.2d 230, 236.

IV. WHETHER THE TRIAL COURT ERRED IN GRANTING APPELLANT, LAKOTA SONGER, CUSTODY OF THE MINOR CHILD WHEN THE MELIUS' ESTABLISHED EXTRAORDINARY CIRCUMSTANCES EXISTED WHICH WOULD RESULT IN THE SERIOUS DETRIMENT F

THE CHILD IF CUSTODY WAS GRANTED TO APPELLANT AS SET FORTH IN SDCL 25-5-30.

The statutory language of SDCL 25-5-29 involving the extraordinary circumstances and serious detriment to the welfare of children, and whether the facts of a case constitutes extraordinary circumstances of serious detriment to the welfare of the child is a conclusion of law that is reviewed de novo. Veldheer v. Peterson, 2012 SD 86, ¶14, 824 N.W. 2d 86, 92 (2012) (citing 27, v. Novotny, 2002 SD 15, ¶19, 640 N.W.2d 460, 469)

Lakota has trouble knowing basic acceptable parenting. Issues were brought up by witnesses of his inability to properly child proof his home (FOF 52), his inability to know the correct car seat to use for BM (FOF 52), constantly returning BM in a filthy state, with poop up and down her back or a diaper that was soaked through (TT 16; EXH 15), snotty nose (EXH TR 18), the constant diaper rashes that would often be bloody and blistered (TT 15-16; EXH TR 5). The list really goes on and on.

Despite services being available to Lakota through Nikki Kavanaugh, and Donna obviously knowing how to utilize them, Lakota has failed until just recently to ask for help and ask about getting parenting classes. Lakota has failed to ask for help with companion care to work with him on proper hygiene for a child, nutritional needs of a child, independent living skills, family training, etc. Lakota has had these services available to him and he has not utilized them. Lakota has gotten help from Nikki to have repairs to his vehicle and to get a fridge but does not think to request help for BM.

BM is trying to tell us she is suffering right now from serious emotional distress and physical harm. Even though she is not able to talk, her actions provide us with considerable information. Despite having a constant back and forth routine between Tori's and Lakota's she had one constant and that was her daycare at Teri's. BM was

doing just okay in Lakota's care but was able to get her basic needs provided for when she was returned to Teri's and then Tori's home. They were able to provide BM with security in being safe. Lakota took that away from BM when he suddenly ripped her away from the one constant she knew, which was Teri's, all because Lakota did not want to pay $50 every other week to Teri for providing BM with daycare.

The court may consider evidence of a parent's past conduct in making decisions relating to children. In Interest of A.D., 416 N.W.2d 264, 268 (1987). Even though *Interests of A.D.* is discussed relative to an abuse and neglect matter, it does still apply in cases generally when looking at parents and children and what circumstances a court can/should consider in determining issues related to children. A child should not be required to wait for his parents to acquire parenting skills that may never develop; he is entitled to a stable, healthy environment now. Id.

In Clough, there was no expert to testify that C.C. would actually suffer a serious detriment without visitation, but in this case, we have two experts that testified that Lakota was neglectful in his parenting of BM and that serious detriment would occur if custody was placed with him.

Erin detailed in her report many of the extraordinary circumstances that applied in this matter under SDCL 25-5-30. Erin discussed 25-5-30(1) throughout her report of how she perceived many instances of potential harm if placed with Lakota. Specifically testifying to areas related to the extensive diaper rashes, failure to safety proof his home, failure to understand proper car seat needs, failure to understand proper nutrition for BM, especially given her prior failure to thrive diagnosis, his failure to properly provide for BM's needs and generally his overall neglect of BM while in his care. (SR27-194, pg. 23)

Erin detailed in her report specific details of extraordinary circumstances relating to SDCL 25-5-30(3), concluding that the Melius' have provided for all of BM's needs since she moved into their home. The Melius' have been diligent in providing for BM's needs and have had to provide treatment to her for the harm she suffers by being in Lakota's care. (SR27-194, pg.23) Under SDCL 25-5-30(4) it is clear to Erin that there is no doubt a bonded relationship between the Melius' and BM. Erin determined that BM had already suffered in her time with Lakota over the past nine months and felt it would only worsen if she does not have her time with the Melius'. (SR27-194, pg.24) Anyone who has had any contact with the Melius' and BM are able to easily see the bonded relationship between them. Breaking this bond would cause significant emotional harm to BM, which is an extraordinary circumstance.

