

CHILDREN'S COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT

STATE OF MINNESOTA

In Re the Matter

Court File No. 4

Neglected Child.

CHILDREN'S COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

FILED JUN 17 2013

LYNN K. McDONALD
CLERK OF COURT

MEMORANDUM OPINION AND
PROTECTIVE ORDER

In this Child Welfare proceeding, _____ the mother of _____, has moved the Court for an order directing the Shakopee Mdewakanton Sioux Community Child Welfare Office to provide her with "copies of all case notes, supervised visit reports, case plans, and any other documentation relative to [this matter]." _____ s father, has joined in

_____ motion. _____ argues that the Court has adopted one and only one set of discovery rules, and that under those rules she is entitled to all of the documents created and obtained by the Child Welfare Office. The Child Welfare Office has resisted her requests, contending, *inter alia*, that certain of the documents sought are exempt from discovery because they were prepared in anticipation of litigation, and that in some instances pledges of confidentiality were made to persons who provided the Child Welfare Office with information – pledges which would be broken were _____ given access to the information.

On March 18, 2013, the undersigned judges, sitting as a three-judge panel under Rule 25 of this Court's Rules of Civil Procedure, heard oral argument on the parties' contentions, and today, in the Order that follows this Memorandum, we adopt procedures to properly balance the legitimate interests of the moving parties in having access to information with the also-legitimate interests of other persons in protecting very sensitive personal information.

It is in the nature of child-welfare proceedings that materials must be generated and maintained that contain deeply personal, deeply sensitive information – information that, for the

persons to whom it pertains, would be painful to have generally available. It is for these reasons that Chapter IX, section 8, of the Domestic Relations Code of the Shakopee Mdewakanton Sioux Community (the "Code") provides --

All matters under this Code shall be confidential and heard in closed Court, excluding all persons except the Petitioner, parents, guardian, custodian or caregiver, guardians ad litem, family members, the Child Welfare Officer, attorneys entering appearances on behalf of any of the foregoing, or other persons permitted by the Court.

And it is for the same reasons, Chapter IX, section 10 of the Code mandates that --

[t]he Court shall maintain a record of all proceedings under this Chapter in files labeled "Records of the Children's Court." The records of proceedings under this Code shall not be open to public inspection ...

In our view, these provisions modify the discovery rules that generally apply to proceedings in this Court. But these provisions of the Code do not contemplate that all aspects of a child-welfare proceeding will be shrouded in secrecy, with sensitive information available only to the Child Welfare Office and the Guardian ad Litem. Indeed, as . correctly points out, Chapter IX, section 14(d)(1) of the Code requires specifically requires that --

[f]or all matters in which a dispositional order other than a dismissal is entered, the Child Welfare Office shall develop a written plan of service in consultation with the child (of over 12 years of age), the parents guardian, custodian or caregiver and such other child-and-family-service providers as may be appropriate to the case. Each case plan shall be designed to comply with Section 9(e)(1) [of the Code, relating to the Code's preferences of child placements] and shall include the following features:

- (i) a description of the type of placement;
- (ii) a discussion of the appropriateness of the placement for the particular child;
- (iii) a plan for assuring that:
 - (a) the child receives proper care while in placement;
 - (b) services are provided to the parents(s), child, and designated caregivers to facilitate the return of the child to her/his home; and
 - (c) the need for services of the child in placement are met and that the services are appropriate of a child must be placed out of home.

Under section Chapter IX, section 14(d)(2) the case plan developed under the foregoing mandate must be reviewed “[a]t no less than six month intervals,” with “written findings that address” –

- (i) Continuing need for service and/or placement.
- (ii) Appropriateness of services and/or placement to date.
- (iii) Compliance with the service plan.
- (iv) Progress made toward alleviating or mitigating the circumstances giving rise to the dispositional order.
- (v) Projection of a likely date by which the child may be returned home or provided a long-term replacement.

