

220
IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

IN THE INTEREST OF

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

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 the child named above 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 appears ☐ in person and ☐ not in person, but by the child's 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 through his attorney, _____ ☐ appears not in person, but by and through his attorney, _____ ☐ does not appear.
- ☐ (Other parent appearances) _____

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

☐ Interested parties appearing are: _____

☐ The Secretary ~~is present~~ appears through

☐ Also present is/are: _____

THE COURT FINDS:

1. 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:

Comment [LN1]: CFR 23.107(a)

2. The ICWA Notice of the proceeding has been received, at least 10 days prior to this hearing, by registered or certified mail, as evidenced by the filed return receipt, to:

Comment [LN2]: 25 USC 1912(a), 25 CFR 23.111(b), 23.112(b); 25 CFR 23.11

☐ _____, the mother
☐ _____, the ☐ father ☐ putative father
☐ _____, the child's Indian custodian
☐ the following Tribe(s): _____
☐ _____, the Regional Director of Bureau of Indian Affairs
☐ _____

2.3. The proper notice hearing was provided to all parties, interested parties and those required to receive notice as required by K.S.A. 38-2267.

4. The Court finds that jurisdiction and venue are proper.

5. ☐ The child's membership in a Tribe is not yet determined, but the following efforts have been made to identify the child's Tribe:

☐ The child is a member of _____

☐ The child is eligible for membership in _____
(insert names of Tribes).

☐ The child is eligible for membership in more than one Tribe. The child's Tribe in this case is _____
because _____

(See 25 C.F.R. 23.109 for guidelines for determining how the court determines which Tribe is the child's Tribe.)

6. A request to transfer of jurisdiction to the Tribe:

☐ has not been made.

☐ was made on _____ by _____
and the transfer of jurisdiction was declined by the Tribe.

☐ was made on _____ by _____ and
the transfer of jurisdiction was denied by the Court because:

☐ the following parent(s) object(s) to the transfer: _____

☐ after receiving arguments from all parties, the Court finds good cause exists
for denying the transfer. *(Document specific findings that good cause exists.)*

☐ see findings of fact and conclusion of law in the court's order filed _____.

☐ was made on _____ by _____ and
the transfer of jurisdiction to _____ was granted. See attached
Order Transferring Jurisdiction (Form 214).

7. The Court received testimony from the following witness(s), whom the Court finds to be a qualified expert witness under ICWA:

8. The evidence is clear and convincing that the ☐ mother of the child named above 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. The finding is based on the following facts:

Comment [LN3]:
25 USC 1911(b)
25 CFR 23.115 – 23.23.119
BIA Guidelines Section F

9. The evidence is clear and convincing that ☐ father
☐ putative father of the child named
 above 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.
 The finding is based on the following facts:

10. Reasonable and active efforts have been made to prevent the breakup of the Indian family and
 those efforts have been unsuccessful. (Specific findings of fact regarding what active efforts
 were provided must be written here.)

Comment [LN4]: 25 USC 1912(d); 25 CFR
23.120

Comment [LN5]: CFR 23.120; Guidelines pg 44

11. There is evidence beyond a reasonable doubt 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. (Provide specific findings. Include evidence provided by the qualified expert witness.)

Comment [LN6]: NCJFCJ Benchbook page 52
25 USC 1912

12. ☐ Considering the physical, mental or emotional health of each child, termination of parental
 rights is in the best interests of the child named above and the physical, mental or
 emotional needs of the 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
 the child. Parental rights should not be terminated.

13. ☐ THE COURT FURTHER FINDS:

IT IS THEREFORE ORDERED:

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

 _____.

2. ☐ A permanent custodian shall be appointed for _____.

~~or~~ OR

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

OR~~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. The adoptive placement complies with the ICWA adoptive placement preferences as set forth below. *(Complete section 3- Adoptive Placement.)*

OR~~or~~

- ☐ Other _____

3. (Complete either the Adoptive Placement or the Foster Care Placement section)
Adoptive Placement *(Complete either section A, B, or C.)*

☐ A. ICWA order of preferred placements

The child:

(Complete each numbered placement option below including and above the placement option where the child is placed.)