Erin was able to further detail under SDCL 25-5-30(5) and the court has found that BM has done remarkably well in the care of the Melius' and substantial improvement since being with them. (SR27-194, pg. 24; FOF 17) Erin identified under SDCL 25-5-30(7), that while Lakota may state a commitment to raising BM his actions throughout the pendency of the report did not always back that position up. (SR27-194, pg. 24) Erin and Luke were both able to see that it is Donna that is spearheading this custody action. Lakota's attitude is one more of he is entitled to the custody because he is the father regardless of what harm he causes to BM. Erin identified a significant concern about Lakota's stability and security.

Lakota does not have the desire to find out what BM should be doing, what her milestones are, and where she should be developmentally. When asked about her milestones, Lakota was able to identify that she is running and playing, said she is eating a lot more, getting all her teeth in, then stated he "did not exactly know what they are for this

age group because he never grew a kid up at this age." (TT 393) When asked further about her milestones, Lakota stated he looked them up when he first started getting her but hasn't looked since then, and that was why he was taking parenting classes. (TT 394) This factor goes directly to SDCL 25-5-30(9). How is Lakota going to provide help BM with her development and education when he does not try to figure these things out. The Melius' have demonstrated a dedication to BM and to making all of her needs a priority. Lakota cannot say the same.

Any one of these subsections alone are able to rebut Lakota's parental presumption. Substantial testimony was provided by Erin and Luke on each of the extraordinary circumstances. Tori and Miles provided substantial evidence of extraordinary circumstances. The trial courts finding that the Melius' did not meet their burden of proof of showing was clearly erroneous.

V. WHETEHR THE TRIAL COURT ERRED AFTER CONSIDERATIONS OF ICWA IN GRANTING APPELLANT, LAKOTA SONGER, CUSTODY WHEN THE MELIUS' ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT THE CONTINUED CUSTODY OF BM BY LAKOTA WAS LIKELY TO RESULT IN SERIOUS EMOTIONAL OR PHYSICAL DAMAGE.

Once a child is determined to be an Indian child in a child custody proceeding, then ICWA will apply. 25 U.S.C. §1902. The Court has said in this case that BM is an Indian child, therefore ICWA applies. (COL 4) ICWA has several procedural requirements. The trial court has determined that this case best meets the definition of a foster care placement under ICWA. (COL 13) Guardianships fall under "foster care placements" within ICWA. 25 U.S.C. §1903(1)(i) For the placement to be ordered three specific requirements for finding foster care placement of Indian children is warranted the Court must make findings

supported by clear and convincing evidence, including testimony of a qualified expert witness that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(e).

There are specific standards of evidence for foster care placements.

> (a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
> (b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
> (c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceedings.
> (d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate house, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

25 C.F.R. §23.121.

Guidelines have been created by the BIA for ICWA and state "to be clear and convincing, the evidence must show the existence of conditions in the home that are likely to result in the serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result." In re Mahaney, 51 P.3d 776 783-4 (WA 2002) (citing Guidelines for State Courts; Indian Child Custody Proceedings, 44

Fed. Reg.67593 (Nov.26, 1979). The focus of the guidelines in determining whether the parent poses a risk of harm to the child is on the parent and his or her present unfitness to care for the child. Id. Mahaney goes on to state in their case that ICWA does not replace the best interests test of the state, but merely requires that the foster care finding be made by clear and convincing evidence. Id.

The burden of proof in cases dealing with SDCL 25-5-29 and ICWA is clear and convincing evidence. As the Mahaney court recognized, both federal and Washington state law are settled that court proceedings deciding matters of child custody should aim to protect the child's best interests and that ruling is consistent with opinions of other jurisdictions. Id. (See the *Mahaney* case for a full listing of those cases.) This Court needs to do the same and the fact that ICWA applies should not signal to this court that BM's best interests are replaced by the ICWA mandates. "Congress did not intend 'to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits' through enacting ICWA. Id. At 785. Further, in Mahaney the Court determined that even when there is no showing of present parental unfitness, in determining the best interests of the child the court may take into consideration emotional and psychological damage from prior unfitness of a parent and the child's current special needs to treatment and care. Id.

