

215.1
IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

IN THE INTEREST OF

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

INDIAN CHILD WELFARE ACT
JOURNAL ENTRY AND ORDER OF ADJUDICATION

Pursuant to K.S.A. 38-2203(a), 38-2251, 42 U.S.C. 671 *et seq.* and 25 U.S.C. §1901 *et seq.*

Now on this _____ day of _____, _____, the above-captioned matter comes on for adjudication.

~~The Court finds 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. The Court has received and considered evidence including the testimony of a qualified expert witness as required by ICWA.~~

~~The Court finds 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.

☐ Indian Custodian _____

5/1/13

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

☐ Interested parties appearing: _____

☐ The Secretary ~~is present through~~ appears through _____

☐ Also present: _____

THE COURT FINDS AND ORDERS:

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 was received, at least 10 days prior to this hearing, by registered or certified mail, as evidenced by the filed return receipt, by:

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

☐ _____

3. The court has advised the parent(s) or Indian custodian that he or she has a right to a court-appointed attorney if he or she is unable to afford an attorney.

4. At the time of removal, the child ☐ was ☐ was not in the custody of an Indian custodian, as defined in 25 U.S.C. 1903(6).

5. The child does not reside or is not domiciled on an Indian reservation.

6. The child is not a ward of a tribal court.

Comment [LN3]: Benchbook pg 25
25 USC 1911(a)

7. ☐ 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 ~~for the sake of~~ 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.)

8. ☒ A request to transfer 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).

9. ☐ a. the guardian *ad litem* and parents of the child did submit to the Court a stipulation or statement of no contest to the petition pursuant to K.S.A. 38-2248. Upon inquiry the Court finds that it is knowingly and voluntarily offered and that there is a factual basis and accepts it.

☐ The Court also received evidence from a qualified expert witness. *(Required if child is not placed in the custody of a parent or Indian custodian.)*

OR

☐ b. the Court held a hearing and received evidence.

☐ The Court also received evidence from a qualified expert witness. *(Required if child is not placed in the custody of a parent or Indian custodian.)*

10. ☐ a. the evidence is clear and convincing that the child *(Write specific findings of fact):*

Comment [LN4]:
25 USC 1911(b)
25 CFR 23.115 – 23.23.119
BIA Guidelines Section F

Comment [LN5]: Margaret suggested adding this option because a court may have an adjudication hearing, adjudicate the kids a CINC, and then a parent may request the case be transferred. The transfer would not negate any of the state court's findings regarding adjudication so the court could go ahead and use this form rather than just ordering the transfer.

Comment [LN6]: Margaret thinks that if all the parties stipulate, the court would still need to receive evidence from an expert witness. This could take the form of an expert report stipulated to by the parties. Margaret noted that this is a gray area and not everyone agrees that this process satisfies ICWA. If parties cannot stipulate than every ICWA CINC adjudication must have a full evidentiary hearing.

Court still needs to make all the active efforts and risk of harm findings with the QEW's input.

Comment [LN7]: Margaret suggested adding this option because a court may have an adjudication hearing, adjudicate the kids a CINC, and then a parent may request the case be transferred. The transfer would not negate any of the state court's findings regarding adjudication so the court could go ahead and use this form rather than just ordering the transfer.

- ☐ is without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian;

- ☐ is without the care or control necessary for the child's physical, mental or emotional health;

- ☐ has been physically, mentally or emotionally abused or neglected, or sexually abused;

- ☐ has been placed for care or adoption in violation of law;

- ☐ has been abandoned or does not have a known living parent;

- ☐ is not attending school as required by K.S.A. 72-977 or 72-1111, and amendments thereto;

- ☐ except in the case of a violation of K.S.A. 41-727, subsection (j) of K.S.A. 74-8810 or subsection (m) or (n) of K.S.A. 79-3321, and amendments thereto, or, except as provided in K.S.A. 38-2202(d) (12), did an act which, when committed by a person under 18 years of age, is prohibited by state law, city ordinance or county resolution but which is not prohibited when done by an adult;

- ☐ while less than 10 years of age, committed an act which if done by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 21-5102, and amendments thereto;

- ☐ is willfully and voluntarily absent from the child's home without the consent of the child's parent or other custodian;