(1) ☐ is ☐ is not placed with the following member of the child's extended family . If child is not placed with a member of the child's extended family, it is because: *(Specific findings of fact must be written here)*

(2) ☐ is ☐ is not placed with the following member of the child's Tribe . If child is not placed with a member of the child's Tribe, it is because: *(Specific findings of fact must be written here)*

(3) ☐ is ☐ is not placed with the following member of an Indian family . If child is not placed with a member of an Indian family, it is because: *(Specific findings of fact must be written here)*

OR

☐ B. Tribe's order of preferred placement

The child's Tribe has a different order of placement preferences, which is:

The child is placed _____, pursuant to the child's Tribe's placement preference order.

OR

☐ C. Child is not in a preferred placement

The child is placed _____.

The court, after considering evidence and arguments from all parties, finds that there is clear and convincing evidence that there is good cause to deviate from the placement preferences based on one or more of the following considerations:

- ☐ The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference.
- ☐ The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made.
- ☐ The presence of a sibling attachment that can be maintained only through a particular placement.
- ☐ The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.
- ☐ The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located.

(Specific findings of fact must be written here)

OR

Foster Care Placement *(Complete either section A, B, or C.)*

(If the child is placed in the custody of the Secretary, ICWA requires the court to determine if and how the Secretary's choice of placement complies with ICWA.)

☐ **A. ICWA order of preferred placements** (foster care placement)

The child:

(Complete each numbered placement option below including and above the placement option where the child is placed.)

(4) ☐ is ☐ is not placed with the following a member of the child's extended family . If child is not placed with a member of the child's extended family, it is because: *(Specific findings of fact must be written here)*

(5) ☐ is ☐ is not placed with the following foster home licensed, approved, or specified by the Indian child's Tribe . If child is not placed with a foster home licensed, approved, or specified by the Indian child's Tribe it is because: *(Specific findings of fact must be written here)*

(6) ☐ is ☐ is not placed with the following **Indian foster home licensed or approved by an authorized non-Indian licensing authority**. If child is not placed with an Indian foster home licensed or approved by an authorized non-Indian licensing authority, it is because: *(Specific findings of fact must be written here)*

(7) ☐ is ☐ is not placed with the following **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**. If child is not placed with 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, it is because: *(Specific findings of fact must be written here)*

OR

☐ B. Tribe's order of preferred placement

The child's Tribe has a different order of placement preferences, which is:

The child is placed _____, pursuant to the child's Tribe's placement preference order.

OR

☐ C. Child is not in a preferred placement

The child is placed _____.

The court, after considering evidence and arguments from all parties, finds that there is clear and convincing evidence that there is good cause to deviate from the placement preferences based on one or more of the following considerations:

- ☐ The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference.

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- ☐ The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made.
- ☐ The presence of a sibling attachment that can be maintained only through a particular placement.
- ☐ The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.
- ☐ The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located.

(Specific findings of fact must be written here)

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

5. ☐ 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.* and 25 C.F.R. 23.

Notes on Use

Indian Child

At the beginning of the hearing, the court must ask whether each participant knows or has reason to know that the child is an Indian child. All responses should be on the record. 25 C.F.R. 23.107(a). 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 court must also ascertain whether the child’s Tribe has been identified and whether the Tribe has been afforded a full opportunity to participate in the proceedings. If so, the court must determine whether the agency provided the child’s Tribe with copies of the petition, reports, and information concerning the child in a timely manner. 25 U.S.C. 1911(c) & (d); 25 U.S.C. 1912(a).

The circumstances under which a court knows or has reason to know a child is an Indian child include, but are not limited to, the following: any party to the case, Indian Tribe, or agency informs the court that the child is an Indian child; any agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child; the child gives the court reason to believe he or she is an Indian child; the residence of the child, parent(s), or custodian is known to be on a reservation or a predominantly Indian community; a parent of the child is enrolled in a Tribe; or an officer of the court has knowledge that the child may be an Indian child. 25 C.F.R. 23.107. “ICWA does not apply simply based on a child or parent’s Indian ancestry. Instead, there must be a political relationship to the Tribe.” BIA Guidelines for Implementing the Indian Child Welfare Act, B.1, pg. 9 (2016).

ICWA Notice of the proceeding

The termination of parental rights is a new proceeding under ICWA. Therefore, Notice of the proceedings (Form 210) must again be sent by registered or certified mail with return receipt requested to the parents, Indian custodian, and the Indian child’s Tribe’s designated agent. (Even if a Notice of the proceeding was previously sent prior to adjudication.) Copies of the notices 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) (see address information below). 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).