BM has endured physical detriment while in Lakota's care. BM has been subjected to physical pain because of Lakota's inability to provide basic proper parenting to BM. Luke Yellow Robe, an experienced, recognized Rosebud ICWA expert testified to the neglect that BM has been subjected to while in Lakota's care and that the continued placement of BM with Lakota is likely to result in serious emotional or physical damage.

One isolated incident of neglect may not be enough to show serious emotional or physical damage to BM but certainly the continued, repeated incidents of neglect, and repeated incidences of putting BM in harm's way by Lakota's failure to use proper car seats, failing to child proof his home, and his failure to understand why these things are issues further shows he is likely to continue to put BM in harms way. The trial court was clearly erroneous in determining that the Melius' did not meet their burden by clear and convincing evidence.

The trial court found the measures taken by the Melius' did constitute active efforts. (COL 17) The Melius' provided Lakota with a home initially to have visits with BM, Tori provided Lakota with a feeding schedule to help him understand the needs of BM, especially with her failure to thrive diagnosis. Tori provided arrangements for daycare while in her care and Lakota's care. Tori tried helping Lakota where she could in providing for BM's needs. Lakota even testified that Tori helped him throughout this process quite a bit. (TT 398)

CONCLUSION

The Melius' contend the trial court was not clearly erroneous in granting them continued visitation with BM. They have closely bonded with, and have a significant relationship with BM. Lakota recognized this bond and testified that he felt they should have continued visitation with her. The Melius' also contend the trial court was not clearly erroneous in requiring Lakota to continue using Teri for daycare for BM. There was testimony provided of the close significant relationship between Teri and BM and that BM did already exhibit adverse behaviors when she was abruptly removed from Teri's daycare.

The closeness of these bonds alone constitutes extraordinary circumstances and are in the best interests of BM.

The trial court was clearly erroneous in determining the Melius' did not show by clear and convincing evidence that they rebutted Lakota's presumptive rights as a parent under SDCL 25-5-29 and 30 along with the requirements of ICWA. Testimony and evidence were provided to the trial court of serious emotional or physical damage is likely to continue if custody is placed with Lakota.

APPENDIX

CERTIFICATE OF COMPLIANCE

The undersigned, Dava A. Wermers, attorney for the Appellee in the above-captioned matter, hereby certifies pursuant to SDCL 15-26A-66(b)(4) that the Appellee's Brief was completed in Times New Roman typeface. 12 point, and according to the word-processing system used to prepare the brief, Microsoft Word 365, it contains 9,711 words.

Dated this 8th day of October 2024.

WANTOCH LAW OFFICE, PROF LLC

/ Dava A. Wermers

Dava A. Wermers
221 E. 3rd
Mitchell, SD 57301
605-996-4454
dava@wantochlaw.com
Attorney for Appellees,
Miles and Tori Melius

REQUEST FOR ORAL ARGUMENT

The Appellant, requests oral argument pursuant to SDCL 15-26A-83.

CERTIFICATE OF FILING

I, Dava A. Wermers, certify that I have filed the Appellee's Brief and attached appendix and transmitted those to the South Dakota Supreme Court electronically and with electronic service via email upon the following:

Rose Ann Wendell
Wendell Law Office
2520 E. Franklin
Pierre SD 57501
605-224-2500
office@wendelllawoffice.com
Attorney for Plaintiff and Appellant
Lakota Songer

WANTOCH LAW OFFICE, PROF. LLC

Dava A. Wermers

Dava A. Wermers
221 E. 3rd
Mitchell, SD 57301
605-996-4454
dava@wantochlaw.com
Attorney for Appellees,
Miles and Tori Melius

CERTIFICATE OF SERVICE

The undersigned, Dava A. Wermers, as an attorney of record for the above-named Plaintiffs, Miles and Tori Melius, hereby certifies that I served a true and correct copy of the foregoing Appellee's Brief and Request for Oral Argument upon Rose Ann Wendell, Attorney for the Defendant, Lakota Songer, at her address at Wendell Law Office, 2520

East Franklin Street, Pierre, SD 57501; email at Office@WendellLawOffice.com; by electronic service via the State of South Dakota Odyssey File and Service system.

