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IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

IN THE INTEREST OF

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

***EX PARTE ORDER OF PROTECTIVE CUSTODY**

Pursuant to K.S.A. 38-2242 and 42 U.S.C. 671 *et seq.*

(Orders pertaining to more than one child must include findings specific to each child listed in the caption.)
(If the court knows or has reason to know the child is an Indian child, use Form 208)

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

~~The Court finds that the Indian Child Welfare Act (ICWA) ☐ is applicable ☐ is not applicable ☐ applicability is undetermined. Petitioner ☐ need not give ☐ has given ☐ shall give notice to the Tribe and the Court has jurisdiction to proceed.~~

The Court asked each participant if the participant knows or has a reason to know the child is an Indian child. The Court finds there is no reason to know that the child is an Indian child and the Indian Child Welfare Act does not apply. (If the court knows or has reason to know that the child is an Indian child, use ICWA Form 207.)

THE COURT FURTHER FINDS that there is probable cause to believe that the allegations in the application for protective custody are true and:

Appropriate public or private agencies have made reasonable efforts but have failed to maintain the family and prevent the removal of the child from the child's home **or** reasonable efforts are not required to maintain the child in the home because an emergency exists which threatens the safety of the child as follows: (~~List finding of facts~~ Specific findings of fact must be written here)

AND

The child is likely to sustain harm if not immediately removed from the home; remaining in the home or returning to the home would be contrary to the welfare of the child; **and/or**, immediate placement is in the best interest of the child. (~~List finding of facts~~ Specific findings of fact must be written here)

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, even in emergency proceedings. The term "participant" is used in the regulations and so was used here and is meant to be very broad.

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Comment [LN2]: Matching changes to form 309 Making language stronger so courts remember to write something after these first two paragraphs.

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Comment [LN3]: Matching changes to form 309 Making language stronger so courts remember to write something after these first two paragraphs.

- ☐ 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.

THE COURT THEREFORE ORDERS the above named child **shall be** placed in the protective 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 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.

Comment [LN4]: Added per K.S.A. 38-2242(c)(1)(E) - allowed if child has been subjected to human trafficking

Comment [LN5]: Added to KSA 38-2242(c)(1)(F)- per 18 SB 179

THE COURT FURTHER 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).

- ☐ Visitation during protective custody pursuant to K.S.A. 38-2242(b)(2) is not in the best interest of the child and is prohibited.
- ☐ A restraining order shall be filed against _____.
- ☐ IT IS FURTHER ORDERED that any duly authorized law enforcement officer of the jurisdiction where the child can be found shall take the child named above into custody and deliver the child to _____.

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

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

Judge of the District Court

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Authority

K.S.A. 38-2242 and 42 U.S.C. 671 *et seq.*

Notes on Use

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. Federal funding is not available when the court finds reasonable efforts have not been made unless the court also finds the efforts were not required **because an emergency exists**. If reasonable efforts have not been made and no emergency exists, a removal should not be ordered.

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

Comment [LN6]: Same language added for JO Removal form Form 309 and to Form 107

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. Before issuing the order, the court should ask whether the participants know or have 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. **If the court has reason to know a child is 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).**–Use Form 207 if the State or the court knows or has reason to know that the child is an Indian child. The court “has reason to know” a child is an Indian child if:

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- “(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;

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(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).

Comment [LN7]: See Guidelines pg 9 and 10 Reg 23.107

When a court has reason to know a child involved in a child in need of care proceeding is an Indian child, the Indian Child Welfare Act (ICWA) applies; notice requirements, findings and procedure are dictated by ICWA, and the ICWA forms must be used. In addition to the federal ICWA statutes, all federal regulations (25 C.F.R. 23) must be followed. The court should also consult the BIA December 2016 guidelines (www.bia.gov/bia/ois/dhs/icwa).

~~When a court has reason to believe a child involved in a child in need of care proceeding is an Indian child as defined by 25 U.S.C. 1903(4), ICWA applies; notice is required by ICWA, and the ICWA forms must be used. Removal of an Indian child from the home is prohibited without the specific findings required by ICWA either entered with the order of removal, or within 90 days if the removal was due to an emergency. The circumstances under which a court has reason to believe 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 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. Department of the Interior, BIA Guidelines for State Courts, Indian Child Custody Proceedings.~~

This order may be issued upon the court’s determination that there is probable cause to believe that the allegations in the verified application for protective custody are true. K.S.A. 38-2242(b)(1). No child shall be held in protective custody for more than 72 hours (not including Saturdays, Sundays, legal holidays, and days on which the clerk of the court is not available). K.S.A. 38-2242(b)(2). A protective custody order may not be used in conjunction with police custody to extend the total 72 hours that a child may be in protective custody without a temporary custody hearing. K.S.A. 38-2242(b)(2). The time begins to run when the placement accepts physical custody of the child while in police protective custody pursuant to K.S.A. 38-2232(e). A temporary custody hearing shall take place and an order of temporary custody (Form 132) shall be issued within that time frame if the child is to remain in custody beyond 72 hours.

The Court may place the child in the protective custody of a staff secure facility if the child has been subjected to human trafficking or aggravated human trafficking, as defined in K.S.A. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, as defined by K.S.A. 21-6422, and amendments thereto, or the child committed an act which, if committed by an adult, would constitute a violation of K.S.A. 21-6419, and amendments thereto. K.S.A. 38-2242(c)(1)(E). The Court may place the child in the protective custody of a juvenile crisis intervention center only after written authorization by a community mental health center. K.S.A. 38-2242(c)(1)(F).

Comment [LN8]: 18 SB 179

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If the petition in the case 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, not including Saturdays, Sundays and legal holidays. K.S.A. 38-2242(c)(2).

Comment [LN9]: Language deleted from statute effective July 1, 2019

If a grandparent requests custody, the form facilitates documentation required by K.S.A. 38-2286-L-2012, SB-262, which specified requirements concerning grandparents as potential custodians. If the court does not award custody of the child to a parent and, if a grandparent requests custody, the court shall give substantial consideration when evaluating what custody, visitation or residency arrangements are in the best interests of the child. Relevant factors to be considered include wishes of the parents, child and grandparent; the extent to which the grandparent has cared for, nurtured and supported the child; the intent and circumstances under which the child is placed with the grandparent, including whether domestic violence is a factor and whether the child is placed to allow the parent to seek work or attend school; and the physical and mental health of all individuals involved.

If the court awards custody of the child to the secretary then the secretary shall have the authority to designate the placement, and the court may make placement recommendations. While the *ex parte* protective custody order is in effect the statute requires that the secretary allow a visit between the child and parent or parents; however, the court may find that such a visit is not in the best interest of the child and may prohibit the visit, as provided in the form. If the court awards custody to the secretary, the court shall provide the secretary with a copy of any orders entered. This order shall be served on the child's parents and any other person having legal custody of the child.

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). ~~There is a provision in this form directing that a restraining order issue pursuant to K.S.A. 38-2242(e).~~