

IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

IN THE INTEREST OF

Name _____

Case No. _____

Year of Birth _____ A male female

INDIAN CHILD WELFARE ACT
COMBINED JOURNAL ENTRY AND ORDER
OF REHEARING OF DISPOSITION

Pursuant to K.S.A. 38-2203(a), 38-2256, 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 rehearing of disposition **on the Court's own motion** **on the motion of** _____.

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 _____

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

Interested parties appearing: _____

The Secretary appears through: _____

Also present: _____

THE COURT FINDS AND ORDERS:

1. The child named above has been adjudicated a Child in Need of Care and the Court's previous findings and orders:

- shall remain in full force and effect.
 - shall remain in full force and effect to the extent that they are not inconsistent with any findings or orders in the present order, and except that it is now in the best interest of the child
- _____

2. 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:**

3. 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:

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

4. Proper notice of this dispositional hearing to parties, interested parties and those required to receive notice has been given as required by K.S.A. 38-2254.

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 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. Appropriate public and private agencies **have made** **have not made** reasonable and active efforts to facilitate the permanency plan. (*Specify basis for finding for the child.*)

8. 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.**

9. **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 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)

10. 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.

11. 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).

12. THE COURT FURTHER ORDERS:

_____.

13. A restraining order shall be filed against _____.

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

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

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

Authority

K.S.A. 38-2203(a), 38-2256, 42 U.S.C. 671 *et seq.*, 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.

Dispositional hearings shall be closed except to the parties, the guardian ad litem, interested parties, officers of the court, CASA and the custodian may attend. Other persons may be permitted to attend by consent of the parties or order of the court, if the court determines that their attendance would be in the best interests of the child or the conduct of the proceedings. The court may impose limitations as appropriate. In addition, 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

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.

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.1, pg. 9 (2016).

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 BIA 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).

The notice of the proceeding may or may not include the required notice of the dispositional 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).

Notice of Dispositional Hearing

K.S.A. 38-2254 requires notice of the dispositional hearing be given to the parties and the following: foster parents or permanent custodian, preadoptive parents, the person who has custody of the child, any person with close emotional ties to the child who has requested notice and is deemed by the court to be essential to the deliberations, grandparents at their last known addresses or if no grandparent is living or the address is not known, to the closest relative of the parent, if the address is known. Notice shall be given by first class mail no less than 10 business days before the hearing.

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

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 court must also determine 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).

K.S.A. 38-2255(a) sets out the considerations that the court must make prior to entering a dispositional order. In addition to entering a custody order, the court may impose terms and conditions, which may include participation by the parent and child in programs and treatment for the child.

“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 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.