Dated this 8th day of October 2024.

WANTOCH LAW OFFICE, PROF. LLC

/s/ Dava A. Wermers

Dava A. Wermers
221 E. 3rd
Mitchell, SD 57301
605-996-4454
dava@wantochlaw.com
Attorney for Appellees, Miles and Tori Melius

Dava Wermers

From: Rank, Judge Bobbi (UJS) <Bobbi.Rank@ujs.state.sd.us>
Sent: Tuesday, July 25, 2023 3:41 PM
To: WLO General Use; Dava Wermers
Subject: RE: Songer trial

I sent the email when I did in the hope that neither of you had traveled yet, so I expected to decide the applicability issue via briefs.

There are three issues. The first two are relatively quick and third is hair splitting:

1. Does ICWA apply to this proceeding? If so...
2. Was notice provided to the Tribe? If not, then this would require continuance of the whole trial unless Ms. Wermers finds authority that notice to the Tribe is excused by the late disclosure.
3. What is the legal effect of ICWA beyond tribal right to intervene – Is ICWA expert testimony necessary if the Tribe decides they are not interested? Is there any real difference in the burden of proof? These are more substantive issues that will take a bit to brief and hash out.

Wendell has provided her authority on issues 1 and 2 and a minimal analysis on 3. If Wermers can provide her authority yet today on 1 and 2, then I can decide it tonight. But if she needs time, then I will push back day one and give her the time.

Judge Rank

From: WLO General Use <Office@WendellLawOffice.com>
Sent: Tuesday, July 25, 2023 3:16 PM
To: Rank, Judge Bobbi (UJS) <Bobbi.Rank@ujs.state.sd.us>; Dava Wermers <dava@wantochlaw.com>
Subject: Re: [EXT] Songer trial

Judge Rank -

I just saw this. I sent my brief but I would probably take some more time to address the issue. Can you explain more about what you are thinking? Would we have an in-person hearing on the issue tomorrow? I'm just trying to figure out whether to travel there or not.

Thanks.
RoseAnn

Wendell Law Office, P.C.

2520 East Franklin Avenue

Pierre, South Dakota 57501

Telephone: (605) 224-2500

Facsimile: (605) 224-2510

Email: Office@WendellLawOffice.com

From: Rank, Judge Bobbi (UJS) <Bobbi.Rank@ujs.state.sd.us>
Sent: Tuesday, July 25, 2023 2:57 PM
To: Dava Wermers <dava@wantochlaw.com>; WLO General Use <Office@WendellLawOffice.com>
Subject: RE: Songer trial

Because the clock is ticking, I am going to tell you that my initial reaction is that ICWA applies to this proceeding if Songer is in fact an enrolled member. Foster care placement is broadly defined in 25CFR 23.2 under the definition of a child custody proceeding. *In re: Mahaney*, 51 P.3d 776 (2002). Third party custodians are essentially guardians and conservators whether they started it as a guardianship or moved to intervene in a custody case as happened here.

If that is the case, then at a minimum the tribe is entitled to notice under 25CFR 23.11.

The evaluator recommendation in this case is third party custody. I'm not saying I will accept that recommendation – that's why we have a trial. But I don't want to go through a two day hearing and place custody with the Meliuses only for the Tribe to intervene later and change the playing field.

This is a two day trial. I am seriously considering at a minimum pushing day 1 to day 2 to allow the applicability, or non-applicability, and effect of ICWA to be fully briefed overnight. The late disclosure is a separate issue to deal with at the attorney's fees stage. But as you know, the appellate courts are very lenient with the Tribes asserting their rights late.