The notice of the proceeding may or may not include the required notice of the termination of parental rights hearing. A separate notice of hearing may be necessary.

Comment [LN7]: Reg 23.111(c)

Comment [LN8]: 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.

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).

Identifying the Child’s Tribe(s)

If the identity or location of the parents, Indian custodian, or Tribes cannot be ascertained, but there is reason to know the child is an Indian child, notice of the proceeding must be sent to the appropriate BIA Regional Director. The BIA may be able to help identify Tribes to contact. As much information as is known regarding the child’s direct lineal ancestors should be provided to the BIA. 25 C.F.R. 23.111(e). After receipt of the notice, the BIA has 15 days to locate and notify the child’s Tribe and parents or Indian custodians. Within that 15-day period, if the BIA is unable to locate the parents or Indian custodians, or verify that the child meets the criteria of an Indian child, the BIA will inform the court and the state how much more time, if any, will be needed to complete the verification or the search. 25 C.F.R. 23.11(c).

Only one Tribe can be designated as the child’s Tribe in the CINC case. For rules governing how the court should determine which Tribe must be designated as the child’s Tribe, see 25 C.F.R. 23.109 and BIA Guidelines, Section B.5.

Qualified Expert Witness

The court must hear and consider the testimony of one or more expert witnesses. 25 U.S.C. § 1912. At least one expert witness must be qualified to address the issue of whether the child’s continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. At least one expert witness must be qualified to testify on the prevailing social and cultural standards of the child’s Tribe. The same expert witness may be able to testify to both issues, but sometimes multiple experts are needed. The expert witness cannot be the social worker regularly assigned to the child. 25 C.F.R. § 23.122.

Comment [LN9]: Guidelines pg 53

Standard for termination of parental rights or appointment of permanent custodian

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. However, ICWA raises the standard of proof to beyond a reasonable doubt. 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)~~. “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. The court shall make detailed findings about whether reasonable and active efforts have been provided to assist the family, what the active efforts were, and whether the efforts have been successful.

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)~~. -25 U.S.C. 1912(e). 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. 25 C.F.R. 23.121(c). Without the causal relationship, evidence that shows only the existence of community or family poverty, single parenthood, custodian age, crowded or inadequate house, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. 25 C.F.R. 23.121(d). 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.

Custody and Placement

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. The court must make findings about how the foster-care placement of the child complies with or deviates from the list of foster-care preferred placements.

The court may grant custody of the child directly to the proposed adoptive parents and consent to the adoption. The court must make findings about how the adoptive placement complies with or deviates from the list of adoptive preferred placements. 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.

Placement Preferences

The Court must document where the child is placed. The Court must complete section A, B, or C under the "Adoptive Placement" or "Foster Care Placement" section. The Court must consider each category of preferred placement individually in descending order. Starting with the first preferred placement category (a member of the child's extended family), if the child is not in that category of preferred placement, the Court must make specific findings explaining why the child is not placed within that category of preferred placement before moving to the next category of preferred placement. For example, if a child is placed in an Indian foster home that is licensed by a non-Indian licensing authority (placement category #3), the court must first make finding explaining why the child is not placed with a member of the child's extended family (placement category #1). Then, the court must make findings explaining why the child is not placed in a foster home that is licensed by the child's Tribe (placement category #2).

An Indian 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).

If a party argues there is good cause to deviate from the placement preferences, the court must allow for all parties to provide evidence and make arguments to the court regarding whether there is good cause to deviate. The court must make findings on the record or in writing about whether the party seeking the departure from the placement preferences has proven this through clear and convincing evidence. 25 C.F.R. 23.132(b). As set out in section C, the court's finding of good cause should be based on one or more of the following considerations:

- (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
- (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
- (3) The presence of a sibling attachment that can be maintained only through a particular placement;
- (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; and/or
- (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none have been located. The standard for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the parents or extended family maintains social and cultural ties. 25 C.F.R. 23.132(c).

A placement may not depart from the preferences based on socioeconomic statutes of any placement relative to another placement; or based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA. 25 C.F.R. 23.132(d) and (e). The court should make detailed findings as to whether the agency has made an ongoing, diligent search to locate extended family, a tribal member, or other Indian family for placement if the child is not already with a preferred placement pursuant to 25 U.S.C. 1915(b); 25 C.F.R. 23.130 and 23.131.