- ☐ is willfully and voluntarily absent at least a second time from a court ordered or designated placement, or a placement pursuant to court order, if the absence is without the consent of the person with whom the child is placed or, if the child is placed in a facility, without the consent of the person in charge of such facility or such person's designee;

- ☐ has been residing in the same residence with a sibling or another person under 18 years of age, who has been physically, mentally or emotionally abused or neglected, or sexually abused;
- ☐ while less than 10 years of age committed the offense defined in K.S.A. 21-6301(a)(14), and amendments thereto;
- ☐ has had a permanent custodian appointed and the permanent custodian is no longer able or willing to serve;
- ☐ has been subjected to an act which would constitute human trafficking or aggravated human trafficking, as defined by 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 has committed an act which, if committed by an adult, would constitute selling sexual relations, as defined by K.S.A. 21-6419, and amendments thereto;

and the child is a Child in Need of Care.

OR

- ☐ **b.** there is not sufficient evidence to support the petition, and all parties are discharged. HAVING SO FOUND, the Court ORDERS the following parties discharged:

11. The Court ☐ approves and adopts the proposed permanency plan as the plan for permanency in the present matter and the permanency plan meets the requirements of active efforts or ☐ does not approve the proposed permanency plan and orders a new permanency plan submitted to the Court within 30 days.

12. Custody

(If this order places the child in the custody of someone other than a parent or Indian Custodian, even if this is not the first order of removal in the case, complete and attach Form 209.)

The above named child ☐ **shall be** ☐ **shall remain** placed in the custody of:

- ☐ _____, a parent. This placement is compliant with ICWA.

- ☐ _____, an Indian custodian. This placement is compliant with ICWA.
- ☐ _____, a member of the child's extended family. (Complete the placement section below.)
- ☐ _____, an unlicensed person approved or specified by the Tribe with close emotional ties to the child. (Complete the placement section below.)
- ☐ _____, a youth residential or shelter facility approved or specified by the Tribe or operated by an Indian organization. (Complete the placement section below.)
- ☐ 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 or emotional or sexual abuse. (Complete the placement section below.)

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

(If the child is not placed in the custody of a parent or Indian custodian, 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**

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 the 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 **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)

(3) ☐ 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)*

(4) ☐ 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.

☐ 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 not has been located.

(Specific findings of fact must be written here)

13. ☐ 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.

14. 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).

15. THE COURT FURTHER ORDERS:

16. THE COURT FURTHER ORDERS all previous orders entered by this Court shall remain in effect except as herein modified.

17. ☐ A restraining order shall be filed against _____.

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

~~1. THE COURT FURTHER FINDS:~~

~~☐ a. the guardian *ad litem* and parents of the child did submit to the Court a stipulation or statement of no contest to the petition pursuant to K.S.A. 38-2248. Upon inquiry the Court finds that it is knowingly and voluntarily offered and that there is a factual basis and accepts it.~~

OR

~~☐ b. the Court received evidence including the testimony of qualified expert witnesses and considered statements from the parties.~~

~~2. WHEREUPON, THE COURT FINDS:-~~

- ~~☐ a. the evidence is clear and convincing that the child *(Show name of child on line)*:~~
- ~~☐ is without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian;~~
 - ~~☐ is without the care or control necessary for the child's physical, mental or emotional health;~~
 - ~~☐ has been physically, mentally or emotionally abused or neglected, or sexually abused;~~
 - ~~☐ has been placed for care or adoption in violation of law;~~
 - ~~☐ has been abandoned or does not have a known living parent;~~
 - ~~☐ is not attending school as required by K.S.A. 72-977 or 72-1111, and amendments thereto;~~
 - ~~☐ except in the case of a violation of K.S.A. 41-727, subsection (j) of K.S.A. 74-8810 or subsection (m) or (n) of K.S.A. 79-3321, and amendments thereto, or, except as provided in K.S.A. 38-2202(d) (12), did an act which, when committed by a person under 18 years of age, is prohibited by state law, city ordinance or county resolution but which is not prohibited when done by an adult;~~
 - ~~☐ while less than 10 years of age, committed an act which if done by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 21-5102, and amendments thereto;~~
 - ~~☐ is willfully and voluntarily absent from the child's home without the consent of the child's parent or other custodian;~~

☐ is willfully and voluntarily absent at least a second time from a court ordered or designated placement, or a placement pursuant to court order, if the absence is without the consent of the person with whom the child is placed or, if the child is placed in a facility, without the consent of the person in charge of such facility or such person's designee; _____

☐ has been residing in the same residence with a sibling or another person under 18 years of age, who has been physically, mentally or emotionally abused or neglected, _____ or _____ sexually _____ abused; _____

☐ while less than 10 years of age committed the offense defined in K.S.A. 21-6301(a)(14), _____ and _____ amendments thereto; _____

☐ has had a permanent custodian appointed and the permanent custodian is no longer able _____ or _____ willing _____ to _____ serve; _____

and each child named above is a Child in Need of Care.