Presumably, the process for generating these written findings (which, as matters have developed in our Court, take the form of the Child Welfare Officer reports that are submitted to the Court and the parties in conjunction with review hearings or status conferences) is to be the same as the process involved in creating the initial case plan. That is, the findings should be generated “. . . in consultation with the child (if over 12 years of age), the parents guardian, custodian or caregiver and such other child-and-family-service providers as may be appropriate to the case . . .”

Hence, under the Code the parties – in particular, for our purposes here, the parents – are to have direct involvement in the generation and review of case plans and progress reports. And from that, it seems clear that they also should have access to significant amounts of the information that is available to the Child Welfare Office. On the other hand, we do not discount the arguments made by the Child Welfare Office that there may be circumstances where obtaining information that could be vital to ensuring or enhancing the best interests of the affected child or children – the interests are the central focus of Chapter IX of the Code – would be difficult or impossible unless that information will not be disclosed to certain parties.

So we are obliged to create a balance. Going forward, we intend to adopt a rule that will apply to all of our Child Welfare proceedings. But pending the propounding of that rule – which we intend to circulate for comment to the attorneys who practice before our Children’s Court – we today adopt the following Protective Order, that we intend to facilitate the orderly, efficient and expeditious exchange of discoverable information while minimizing the potential for unauthorized disclosure of confidential, proprietary, private or secret documents.

SCOPE OF THIS ORDER

1. Rule 23 of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux Community shall apply to these proceedings, and the Child Welfare Office of the Shakopee Mdewakanton Sioux Community shall, within twenty days, produce the materials sought by the mother of N.J.B., subject to the provisions of this Protective Order
2. This Protective Order shall apply to all information, documents and things (and copies thereof) produced or disclosed during the course of this matter by any party or nonparty that is required to produce or disclose such information, documents or things pursuant to any other Court order or process, including all such information, documents or things disclosed:
 - a. pursuant to a subpoena;
 - b. through informal or formal discovery or at any hearing;
 - c. pursuant to Court Order unless otherwise allowed by this Court;
 - d. in testimony given in a deposition or hearing; or
 - e. through any copies, notes, abstracts or summaries of information described in parts (a) through (d) above.

Information and documents described in this paragraph shall be referred to hereinafter collectively as "Litigation Materials."

DESIGNATION

3. Any party or nonparty producing or disclosing Litigation Materials in this action (hereinafter, "Producing Party") may designate Litigation Materials as "Confidential" or "Attorneys' Eyes Only." Materials designated as "Confidential" or "Attorneys' Eyes Only" are referred to herein as "Designated Materials."
4. Any Producing Party may designate as "Confidential" any Litigation Materials that consist of or relate to any of the following: personal, investigatory, or private material or information concerning any individual.
5. Any Producing Party may designate as "Attorneys' Eyes Only" any Litigation Materials that consist of the following:

- a. highly confidential or private information about any party or the child; or
- b. any medical, psychological, personal, investigatory material or information concerning any party or the minor child.

MANNER OF DESIGNATION OF MATERIALS

6. A Producing Party may designate materials in the following manner:
 - a. Documents or Things. The Producing Party may write, type, or stamp the word “Confidential” or “Attorneys’ Eyes Only” on the particular document or thing. Writing, typing, or stamping “Confidential” or “Attorneys’ Eyes Only” upon the first page of multi-page Litigation Materials, or Litigation Materials that are bound or attached together by the producing party in any manner, shall have the effect of designating such collection in its entirety.
 - b. Interrogatories and Requests for Admissions. In answering any interrogatory, request for admission, or part thereof, a Producing Party may write, type, or stamp the word “Confidential” or “Attorneys’ Eyes Only” at the beginning of the relevant response.