Judge Rank

From: Dava Wermers <dava@wantochlaw.com>
Sent: Tuesday, July 25, 2023 1:24 PM
To: WLO General Use <Office@WendellLawOffice.com>; Rank, Judge Bobbi (UJS) <Bobbi.Rank@ujs.state.sd.us>
Subject: RE: [EXT] Songer trial

I believe I should be afforded to ability to respond once Rose Ann provides the authority. I do not believe ICWA applies as it is a statute that governs jurisdiction and efforts required by the state in abuse and neglect cases, termination of rights cases and adoptions, none of which are the current situation. The state has not removed this child from Lakota's custody as he has never had custody.

PLEASE NOTE I HAVE A NEW EMAIL ADDRESS. PLEASE CHANGE YOUR CONTACT INFORMATION FOR ME TO dava@wantochlaw.com AND ALICIA IS NOW alicia@wantochlaw.com. Thank you.

Dava A. Wermers
Attorney and Counselor at Law

Wantoch Law Office
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Mitchell, SD 57301
Phone: (605) 996-4454
Fax: (605) 996-0023

Like us on Facebook!
facebook.com/wantochlaw

From: WLO General Use <Office@WendellLawOffice.com>
Sent: Tuesday, July 25, 2023 1:18 PM
To: Rank, Judge Bobbi (UJS) <Bobbi.Rank@ujs.state.sd.us>
Cc: Dava Wermers <dava@wantochlaw.com>
Subject: Re: Songer trial

Judge Rank -

I agree and I apologize for the late notice. My case - Lakota v. Cheryl - would not require the notice and I simply did not consider it when the Melius' filed their lawsuit. I will provide the court with authority as ordered.
RoseAnn

Wendell Law Office, PC
2520 East Franklin Street
Pierre, SD 57501
Phone: 605-224-2500

Sent from my iPhone

> On Jul 25, 2023, at 1:04 PM, Rank, Judge Bobbi (UJS) <Bobbi.Rank@ujs.state.sd.us> wrote:
>
> This is ridiculously late disclosure. The two or you need to confer immediately and get me your legal positions by end of the day on whether there needs to be a continuance, with citation of authority.
>
> **From:** WLO General Use <Office@WendellLawOffice.com>
> **Sent:** Tuesday, July 25, 2023 12:09 PM
> **To:** Rank, Judge Bobbi (UJS) <Bobbi.Rank@ujs.state.sd.us>; Dava Wermers <dava@wantochlaw.com>
> **Subject:** [EXT] Songer trial
>
> Judge Rank and Dava -
>
> My paralegal is preparing the witness and exhibit list. She will get it emailed shortly if she hasn't already done so.
>
> I woke up in the middle of the night the other night thinking about this issue and then it went out of my head until I confirmed with Lakota a little bit ago. Lakota is an enrolled member of the Rosebud Sioux Tribe. I believe ICWA applies to this case. I believe ICWA is required to be followed in this case. It is likely known in the area that the Songer children are Native American and I think I had a previous conversation with Lakota but it had slipped my mind.
>
> Please advise.
> RoseAnn

Wendell Law Office, PC
2520 East Franklin Street
Pierre, SD 57501
Phone: 605-224-2500

Sent from my iPhone

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30630

Miles Allen Melius and Tori Lynn Melius,
Plaintiffs and Appellees
vs.
Lakota Songer,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
GREGORY COUNTY

THE HONORABLE BOBBI RANK

Circuit Court Judge

APPELLANT'S REPLY BRIEF

NOTICE OF APPEAL FILED February 23, 2024

RoseAnn Wendell
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Filed: 11/21/2024 1:45 PM CST Supreme Court, State of South Dakota #30630

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TABLE OF AUTHORITIES

STATUTES AND RULES

CASES

Pursuant to SDCL §15-26A-62, Defendant and Appellant Lakota Songer (hereinafter Lakota) submits his reply to the brief of the Plaintiffs and Appellees, Miles Melius and Tori Melius (hereinafter Melius'). Reference to the trial transcript will be designated by "TT" followed by the applicable page number. Reference to the Findings of Fact are designated as "FF" followed by the finding number and reference to Conclusions of Law are designed at "CL" following by the conclusion number.

ISSUE I:

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED ALTERNATING WEEKENDS AND ALTERNATING HOLIDAY VISITATION AND REGULAR PHONE CALLS FOR THE PREVIOUS GUARDIANS AFTER FINDING APPELLANT FATHER LAKOTA SONGER A FIT PARENT AND GRANTING HIM SOLE LEGAL AND PHYSICAL CUSTODY.