OR

☐ b. there is not sufficient evidence to support the petition, and all parties are discharged. **HAVING SO FOUND**, the Court **ORDERS** the following parties discharged:- _____

The Court ☐ approves and adopts the proposed permanency plan as the plan for permanency in the present matter or ☐ does not approve the proposed permanency plan and orders a new permanency plan submitted to the Court within 30 days.

4. THE COURT FURTHER FINDS:

5. THE COURT THEREFORE FINDS AND ORDERS:

(If this is the first order removing custody from a parent or Indian custodian, complete and attach Form 209.)

☐ 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 the wishes of the parents, child and grandparent; the extent that the grandparent has cared for the child; the intent and circumstances under which the child is placed; and the physical and mental health of all involved individuals.

The above named child ☐ shall be ☐ shall remain placed in the custody of:

- ☐ _____, a parent.
☐ _____, an Indian custodian.
☐ _____, a relative.
☐ _____, an unlicensed person
 approved or specified by the Tribe with close emotional ties to the child.
☐ _____, a youth residential or shelter
 facility approved or specified by the Tribe or operated by an Indian organization.
☐ 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 or
 emotional or sexual abuse.

AND

7.

- ☐ 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 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).~~

7. ~~THE COURT FURTHER ORDERS:~~

8. ~~THE COURT FURTHER ORDERS all previous orders entered by this Court shall remain
 in effect except as herein modified.~~

☐ A restraining order shall be filed against _____.

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

5/1/13

THE COURT FURTHER ORDERS this matter set for dispositional hearing 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), 38-2251, ~~and~~ 25 U.S.C. §1901 *et seq.* and 25 C.F.R. 23.

Notes on Use

If this order places the child in the custody of someone other than a parent or Indian custodian, even if this is not the first removal, Form 209 must be used in addition to and attached to this form. Failure to make and properly document the findings required by Adoption and Safe Families Act (ASFA) in the initial order authorizing out of home placement will result in the loss of federal funding for the placement, or any subsequent placement, of the child in the present case.

Adjudication hearings are open to the public unless the court determines that closed proceedings, or the exclusion of a specific person, are in the best interests of the child or are necessary to protect the privacy rights of the parents. The court may exclude the public during the presentation of evidence that is confidential (see K.S.A. 38-2209) or conduct an *in camera* inspection. The court may not exclude the guardian *ad litem*, parties or interested parties. The court shall permit the attendance of up to two people who have been designated by the parent as allies, if they have participated in a parent ally orientation program approved by the judicial administrator. An ally may be removed if the ally becomes disruptive or has been disruptive in a prior proceeding. K.S.A. 38-2247.

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.” Bureau of Indian Affairs (BIA) Guidelines for Implementing the Indian Child Welfare Act, B.I. pg. 109 (2016).

Timing of Adjudication Hearing

Once a case is filed, an adjudicatory hearing must be held without undue delay, and within 60 days from the date of the filing of the petition unless good cause for a continuance is shown on the record. K.S.A. 38-2251. An adjudication hearing cannot be held until at least 10 days after receipt of the ICWA Notice of the proceeding (Form 210) by the parent, any Indian custodian, and the child's Tribe(s) or BIA. Each parent, Indian custodian, and Tribe have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding. 25 C.F.R. 23.112(a).

ICWA Notice of the proceeding

Notice of the proceedings (Form 210) must 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. 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). 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 BIA Regional Director. 25 C.F.R. 23.111(e).

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.

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

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.

Court Findings and Orders

If the child resides or is domiciled on an Indian reservation or is a ward of a tribal court (regardless of the child's residence or domicile), the Tribe has exclusive jurisdiction and the state court has no jurisdiction to proceed. 25 U.S.C. 1911(a).

