

220

IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

IN THE INTEREST OF

Name _____
DOB xx /xx / ____ A male female

Case No. _____

Name _____
DOB xx /xx / ____ A male female

Case No. _____

Name _____
DOB xx /xx / ____ A male female

Case No. _____

INDIAN CHILD WELFARE ACT
FINDING OF UNFITNESS
AND ORDER TERMINATING PARENTAL RIGHTS
OR APPOINTING PERMANENT CUSTODIAN

Pursuant to K.S.A. 38-2203(a), 38-2269, 38-2270, 38-2271, 38-2272 and 25 U.S.C. § 1901 *et seq.*

Now on this _____ day of _____, _____, the above-captioned matter comes on for hearing of the Motion for Finding of Unfitness before Judge _____.

The Court finds that each child named above has been adjudicated a Child in Need of Care and that **each child named above or** **the child** _____ is an Indian child as defined by the Indian Child Welfare Act (ICWA) and notice as required by ICWA has been timely provided. A petition requesting the transfer of jurisdiction to the Tribe **has not been filed** **was filed and the transfer of jurisdiction was denied** **was filed and the transfer of jurisdiction was declined**, and the Court has jurisdiction to proceed.

The Court finds that jurisdiction and venue are proper. Notice to parties, interested parties and those required to receive notice has been given as required by law.

- The petitioner appears by _____ **County/District Attorney or designee** **other** _____.
- The child(ren) appears **in person and** **not in person, but by the child(ren's) guardian ad litem,** _____.
- _____ *Name of Mother*, the mother **appears in person pro se** **appears in person, and through her attorney,** _____ **appears not in person, but by and through her attorney** _____ **does not appear.**

proven unsuccessful. Those efforts include, but are not limited to, the following: _____

_____.

3. The Court has received and considered evidence including the testimony of a qualified expert witness, as required by ICWA, and that evidence shows, beyond a reasonable doubt, that continued parental custody of the Indian child(ren) is likely to result in serious emotional or physical damage to the child.

4. Considering the physical, mental or emotional health of each child, termination of parental rights is in the best interests of each child named above and the physical, mental or emotional needs of each child would best be served by termination of parental rights. The parental rights of _____ should be terminated.

or

The Court has considered whether termination of parental rights is in the best interests of each child, but parental rights should not be terminated.

THE COURT FURTHER FINDS:

_____.

IT IS THEREFORE ORDERED:

1. The parental rights to the children named above of the following persons are terminated: _____

_____.

2. A permanent custodian shall be appointed for _____.

or

Custody of _____ shall be granted for adoption proceedings to **the Secretary** **other agency** _____.

or

Custody of _____ shall be granted to proposed adoptive parents _____ for adoption proceedings. The Court hereby consents to the adoption of the child by the proposed adoptive parents.

or

Other _____

3. The Court has considered ICWA placement preferences, in order of preference, as follows:

Extended family (*List considered placements or efforts to identify placements.*)

Other members of the child's tribe (*List considered placements or efforts to identify placements.*) _____

Other Indian families (*List considered placements or efforts to identify placements.*)

4. Good cause exists not to follow the placement preference: (*Specify basis for finding for each child.*) _____

THE COURT FURTHER ORDERS:

THE COURT FURTHER ORDERS this matter set for permanency hearing before **the Court**
 the CRB on the _____ day of _____, _____, at _____ **a.m.** **p.m.**

IT IS SO ORDERED THIS _____ day of _____, _____.

Judge of the District Court

Authority

K.S.A. 38-2203(a), 38-2269 through 38-2272 and 25 U.S.C. § 1901 *et seq.*

Notes on Use

The court may terminate parental rights or appoint a permanent custodian when the child has been adjudicated a child in need of care. The standard, under K.S.A. 38-2269a, is clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future. K.S.A. 38-2269 sets out specific considerations that the court is required to make, in addition to factors that may establish grounds for termination of parental rights. K.S.A. 38-2271 defines the terms and conditions under which the presumption of unfitness shifts the burden of proof to the parent. Once those considerations and determinations have been made, ICWA requirements apply. Compliance with ICWA is jurisdictional. Failure to comply with ICWA may render orders devoid of authority.

Prior to terminating the parental rights to an Indian child, the court must find that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful (paragraph 2 of the form). ICWA prohibits termination of parental rights to an Indian child unless the court determines beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (paragraph 3 of the form). The evidence must show that the conditions that exist are likely to cause the damage. A finding that the parents are unfit is not sufficient. The testimony of a qualified expert witness at the termination

hearing is required. This finding shall be made in addition to the finding pursuant to the Kansas standard. Department of the Interior, BIA Guidelines for State Courts, Indian Child Custody Proceedings.

