

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 OF INDIAN CHILD**

Pursuant to K.S.A. 38-2242, 42 U.S.C. 671 *et seq.*, 25 U.S.C. §1901 *et seq.*, and 25 C.F.R. 23
(Orders pertaining to more than one child must include findings specific to each child listed in the caption.)

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

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

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

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

The Court has jurisdiction to proceed.

THE COURT FINDS:

1. 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 and active efforts but have failed to maintain the family and prevent the removal of the child from the child’s home **or** an emergency exists which threatens the safety of the child as follows: *(Specific findings of fact must be written here)*

AND

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

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

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 juvenile crisis intervention center.
- _____, a staff secure facility.
- The Secretary, if the child is 15 years of age or younger, or if the child is 16 or 17 years of age if the child has no identifiable parental or family resources or shows signs of physical, mental, emotional or sexual abuse.

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 _____.

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_____.

Authority

K.S.A. 38-2242, 42 U.S.C. 671 *et seq.*, 25 U.S.C. 1901 *et seq.*, and 25 C.F.R. 23.

Notes on Use

This form is to be used if the state or the court knows or has reason to know that the child is an Indian child. If there is reason to know the child is an Indian child but the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court must treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an Indian child. 25 C.F.R. 23.107(b). The court should document what is the “reason to know the child is an Indian child” in the space provided in the form. **The state and the secretary should be pursuing information required by the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 *et seq.* at this time.** 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.

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

Indian child

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

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

In addition to the federal ICWA statutes, all federal regulations (found at 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).

Federal Funding

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

ICWA Notice of the Proceeding

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

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

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

Standard for Removal

The Indian Child Welfare Act (ICWA) requires the court to determine if active efforts were made to prevent the removal of the Indian child from the home. "Active efforts" means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the

prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case. 25 C.F.R. 23.2.

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

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). The court must find that the child is likely to sustain imminent physical damage or harm by clear and convincing evidence rather than just by probable cause.

Length

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 208) shall be issued within that time frame if the child is to remain in custody beyond 72 hours.

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

Placement

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).

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, but not for more than 24 hours, not including Saturdays, Sundays and legal holidays.

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.

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. If the child is an Indian child, it is best practice to try to provide an initial placement for the child that meets ICWA's (or the Tribe's) placement preferences. This will prevent subsequent disruptions if the child needs to be moved to a preferred placement once a child in need of care case is initiated. BIA Guidelines for Implementing the Indian Child Welfare Act, December 2016, Section C.6.

Other Orders

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).