RESTRICTIONS ON USE AND DISCLOSURE OF CONFIDENTIAL MATERIALS

7. Designated Materials may only be used by the recipient of such information in connection with the litigation of this action, and for no other purpose. The recipient of any Designated Materials shall maintain such information in a manner intended to preserve, and shall use its best efforts to maintain, the confidentiality of such information.
8. Except by Order of this Court, any Litigation Materials designated as “Confidential” (hereinafter, “Confidential Materials”) may be disclosed only to the following persons:

- a. attorneys of the law firm _____ and its staff; attorneys of the law firm _____, attorneys of the law firm _____ and its staff; the Guardian *ad Litem* and her staff; and the Court and Court personnel;
- b. stenographic reporters engaged for depositions or other proceedings necessary for the conduct of this case;
- c. such other persons as may be consented to by the Producing Party designating the Confidential Materials;
- d. the parties to the extent deemed necessary by their respective attorneys of record for the preparation for trial and trial of this action, however, any such disclosure shall be in the form of discussions with the attorneys only and the attorney shall not provide copies of any Designated Materials to the party;
- e. the authors, senders, addressees and designated copy recipients of the Confidential Materials; provided, however, that such persons may not retain such Confidential Materials unless otherwise entitled to receive them;
- f. outside litigation support vendors including, but not limited to, commercial photocopying vendors, scanning services vendors, coders and keyboard operators; and
- g. actual or prospective independent outside consultants or experts retained by the attorneys of record to assist in this action, to the extent deemed necessary by said attorneys, and non-party fact witnesses who are in good faith intended to be called at trial; provided that the person first agrees in writing to the restrictions set forth

herein in the form of the Agreement to Protective Order attached hereto as Exhibit A; and

h. Employees and agents of the Shakopee Mdewakanton Sioux Community Child Welfare Office.

9. Except by Order of this Court, any Litigation Materials designated as "Attorneys' Eyes Only" may be disclosed only to the persons designated in paragraphs 7(a), (b), (c), (d), (f), (g), (h) and (i).

10. If any party otherwise objects to another party's designation of Designated Materials, the objection must be made in writing, must state the reasons for such objection, and must be served on counsel for all parties. Upon the service of such an objection, the parties shall first attempt to resolve the dispute informally. If such efforts are not successful, the party seeking to disclose the Designated Materials or seeking the change or removal of a designation may bring a Motion to Compel Discovery, complying with and under the Tribal Court of the Shakopee Mdewakanton Sioux Community Rules of Civil Procedure, this Court's Scheduling Order (if any), and any other applicable court orders, including any informal motion practice rules allowed by the Court; provided, however, that the making of such motion will not be deemed to be determinative of any ultimate issues in the case.

11. Nothing contained in this Protective Order shall restrict or prevent any Producing Party from disclosing or otherwise using Litigation Materials which that Producing Party produces or discloses itself.

12. The inadvertent or unintentional disclosure by a Producing Party of that party's Designated Materials during the course of this litigation, regardless of whether the information was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of

the Producing Party's right to designate such materials or to assert their confidential status, either as to the specific information disclosed or as to any other information relating thereto or on the same or related subject matter. Counsel for the parties shall in any event, to the extent possible, upon discovery of inadvertent disclosure, cooperate to restore the confidentiality of the material that was inadvertently or unintentionally disclosed by the Producing Party.

13. Nothing contained in this Protective Order shall affect the right of any party to make any objection, claim any privilege, or otherwise contest any request for production of documents, interrogatory, request for admission, or question at a deposition or trial, or to seek further relief or protective orders from the Court as permitted by the Tribal Court of the Shakopee Mdewakanton Sioux Community Rules of Civil Procedure. Nothing in this Protective Order shall constitute an admission or waiver of any claim or defense by any party.

FILING AND USE IN COURT OF DESIGNATED MATERIALS

14. The parties agree to file all pleadings and other documents containing Designated Materials under seal, and the Clerk of the Court shall so maintain them. Upon the default of a party to file a document containing Designated Materials under seal, any party may subsequently designate to the clerk that the document should be so maintained. The parties agree to make all efforts reasonable to avoid unnecessarily filing documents under seal and to segregate Designated Materials from other Litigation Materials and file Designated Materials separately under seal to the extent possible.

