

NEW FORM
208

IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

IN THE INTEREST OF

Name _____ Case No. _____
Year of Birth _____ A ☐ male ☐ female

***JOURNAL ENTRY AND ORDER OF TEMPORARY CUSTODY OF INDIAN CHILD**

Pursuant to K.S.A. 38-2243, 42 U.S.C. § 671 *et seq.*, 25 U.S.C. §1901 *et seq.*, and 25 C.F.R. 23
(Orders pertaining to more than one child must include findings specific to each child listed in the caption.)

On this _____ day of _____, 20____ this matter comes before the Court.

The Court asked each participant if the participant knows or has a reason to know the child is an Indian child. The Court has ☐ **sufficient evidence to determine the child is an Indian child as defined in the Indian Child Welfare Act** ☐ **the following reason to know the child is an Indian child:**

_____. Therefore, the Indian Child Welfare Act (ICWA) applies.

Petitioner ☐ **has given** ☐ **shall give** the required ICWA notice of the proceeding to the Tribe or Tribes that may be the Indian child's Tribe, the parents, and Indian custodians, if any.

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

☐ The petitioner appears by _____ ☐ **County/District Attorney or designee** ☐ **other** _____.

☐ The child appears ☐ **in person and** ☐ **not in person, but** by the child guardian *ad litem*, _____.

☐ _____, 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.**

☐ _____, the ☐ **father** ☐ **putative father** of _____, ☐ **appears in person pro se** ☐ **appears in person, and**

Comment [LN1]: 25 CFR 23.107(a) says the court must ask if the participants know or have reason to know the child is an Indian child. The term "participant" is used in the regulations and so was used here and is meant to be very broad.

Comment [LN2]: 25 CFR 23.2(b)
If the court has a reason to know that the child is an Indian child, but still can't determine for sure, ICWA still applies.

Specifying what the reason to know is in the order because it could help clarify what happened later in the case.

Comment [LN3]: This is referring to the ICWA notice of the proceeding rather than just notice of the hearing. The notice of the proceeding must be sent to the Tribe, parents, and indian custodian.

Comment [LN4]: State law controls – must give notice at least 24 hours before the hearing

Clarifying that this is the notice of the hearing, not the ICWA required notice of the proceeding.

through his attorney, _____ ☐ appears not in person, but by and
through his attorney, _____ ☐ does not appear.

☐ (Other parent appearances) _____

☐ The _____ Tribe ☐ appears by _____,
attorney/representative or ☐ does not appear.

☐ Interested parties appearing are: _____

☐ The Secretary appears through: _____

☐ Also present: _____

THE COURT FINDS AND ORDERS

1. There is probable cause to believe that the allegations in the application for custody are true and:

Appropriate public or private agencies have made reasonable and active efforts but have failed to maintain the family and prevent the removal of the child from the child's home or an emergency exists which threatens the safety of the child as follows: *(Specific findings of fact must be written here)*

AND

There is clear and convincing evidence that the child is likely to sustain imminent physical damage or harm pursuant to 25 C.F.R. 23.113 and remaining in the home would be contrary to the welfare of the child as follows: *(Specific findings of facts must be written here.)*

Comment [LN5]: Active Efforts/Emergency Exists=ASFA RE
Imminent physical damage or harm=ASFA CTW

Comment [LN6]: National debate about whether ICWA allows an emergency exists category. Margaret said that at a conference she attended, some people said that it doesn't and if a child was in an emergency situation, the active efforts would just look different – for example, locating parents, contacting family, obtaining needed emergency treatment for the child. (They kind of stretch the definition of active efforts to make it fit.) Margaret said that whether the AFSA emergency exists option is allowed in ICWA cases will probably be litigated at some point.

Comment [LN7]: Per Margaret – the standard of proof for this is clear and convincing, not probable cause. Safer to have the higher standard

Comment [LN8]: add CTW AFSA language here to protect IVE dollars.

2. ☐ A grandparent has requested custody and, in evaluating what custody, visitation and residency arrangements are in the best interests of the child, substantial consideration is given to (1) the wishes of the parents, child, and grandparent; (2) the extent that the grandparent has cared for the child; the intent and circumstances under which the child is placed; and (3) the physical and mental health of all involved individuals.

3. THE COURT FURTHER FINDS:

4. The court orders that the above named child **shall be** placed in the temporary custody of:

- ☐ _____, a parent
☐ _____, a relative.
☐ _____, an unlicensed person with close emotional ties to the child.
☐ _____, a youth residential facility.
☐ _____, a shelter facility.
☐ _____, a staff secure facility.
☐ _____, a juvenile crisis intervention center.
☐ The Secretary, if the child is 15 years of age or younger, or if the child is 16 or 17 years of age if the child has no identifiable parental or family resources or shows signs of physical, mental, emotional or sexual abuse.

