

IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

IN THE INTEREST OF

Name _____

Case No. _____

Year of Birth _____ A ☐ male ☐ female**INITIAL ORDER REMOVING INDIAN CHILD FROM CUSTODY OF PARENT
AND AUTHORIZING OUT OF HOME PLACEMENT**K.S.A. 38-2244, 38-2251, 38-2255, 38-2258, 38-2259, 42 U.S.C. §671 *et seq.*aAnd -25 U.S.C. §1901 *et seq.**Separate journal entry or order must be attached.**(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 HEREBY FINDS AND ORDERS:1. The Court received testimony from the following witness(s), whom the Court finds to be a
qualified expert witness under ICWA:

2. 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 regarding what active efforts were provided must be written here)_____

_____ANDThere 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. Include
evidence provided by the qualified expert witness.)_____
_____**Comment [LN1]:** Form may need to be used even when the removal is not the initial removal. Even if the child was removed at temporary custody hearing, these findings have to again be made at adjudication/disposition.

5/1/13

- ☐ ~~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 reasonable and active efforts are not required to maintain the child in the home because an emergency exists which threatens the safety of the child: (Specific findings of fact must be written here)~~

AND

- ☐ ~~the child is likely to sustain serious emotional or physical damage if not removed from the home; additionally 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: (Specific findings of fact must be written here)~~

OR

- ☐ ~~Appropriate public or private agencies **have not** made reasonable and active efforts but the child is likely to sustain serious emotional or physical damage if not removed from the home; additionally 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:~~

- ☐ ~~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.~~

1.3. ~~THE COURT THEREFORE ORDERS THAT T~~the above named child shall immediately be placed in the custody of:

- ☐ _____, a relative; a person who need not be licensed but is approved by the child's [tribeTribe](#); a youth residential facility or a shelter facility approved by an Indian [tribeTribe](#) or operated by an Indian organization; or
- ☐ 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 [LN2]: This section is general because this form would be attached to another JE that would have specific findings re custody and placement.

~~2.4.~~ 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).

~~3.5.~~ ☐ A restraining order shall be filed against _____

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

- ☐ The court provided the parents, grandparents and/or interested parties, who were present at this hearing and who had not previously received them, with informational materials pertaining to their respective rights and responsibilities in connection with the proceedings.

Authority

K.S.A. 38-2244, 38-2251, 38-2255, 38-2258, 38-2259, ~~and~~ 42 U.S.C. § 671 *et seq.*, 25 U.S.C. § 1901 *et seq.*, and 25 C.F.R. 23.

Notes on Use

Compliance with the Indian Child Welfare Act (ICWA) is jurisdictional. Failure to comply with ICWA may render orders devoid of authority.

Form 209 is only to be used at or after adjudication. It contains the required findings under the Adoption and Safe Families Act (ASFA) and ICWA for when a child is removed from the child's parents or Indian custodian **at or after adjudication**. Even if the child was previously removed from the child's parents or Indian custodian before adjudication (i.e. by a temporary custody order), this form and its related findings must be completed at adjudication.

Federal Funding

~~is designed to serve as 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 or trial home placement).~~ Supreme Court Rule 174 requires the use of this form or another form approved by the Supreme Court as meeting ~~Adoption and Safe Family Act (ASFA)~~ requirements. -Failure to make and properly document the findings required by ASFA will result in the loss of federal funding for the placement and 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.~~ ~~Finding that reasonable efforts were not made does not bar the court from removing the child and failure to make these findings does not does not bar the court from removing the child.~~ If reasonable and active efforts have not been made and no emergency exists, a removal should not be ordered.

Comment [LN3]: Fed funding only tied to reasonable efforts, not active efforts.

Comment [LN4]: Same language (adding "active efforts" reference) as added to Forms 106 and 107 in 2016

Specific findings of fact regarding the reasonable and active 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 [LN5]: Same language added for JO Removal Form 309 and to Form 107

Standard for Removal

If the court removes the child from the home, in addition to the findings related to reasonable efforts required by ASFA and Kansas law, 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 ~~were made~~. "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 also requires the court to determine by clear and convincing evidence that continued custody with the child's parents or Indian custodian is likely to result in serious physical or emotional damage 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]). ~~Within 90 days of an emergency removal, ICWA at 25 U.S.C. 1912(e) and 1922 also requires the~~

Qualified Expert Witness

The court must hear and consider the testimony of one or more expert witnesses. 25 U.S.C. § 1912. ~~The At least one expert witnesses 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. whether not removing the child from the home is likely to result in serious physical or emotional damage to the child. The expert witness cannot be the social worker regularly assigned to the child.~~ 25 C.F.R. § 23.122. Source: 25 U.S.C. 1901 *et seq.* and -

~~Compliance with ICWA is jurisdictional. Failure to comply with ICWA may render orders devoid of authority.~~

Custody and Placement

More detailed information about the custody and placement of the child should be made in the journal entry to which this form is attached. If the court awards custody of the child to the secretary then the secretary shall have the authority to designate the placement; however, in future hearings, the court will be required to make rulings to find that the secretary has complied with the ICWA placement preferences. BIA Guidelines for Implementing the Indian Child Welfare Act, December 2016, Section C.6. If the secretary already knows where the child will be placed, the court should make findings about how the placement complies with the ICWA placement preferences.

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).

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).

Comments

~~— In any proceeding involving custody of a child of Indian heritage, the court must make a determination of whether the ICWA governs the proceeding. See *In re H.A.M.*, 25 Kan.App.2d 289, 292, 961 P.2d 716 (1998).~~

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~~— Before there can be removal of an Indian child from an Indian parent, the ICWA requires that clear and convincing evidence, supported by qualified expert witness testimony, be provided that shows continued custody of the child by the Indian parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e).~~

~~— 25 U.S.C. § 1912(e) requires that foster care placement of an Indian child be supported by qualified expert witness testimony that continued custody of the child by the Indian parent is "likely to result in serious emotional or physical damage to the child." *In re S.M.H.*, 33 Kan.App. 2d 424, 430, 103 P.3d 976, 981-82 (2005)~~