The trial court abused its discretion when it utilized the "best interest" standard for visitation of the previous temporary guardians. The constitutional and statutory requirements for nonparent visitation are the same as for a nonparent who seeks custody. The Melius' sought custody of B.M and the trial court found and concluded they did not meet their burden of proof. The trial court further found, because Melius' did not meet their burden of proof, the trial court need not evaluate the *Fuerstenberg* "best interest" factors and, therefore, the trial court erred

when it considered "best interest" and granted Melius' substantial visitation.

SDCL §25-5-29 clearly sets forth the necessary requirements for a nonparent who seeks custody of or visitation with a child. A parent's rights may be rebutted by proof as set forth in SDCL §§25-5-29 and 30. This Court further expounded on the burden of a nonparent in Clough v. Nez, 2008 SD 125 citing D.G. v. D.M.K. 1996 SD 144, 557 NW2d 235, 243. In D.G., this Court stated "[U]ltimately, in order to grant a nonparent visitation rights with a minor child over the objections of a parent, a clear showing of gross misconduct, unfitness, or other extraordinary circumstances affecting the welfare of the child is required. Id. at ¶9.

Our constitutional and statutory scheme is not set up for this alternative option whereby since Melius' have failed to meet their burden for nonparent custody, they may then receive the "consolation prize" of visitation. "The right of visitation derives from the right of custody and is controlled by the same legal principles." Cooper v. Merkel, 470 NW2d 253, 255-56 (SD 1991).

The trial court found "some ongoing contact with [Melius'] is in [B.M.'s] best interest". (FF 67). However,

the "best interest" standard is not applicable this matter. The trial court concluded:

> 12. If the third parties rebut the parent's presumptive right to custody, then the Court conducts the best interest of the child analysis through application of the *Fuerstenberg* factor. *Id.*at ¶31; *Howlett*, at ¶20. Many of the extraordinary circumstances and *Fuerstenberg* factors overlap, but the extraordinary circumstances analysis must be completed first. *Howlett* at ¶20.

The trial court concluded that Melius' did not meet their burden for custody or visitation under SDCL §§25-5-29 and 30. Once the trial court concluded that no extraordinary circumstances applied, the inquiry ends. In fact, the trial court correctly concluded that because the Melius' "did not meet the high burden of proof of clear and convincing evidence to overcome Lakota's presumptive right to custody, the [trial court] need not evaluate the *Fuerstenberg* factors." (CL 21). The trial court must rely on Lakota's judgment, as a fit parent, to determine the ongoing contact between the Melius' and B.M.

Melius' assert "[N]owhere in any of the trial court's findings does the trial court find Lakota is a fit parent. A finding of extraordinary circumstances is not contingent on finding a parent fit or unfit." (Appellant's Brief, page 19). This statement is not accurate. The trial court specifically rejected the notion Lakota engaged in gross

misconduct, was unfit or that extraordinary circumstances resulting in serious detriment to the child were present. The trial court did not find Lakota to be an unfit parent. While Appellee is correct that the trial court did not specifically make a finding of fitness, it is implied within the trial court's many findings of fact and conclusions of law.

Melius' also assert the facts of this case are comparable to Clough v. Nez; Lakota disagrees. In Clough, Clough did not ultimately seek custody of the minor child; he sought only visitation. At the time the lawsuit commenced, the minor child had been in Clough's physical custody for approximately four of the child's five years with the biological mother having no contact during a substantial period of that time. Clough at ¶3-5, ¶16. Once Clough was ruled out as her father, he withdrew his claim for custody but sought visitation with the child. Id. at ¶6. The trial court found, and this Court affirmed, that the length of time Clough was the primary caretaker of the child was, alone, sufficient to rebut Nez's presumptive rights as a parent under SDCL §25-5-29(4) and SDCL ¶25-5-30(3). Id. at ¶16.