5. ☐ A child support order shall issue.
☐ Each parent shall submit information to the child support office for a child support order to be prepared, or present documentation of a current child support order within _____ days.

6. THE COURT ORDERS all providers of services including educational services, treatment, education or care of the child and family, even if not specifically referred to herein, to provide information including any and all educational records to the secretary, any entity providing services to the child and family, counsel for the parties including the county or district attorney, appointed CASA, Citizen Review Board members, the court, and each other to the extent needed to ensure the safety of the child, prevent further abuse or neglect, and to provide appropriate treatment, care and services to the child and family. This order encompasses and complies with the provisions of the Family Education Rights and Privacy Act (20 U.S.C. 1232g; 34 C.F.R. 99 and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. 164.512(e)(1).

7. THE COURT FURTHER ORDERS:

8. ☐ A restraining order shall be prepared by _____, filed, and served upon _____.

9. ☐ **The Secretary** ☐ **Court Services** ☐ _____ shall complete reports and submit them to the Court by _____.

THE COURT FURTHER ORDERS this matter set for _____ hearing before ☐ **the Court** ☐ **the CRB** _____ day of _____, 20____, at ____:____
☐ **a.m.** ☐ **p.m.**

IT IS SO ORDERED THIS _____ day of _____, 20____.

Authority

K.S.A. 38-2205(b), 38-2243, 42 U.S.C. § 671 *et seq.*, 25 U.S.C. § 1901 *et seq.*, and 25 C.F.R. 23

Notes on Use

Federal Funding

If the court, in issuing this order, removes the child from the home, and if it is the first order removing the child from the home or the first order of removal after a previously removed child has been home for six months or longer (as in an informal supervision), Supreme Court Rule 174 requires the use of this form or another form approved by the Supreme Court as meeting the requirements of the Adoption and Safe Families Act (ASFA), 42 USC § 671 *et seq.* Failure to make and properly document the findings required by ASFA will result in the loss of federal funding for the placement, or any subsequent placement, of the child in the present case.

Specific findings of fact regarding reasonable efforts or the emergency, and the likelihood of sustaining harm must be written after the first numbered paragraph on this form. Identical findings may be made for both sections.

Indian child

This form is to be used if the state or the court knows or has reason to know that the child is an Indian child. The court must ask each participant in the case whether the participant knows or has reason to know that the child is an Indian child. The term “participant” is used in the regulations and is meant to be very broad. The goal is to encourage anyone, not just parties, to provide information to the court. The inquiry and all responses should be on the record. The court must also instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child. 25 C.F.R. 23.107(a). **If there is reason to know the child is an Indian child but the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court must treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an Indian child. 25 C.F.R. 23.107(b).** The court should document what is the “reason to know the child is an Indian child” in the space provided in the form. **The state and the secretary should be pursuing information required by the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 *et seq.*, at this time.**

The court “has reason to know” a child is an Indian child if:

- “(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
- (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

- (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
- (4) The court is informed that the domicile or residence of the child, the child's parents, or the child's Indian custodian is on a reservation or in an Alaska Native village;
- (5) The court is informed that the child is or has been a ward of a Tribal court; or
- (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.” 25 C.F.R. 23.107(c).

Standard for Removal

The Indian Child Welfare Act (ICWA) requires the court to determine if active efforts were made to prevent the removal of the Indian child from the home. “Active efforts” means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case. 25 C.F.R. 23.2.

ICWA, specifically 25 U.S.C. 1922, allows the removal of an Indian child in order to prevent imminent physical damage or harm to the child. Federal courts have determined this to include “circumstances in which the child is immediately threatened with harm, including when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence.” BIA Guidelines for Implementing the Indian Child Welfare Act, December 2016, Section C.2. (quoting from *Hurlman v. Ric*, 927 F.2d 74, 80-81 [2d Cir. 1999]). The U.S Department of the Interior interprets the standard that removal of an Indian child “is necessary to prevent imminent physical damage or harm” as mirroring the constitutional standard for removal of *any* child from his or her parents without providing due process. BIA Guidelines, December 2016, Section C.2.

Comment [LN9]: Guidelines page 23

The court may issue a temporary custody order after a hearing and upon making probable cause findings as required by ASFA and K.S.A. 38-2243(i), which are set out in this form. The court must find that the child is likely to sustain imminent physical damage or harm by clear and convincing evidence rather than just by probable cause.

The Kansas statutes require the temporary custody hearing take place within 72 hours (not including Saturday, Sunday, legal holidays and days on which the clerk of the court is not

available) of the execution of a protective custody order (Form 106 or 208) or of a child's being admitted to a placement while in police protective custody pursuant to K.S.A. 38-2233(e).