THIRD-PARTY REQUEST FOR DESIGNATED MATERIALS

15. If any party receives a subpoena or document request from a third party that purports to require the production of Designated Materials in that party's possession, the party receiving the subpoena or document request: (a) shall immediately notify the Producing Party that designated

the materials of the receipt of said subpoena or document request, and (b) shall not oppose any effort by the Producing Party to quash the subpoena or obtain a protective order limiting discovery of such material. The Producing Party seeking to retain Designated Materials shall have the obligation to attempt, in good faith, to reach an informal resolution with the subpoenaing party of the confidentiality concerns before the return date of any subpoena or order for production.

DISCOVERY FROM NONPARTIES

16. A nonparty producing Litigation Materials may designate some or all of the Litigation Materials it produces in the same manner provided for in this Protective Order with respect to Litigation Materials produced by or on behalf of the parties to this action. Any party may also designate any Litigation Materials produced by a nonparty as "Confidential" or "Attorneys' Eyes Only." Such Designated Materials shall be governed by the terms of this Protective Order. A party or their attorney may also direct a nonparty to complete the Agreement to Protective Order, attached as Exhibit A, before that party makes a disclosure.

CONCLUSION OF LITIGATION

17. Within 30 days of the conclusion of this action, including any post-trial motions or appellate proceeding, counsel of record for the parties shall ensure that all Designated Materials and all copies thereof and notes, abstracts or summaries made therefrom, in the possession custody or control of counsel or those persons or entities to whom or to which counsel distributed all Designated Materials, are destroyed and shall certify to counsel for the Producing Party that the Designated Materials have been destroyed. The term "destroy" is understood to include the permanent deletion of all Designated Materials from any and all electronic media.

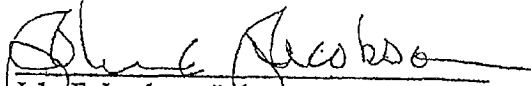
AMENDMENT OF THIS ORDER

18. The provisions of this Protective Order may be modified at any time by stipulation of the parties as approved by the order of the Court. In addition, a party may at any time apply to the Court for modification of this Protective Order by a motion brought in accordance with the rules of the Court.

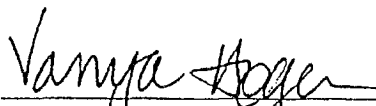
ORDER

The parties shall abide by all terms and conditions set forth above pertaining to the dissemination and use of Confidential and Attorneys' Eyes Only information and documents.

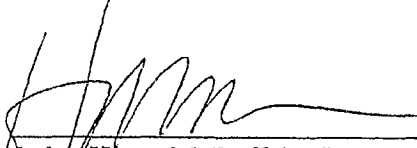
Dated: June 17, 2013



John E. Jacobson, Judge
Snakopee Mdewakanton Sioux Community
Tribal Court



Judge Vanya S. Hogen



Judge Henry M. Buffalo, Jr.

EXHIBIT A
CHILDREN'S COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT

STATE OF MINNESOTA

In Re the Matter of

Court File No.

Neglected Child.

AGREEMENT FOR PROTECTIVE ORDER

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1. I have read a copy of the Stipulation and Protective Order dated _____, 2013 ("the Order") entered in the above--identified lawsuit and I understand that I am bound by its terms.
 2. I hereby agree under penalty of contempt of court that I shall not disclose or use the contents of any material designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY except in accordance with the terms thereof.
 3. I hereby agree and submit to the exercise of personal jurisdiction by the Tribal Court of the Shakopee Mdewakanton Sioux Community, insofar as is necessary to enforce the Order.

Dated: _____, 2013

[Insert Name]