The court may enter an order for one or both parents to pay child support if the child is placed in the custody of a person other than a parent, and shall enter a child support order if the secretary is granted custody of the child. The court shall issue an income withholding order, regardless of whether a payor/employer has been identified. The parent shall be given notice that the order may be registered pursuant to K.S.A. 38-2279, that the withholding order may be served on the parent's employer without further notice, and the child support order may be enforced by any method allowed by law. K.S.A. 38-2256 provides that a child support order that has been registered under K.S.A. 38-2279 may only be modified pursuant to that statute.

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).

Custody and Placement

If the court awards custody of the child to the secretary then the secretary shall have the authority to place the child; 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 court awards custody to the secretary, then the court shall provide the secretary with a copy of any orders entered.

To the extent possible, the Court must document where the child is or will be placed. 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).

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 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). 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.

Clarity and Translation

The court should write the order in easily understandable language that allows the parent(s) or Indian custodian to fully understand what action they must take to have the child returned to their care. An interpreter should be provided for a parent or Indian custodian whose first language

is not English. Compliance with ICWA is jurisdictional. Failure to comply with ICWA may render orders devoid of authority.

When using this form no other journal entry is required or advised. This form is complete in and of itself, reciting appearances and allowing space for findings and orders of the court.

If this is the first order relieving a parent of custody and authorizing out of home placement or the first order of removal when the child has been home for six months or longer (as an informal supervision), **Form 209 must be used.** Failure to make and properly document the findings required by ASFA in the initial order authorizing out of home placement will result in the loss of federal funding for the placement, or any subsequent placement, of the child in the present case.

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 to prevent the removal of the Indian child from the home were made. ICWA also requires the court to determine that continued custody with the child's parents or Indian custodian is likely to result in serious physical or emotional damage to the child. ICWA requires that the court hear and consider the testimony of one or more expert witnesses qualified to address the issue of whether continued custody of the child by the parent or Indian custodian is likely to result in serious physical or emotional damage to the child. ICWA requires that if the court enters a dispositional order granting custody to a person other than a parent or Indian custodian, this expert testimony shall be heard and the finding relating to the likelihood of serious emotional or physical damage shall be made, and that shall occur within 90 days of the removal of the Indian child from the home. Source: 25 U.S.C. 1901 *et seq.* and Department of the Interior, BIA Guidelines for State Courts, Indian Child Custody Proceedings.

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

Adjudication hearings are now open to the public, unless the court determines that closed proceedings, or the exclusion of a specific person, are in the best interests of the child or are necessary to protect the privacy rights of the parents. The court may exclude the public during the presentation of evidence that is confidential (see K.S.A. 38-2209) or conduct an *in camera* inspection. The court may not exclude the guardian *ad litem*, parties or interested parties. The court shall permit the attendance of up to two people who have been designated by the parent as allies, if they have participated in a parent ally orientation program approved by the judicial administrator. An ally may be removed if the ally becomes disruptive or has been disruptive in a prior proceeding. K.S.A. 38-2247.

Once a case is filed, an adjudicatory hearing shall be held without undue delay, and within 60 days from the date the child was removed from the home, if applicable. K.S.A. 38-2251 provides that if the court does not find by clear and convincing evidence, pursuant to K.S.A. 38-2250, that the child is a child in need of care, then the court shall dismiss the proceedings.

If a grandparent requests custody, the form facilitates documentation required by K.S.A. 38-2286, 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.~~

~~—The court may enter an order for one or both parents to pay child support if the child is placed in the custody of a person other than a parent, and shall enter a child support order if the secretary is granted custody of the child. If the court awards custody of the child to the secretary then the secretary shall have the authority to place the child, and the court may make placement recommendations. If the court awards custody to the secretary, then the court shall provide the secretary with a copy of any orders entered.—~~

~~—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*.~~

Comments

~~—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).~~

~~—An adjudication hearing is required when a party files a CINC petition and no stipulation has been entered. *In re K.W.*, 24 Kan. App. 2d 724, 953 P.2d 229 (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 court is not required to determine whether reintegration with the custodial parent is a viable alternative before placing the child with the noncustodial parent. *In re T.S.*, 276 Kan. 282, 74 P.3d 1009 (2003).~~

~~—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).~~