The facts of this case are much different. Lakota had contact with B.M. immediately after her birth in October,

2021. Lakota immediately pursued paternity and, once paternity was established, he sought custody. Beginning in September, 2022 (not September, 2023 as erroneously stated in Appellant's Brief, Statement of Facts), Lakota had four overnights every week. (FF 20, FF 60). Lakota has had B.M. in his care, custody, and control more than half the time since she was less then eleven months' old. Unlike Nez, Lakota never voluntarily placed B.M. with another person. In Clough, the trial court found extraordinary circumstances applied to the facts of the case; in this case, even though the Melius' make argument about extraordinary circumstances, the trial court concluded the Melius' failed to prove extraordinary circumstances.

The trial court concluded, as a matter of law, as follows:

18. However, the Petitioners have failed to present clear and convincing evidence that continued custody by Lakota would result in serious emotional and physical damage to Brynlee.

19. Petitioners have also failed to establish, by clear and convincing evidence, that Lakota abandoned or persistently neglected the child, forfeited his parental rights to Cheryl or Petitioners, or abdicated his parental responsibilities.

20. Petitioners have failed to prove, by clear and convincing evidence, any extraordinary circumstances under SDCL 25-5-30.

This conclusion of law ends the inquiry about whether the trial court may make any further orders regarding custody

and visitation with B.M. The trial court abused its discretion when it ordered substantial, ongoing visitation between Melius' and B.M.

ISSUE IV:

WHETHER THE TRIAL COURT ERRED IN GRANTING APPELLANT, LAKOTA SONGER, CUSTODY OF THE MINOR CHILD WHEN THE MELIUS' ESTABLISHED EXTRAORDINARY CIRCUMSTANCES EXISTED WHICH WOULD RESULT IN THE SERIOUS DETRIMENT TO THE CHILD IF CUSTODY WAS GRANTED TO APPELLANT AS SET FORTH IN SDCL §25-5-30.

AND

ISSUE V:

WHETHER THE TRIAL COURT ERRED AFTER CONSIDERATION OF ICWA IN GRANTING APPELLANT, LAKOTA SONGER, CUSTODY WHEN THE MELIUS' ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT THE CONTINUED CUSTODYOF B.M. BY LAKOTA WAS LIKELY TO RESULT IN SERIOUS EMOTIONAL OR PHYSICAL DAMAGE.

The trial court, after hearing two days of evidence, considered both the statutory requirements as well as the Indian Child Welfare Act (ICWA) and made the appropriate findings and conclusions regarding custody of B.M.

Melius' allege "Lakota has trouble knowing basic acceptable parenting" regarding child proofing, car seats, and the like. (Appellee's Brief page 27). They assert the list "goes on and on". (Appellee's Brief, page 27).

Lakota, as a new, young parent during the pendency of this case, did make parenting mistakes. However, his mother, Donna, who has children placed with her through a DSS kinship placement and who has significant experience

with children, is very supportive of Lakota and B.M. TT 309:2-310:2).

Alternatively, Lakota consistently attempted to establish a relationship with B.M. (FF 65) Lakota loves B.M.; they are bonded. (FF 66). He has sought out resources for B.M. (FF 64).

The trial court found Lakota had learned to address the diaper rashes (FF 37) and that he provides proper food and cooks for B.M. (FF 50). B.M.'s health concerns, specifically the concern of failure to thrive, have improved since she was out of Cheryl's custody. (FF 50). Lakota maintains employment and owns his own house. (FF 51). Lakota made progress in regard to safety issues and there was no evidence of an imminent threat to B.M. (FF 53). Lakota does not abuse substances and has a limited criminal history. (FF 54). The trial court found "Lakota's action and growing maturity throughout these proceedings show a bond between him and B.M. and a willingness and effort to be her parent." (FF 57).

Significantly, Melius' alleged Lakota was "constantly returning B.M. in a filthy state, with poop up and down her back or a diaper that was soaked through. (Appellee's Brief, page 27). However, the trial court rejected this allegation and found the "pictures presented by the

[Melius'] to support this allegation, which presumably are the worst [Melius'] could find, do not show an extreme level of uncleanliness." (FF 56). Melius' embellished Lakota's parenting deficits throughout the case and during the trial.