"Any emergency removal or placement of an Indian child must terminate immediately when the removal or placement is no longer necessary to prevent immediate physical damage or harm to the child." 25 C.F.R. 23.113(a). If the threat has been removed and the child is no longer at risk, the State should terminate the removal, either by returning the child to the parent, Indian custodian, or transferring the case to Tribal jurisdiction. However, if circumstances warrant, the State may instead initiate a child-custody proceeding to which the full set of ICWA protections would apply. BIA Guidelines for Implementing the Indian Child Welfare Act, December 2016, Section C.3.

Comment [LN10]: 25 CFR 23.113, pg 24 in Guidelines.

ICWA Notice of the Proceeding

At least 10 days before the adjudication hearing, the parents, Indian custodian, and the Indian child's Tribe must receive Notice of the proceedings (Form 210) by registered or certified mail with return receipt requested. The Notice of the proceeding is not required before the temporary custody hearing. Copies of the notices of the proceeding must be sent via registered or certified mail with return receipt requested to the Department of the Interior by serving Regional Director of the area office of the Bureau of Indian Affairs as indicated in 25 C.F.R. 23.11(b). 25 C.F.R. 23.11(a). "Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested." 25 C.F.R. 23.111(c). If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member of eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director. 25 C.F.R. 23.111(e).

Comment [LN11]: Reg 23.111(c)

Comment [LN12]: Reg 23.11(a) requires the BIA Regional Director to receive copies of all Notices even if the child's designated Tribe has been identified.
See Guidelines pg 30.

The Notice of the proceeding is separate from any notice of hearing requirements under Kansas state law. The Notice of the proceeding must be served on all the required people at the beginning of a CINC case before adjudication and disposition. It must again be served on all the required people before the court terminates parental rights.

An "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child. 25 U.S.C. 1903(6).

Notice of hearing

Notice of the temporary custody hearing shall be given to all parties and interested parties at least 24 hours prior to the hearing. Oral notice may be used if there is insufficient time to give written notice. Oral notice is completed upon the filing of a certificate of oral notice (Form 131).

Custody and Placement

If the court awards custody of the child to the secretary then the secretary shall have the authority to designate the placement. It is best practice for the state agency to strive to provide an initial placement for the child that meets ICWA's (or the Tribe's) placement preferences. This will help prevent subsequent disruptions if the child needs to be moved to a preferred placement once a child-custody proceeding is initiated. If the Indian child is placed on an emergency basis in a non-preferred placement because a preferred placement is unavailable or has not yet met background check or licensing requirements, the state agency should have a concurrent plan for placement as soon as possible with a preferred placement.

The child must be placed in the least-restrictive setting that:

- (1) most approximates a family, taking into consideration sibling attachment;
 - (2) allows the Indian child's special needs (if any) to be met; and
 - (3) is in reasonable proximity to the Indian child's home, extended family, or siblings.
- 25 C.F.R. 23.131(a).

Unless the child's Tribe has established a different order of preference, preference to placement of the child with the following people must be given, in descending order as listed below:

- (1) A member of the Indian child's extended family;
- (2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;
- (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs. 25 U.S.C. 1915; 25 C.F.R. 23.131(b).

The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent. 25 C.F.R. 23.131(d).

If the court considers direct placement, ICWA should be consulted.

If the petition alleges that the child is a runaway pursuant to K.S.A. 38-2202(d)(9) or (d)(10), but the child has not yet been adjudicated as a runaway, then the order may direct that the child be detained in a secure facility, which may be a juvenile detention facility, but not for more than 24 hours, excluding Saturdays, Sundays, legal holidays, and days on which the clerk of the court is not available. The time limitation of 24 hours is the total time permitted in a secure facility whether by police protective custody or court order.

Length

Emergency/temporary proceedings must not extend for longer than necessary to prevent imminent physical damage or harm to the child. If there is sufficient evidence of abuse or neglect, the state should promptly initiate a proceeding that provides the full suite of due process and ICWA protections. BIA Guidelines, December 2016, Section C.5. Pursuant to 25 C.F.R. 23.113(e), emergency/temporary custody of the Indian child cannot continue for more than 30 days unless the court makes the following determinations:

- (1) restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
- (2) the court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and
- (3) it has not been possible to initiate a “child-custody proceeding” as defined in 25 C.F.R. 23.2.

Other Orders

The court may enter a restraining order (Form 134) against any alleged perpetrator of physical, sexual, mental or emotional abuse of the child. This form includes a provision allowing for issuance of a restraining order pursuant to K.S.A. 38-2255(d)(4).

The court shall make a child support determination if the child is placed with a person other than a parent.

When the term “or” stands alone between optional findings/orders, more than one choice may be checked. Each choice checked must be justified as instructed, *e.g. specify basis for finding for each child.*