K.S.A. 38-2269(g) requires that a court, after making a finding of unfitness, consider whether termination of parental rights is in the best interest of the child, if requested, giving primary consideration to the physical, mental and emotional health of the child. If the court terminates parental rights the court may authorize adoption, appointment of a permanent custodian, or continued permanency planning. If the court does not terminate parental rights, the court may authorize appointment of a permanent custodian or continued permanency planning, subject to ICWA. The placement preferences required at disposition continue to be applicable.

When considering placement of an Indian child, after terminating parental rights, ICWA has preferences that the court is required to consider. Findings should be made and recorded, based on reports and testimony. The child's tribe may change the placement preferences. Department of the Interior, BIA Guidelines for State Courts, Indian Child Custody Proceedings.

After termination of parental rights, the court may enter an order granting custody of the child to the secretary or a Kansas adoption corporation (authorized by K.S.A. 38-112) for adoption proceedings. The secretary or corporation shall have authority to place the child and give consent for the adoption of the child. Or the court may grant custody of the child to proposed adoptive parents and consent to the adoption. The court shall give preference first to granting custody for adoption to a relative of the child and second to a person with whom the child has close emotional ties, to the extent that it is in the best interest of the child, subject to ICWA. The court's jurisdiction over the child shall cease when an adoption decree is filed, and the court shall enter an order to that effect, Form 190.

The court may appoint a permanent custodian after making a finding of unfitness, whether or not the parental rights are terminated. A permanent custodian may also be appointed by the consent of the parents. K.S.A. 38-2272 provides that the secretary's custody of the child shall cease and the court may, but is not required to, terminate jurisdiction over the child upon appointment of the permanent custodian. If an order terminating jurisdiction is not entered, the court may impose limitations or conditions upon the rights and responsibilities of the permanent custodian, some of which are set out in K.S.A. 38-2272(d). Those shall be set out in the order of appointment.

When custody has been granted for adoption, appointment of a permanent custodian or continued permanency planning, the custodian shall submit a written plan for permanent placement of the child within 30 days.

Comments

ICWA did not apply to adoption proceeding involving non-Indian mother's illegitimate child, who had never been in care or custody of putative father, who was duly enrolled as a member of the Kiowa Tribe. *In re Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982).

When the court has reasonable grounds to believe a child involved in the proceeding is or may be an Indian child, the court must comply with ICWA.. *In re H.D.*, 11 Kan. App. 2d 531, 729 P.2d 1234 (1986).

The purpose and intent of ICWA are discussed, and the meaning of “domicile” clarified in this case. *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597 (1989).

In order to comply with ICWA, the trial court must obtain a declination of jurisdiction from the tribal court (not the tribe or counsel for the tribe) or make a finding that good cause exists not to transfer the case to the tribal court before proceeding to exercise jurisdiction over an Indian child. *In re C.Y.*, 22 Kan. App. 2d 941, 925 O.2d 447 (1996).

The state may show good cause for not transferring a termination of parental rights case involving an Indian child to the tribal court. *In re A.P.*, 26 Kan. App. 2d 268, 961 P.2d 706 (1998).

On the facts specific to this case, if the provisions of ICWA are not initially followed, subsequent remedial acts may bring the case into compliance with the act, such as the tribe’s intervention and participation in the case. *In re H.A.M.*, 25 Kan. App. 2d 289, 961 P.2d 716 (1998).

A non-Indian father has standing to seek application of ICWA when the case involves an Indian child, but literal compliance with the evidentiary requirement of ICWA was unnecessary because the tribe elected not to challenge the termination of parental rights and termination of the non-Indian parent’s rights was consistent with reintegration of the child with native heritage. *In re J.J.G.*, 32 Kan. App. 2d 448, 83 P.3d 1264 (2004).

Once a court is faced with evidence that the child is an Indian child, the court is bound to apply ICWA, and to comply with its requirements. *In re S.M.H.*, 33 Kan. App. 2d 424, 103 P.3d 976 (2005).

In a case involving an Indian child, ICWA dictates placement preferences, in the absence of good cause to the contrary. The best interest of the child remains the paramount consideration and good cause can be based on parental preference. *In re Adoption of B.G.J.*, 281 Kan. 552, 133 P.3d 1 (2006).