Erin Nielsen Ogdahl, the court appointed custody evaluator, "gave little credit to Lakota as a parent even though [B.M.] had spent more than half the time with Lakota since September 2022." (FF 60). Luke Yellow Robe, the Melius' ICWA expert, did the same. In addition, his recommendations for Lakota's parenting time would effectively have terminated Lakota's parental rights. The trial court found that this recommendation was in contravention of ICWA. (FF 61). Significantly, the trial court found:

> 62. Ogdahl's analysis of Lakota's presumptive right to custody was inadequate. In reviewing the entirety of her report and testimony, this Court determines that she evaluated this case as if it was a custody dispute between natural parents and did not fully recognize Lakota's presumptive rights as a natural parent. She gave every benefit of the doubt to the [Melius'].

The trial court found Lakota's ICWA expert, Renee Bear Stops, credible and gave her testimony more weight. (FF 63). While she acknowledged some concerns, she recommended Lakota be granted custody of B.M. and that such custody

would not result in serious emotional and physical damage to her. (FF 63).

The trial court made the following relevant findings of fact:

17. The [Melius'] satisfy the preliminary requirement under SDCL §25-5-29 because they were closely bonded with [B.M.] as parental figures and have formed a significant and substantial relationship with the child.

18. However, [Melius'] have failed to present clear and convincing evidence that continued custody by Lakota would result in serious emotional and physical damage to [B.M.]."

19. [Melius'] have also failed to establish, by clear and convincing evidence, that Lakota abandoned or persistently neglected the child, forfeited his parental right to Cheryl or [Melius'], or abdicated his parental responsibilities.

20. [Melius'] have failed to prove, by clear and convincing evidence, any extraordinary circumstances under SDCL §25-5-30.

60. Ogdahl and Yellow Robe gave serious weight to Medrano's Affidavit, even though she did not testify at trial, and they gave little credit to Lakota as a parent even though B.M. had spent more than half the time with Lakota since September of 2022.

62. Ogdahl's analysis of Lakota's presumptive right to custody was inadequate. In reviewing the entirety of her report and testimony, this Court determines that she evaluated this case as if it was a custody dispute between natural parents and did not fully recognize Lakota's presumptive rights as the natural parent. She gave every benefit of the doubt to the Petitioners.

"Child custody determinations are reviewed for an abuse of discretion." Harwood v. Chamley, 2023 SD 35, ¶18.

An abuse of discretion is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable. Id.

The trial court heard the testimony of the witnesses, considered the legal standard and concluded that Melius' failed to meet their burden of proof under both South Dakota statute and the federal Indian Child Welfare Act. The trial court correctly denied the Melius' nonparent custody complaint and granted Lakota Songer sole legal and physical custody of B.M.

CONCLUSION

The trial court erred in concluding and ordering nonparent visitation between the Melius' and B.M. under the "best interests" standard. Once the trial court determined Melius' failed to meet their burden of proof, the court must step back and allow Lakota, as a fit parent, to manage contact between the Melius' and B.M. based on her best interest.

The trial court correctly found and concluded that Lakota is B.M.'s legal and physical custodian. The trial court correctly recognized the fundamental liberty interest in natural parents in the care, custody and management of their children does not evaporate simply because they have

not been model parents. In re: S.M.N., 2010 SD 31 at ¶17. Lakota, as B.M.'s natural parent, has a presumptive right to custody of her. Lakota took immediate steps after B.M.'s birth to parent her, he continued to pursue custody despite the Melius' resistance throughout this case and proved that B.M. has been thriving in his primary care since September, 2022. Regardless of Lakota's constitutional rights, it is also in B.M.'s best interest to be in Lakota's care, custody and control.

CERTIFICATE OF COMPLIANCE

The undersigned, RoseAnn Wendell, attorney for the Appellant in the above-captioned matter, hereby certifies pursuant to SDCL 15-26A-66(b)(4) that the Appellant's Brief was completed in Courier New typeface, 12 point, and according to the word-processing system used to prepare the brief, Microsoft Word 365, it contained 2921 words.

DATED this 21st day of November 2024.

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CERTIFICATE OF FILING

I, RoseAnn Wendell certify that I have filed the Appellant's Brief and transmitted those to the South Dakota Supreme Court electronically and with electronic service via email upon the following on this the 21st day of November 2024:

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