



**HO-CHUNK NATION CODE (HCC)  
TITLE 4 – CHILDREN, FAMILY, AND ELDER WELFARE CODE  
SECTION 9 – DIVORCE AND CUSTODY ORDINANCE**

**ENACTED BY LEGISLATURE: OCTOBER 19, 2004**

**CITE AS: 4 HCC § 9**

**TABLE OF CONTENTS**

1. Authority .....	1
2. Purpose and Personal Jurisdiction .....	1
3. Petition and Response .....	2
4. Prohibited Acts During the Pendency of Divorce .....	3
5. Judgment of Divorce .....	3
6. Irretrievable Breakdown .....	4
7. Actions of the Court Pending Divorce .....	4
8. Provisions for Judgment .....	5
9. Revision of Legal Custody and Physical Placement Order .....	7
10. Effect of Judgment .....	9
11. Visitation Rights of Certain Persons .....	9
12. Fees .....	9

**1. Authority.**

a. Article V, Section 2(a) of the Constitution grants the Legislature the power to make laws, including codes, ordinances, resolution, and statutes.

b. Article V, Section 2(e) of the Constitution grants the Legislature the power to raise revenue, including the power to levy and collect taxes and license fees.

c. Article V, Section 2(p) of the Constitution grants the Legislature the power to enact laws to create and regulate a system of property including but not limited to use, title, deed, estate, inheritance, transfer, conveyance, and devise.

d. Article V, Section 2(r) of the Constitution grants the Legislature the power to protect and foster Ho-Chunk religious freedom, culture, language, and traditions.

e. Article V, Section 2(u) of the Constitution grants the Legislature the power to enact laws to regulate domestic relations of persons within the jurisdiction of the Nation.

**2. Purpose and Construction.** The Ho-Chunk Nation Trial Court is authorized to dissolve a marriage by divorce when the parties are incompatible for any reason when

either party is a resident of the Ho-Chunk Nation for at least six (6) months or is a member of the Ho-Chunk Nation who has resided within the state of Wisconsin for at least six (6) months.

**3. Petition and Response.**

a. Except as otherwise provided, in dissolution of marriage action the petition shall state:

(1) The name and birth date of the parties, the social security numbers of the husband and wife and their occupations, the date and place of marriage and the facts relating to the residence of both parties.

(2) The name and birth date of each minor child of the parties and each other born to the wife during the marriage, and whether the wife is pregnant.

(3) That the marriage is irretrievably broken or that the parties agree it is irretrievably broken.

(4) Whether or not an action for divorce or legal separation by either of the parties was or has been at any time commenced, or is pending in any other court or before any judge, in the state of Wisconsin, in another tribal court, or elsewhere.

(5) Whether the parties have entered into any written agreement as to support, legal custody and physical placement of the children, maintenance of either party, and property division; and if so, the written Agreement shall be attached.

(6) The relief requested.

(7) That during the pendency of the action, the parties are prohibited from, and may be held in contempt of court for, harassing, intimidating, physically abusing or imposing any restraint on the person liberty of the other party or a minor child of either party.

(8) That during the pendency of the action, without the consent of the other party or an order from the Court, the parties are prohibited from, and may be held in contempt of court for, encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties, except in the usual course of business, in order to secure necessities or in order to pay reasonable costs and expenses of the action, including attorney fees.

(9) That during the pendency of the action, the parties are prohibited from, and may be held in contempt of court for, doing any of the following without the consent of the other party or an order of the Court:

(a) Establishing a residence with a minor child of the parties outside the state of Wisconsin or more than 150 miles from the residence of the other party within the state.

(b) Removing a minor child of the parties from the state of Wisconsin without consent of custodial parent.

b. Either or both parties to the marriage may initiate the action. The party initiate the action or his or her attorneys or advocates shall sign the petition. Both parties or their respective attorneys or advocates shall sign a joint petition if the parties are filing together.

c. The summons shall be in the form of a regular summons used by the Trial Court for civil cases.

d. Service shall be made in accordance with regular court procedures. If only one party initiates the action, the other party may serve a response and/or counterclaim within 20 business days after the date of service

#### **4. Prohibited Acts During the Pendency of Divorce.**

a. In an action for divorce, the petitioner upon filing the petition, the joint petitioners upon filing the joint petition and the respondent upon service of the petition are prohibited from doing any of the following:

(1) Harassing, intimidating, physically abusing or imposing any restraint on the personal liberty of the other party or a minor child of either of the parties.

(2) Encumbering, concealing, damage, destroying, transferring, or otherwise disposing of property owned by either or both of the parties, except in the usual course of business, in order to secure necessities or in order to pay reasonable costs and expenses of the action, including attorney fees.

(3) Without the consent of the other party or an order of the Court, establishing a residence with a minor child of the parties outside the state of Wisconsin or more than 150 miles from the residence of the other party within the state, removing a minor child of the parties from the state Wisconsin for more than 90 consecutive days.

b. The prohibitions listed in this section shall apply until the action is dismissed, until a final judgment in the action is entered or until the Court orders otherwise.

c. Any person violating the provisions of this section will be subject to the regular contempt provision in the Ho-Chunk Nation.

**5. Judgment of Divorce.** The Trial Court shall grant a judgment of divorce if:

a. The requirements of this Ordinance as to marriage counseling have been complied with and the Court finds that the marriage is irretrievably broken under Section 6. This is not required if the parties have been living separately for 12 months or longer.

b. To the extent it has jurisdiction to do so, the Court has considered, approved, or made provision under Section 8 for legal custody and physical placement of any minor children of the marriage, the support of any child of the marriage entitled to support, the maintenance of either spouse, the support of the family and the disposition of property.

#### **6. Irretrievable Breakdown.**

a. If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or if the parties voluntarily lived apart continuously for twelve (12) months or more immediately prior to commencement of the divorce action and one party had so started, the Court, after hearing, shall make a finding that the marriage is irretrievably broken.

b. If the parties have not voluntarily lived apart for at least twelve (12) months immediately prior to commencement of the action and if only one party had stated under oath or affirmation that the marriage is irretrievably broken, the Court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation.

(1) If the Court finds no reasonable prospect of reconciliation, it shall make a finding that the marriage is irretrievably broken; or

(2) If the Court finds that there is a reasonable prospect of reconciliation, it shall continue the matter for further hearing not fewer than thirty (30) nor more than sixty (60) days later, or as soon thereafter as the matter may be reached on the Court's calendar, and may suggest to the parties that they seek counseling. The Court, at the request of either party or on its own motion, may order counseling. At the adjourned hearing, if either party states under oath or affirmation that the marriage is irretrievably broken, the Court shall make a finding that the marriage is irretrievably broken.

#### **7. Actions of the Court Pending Divorce.** The Trial Court may order:

a. The husband and wife to provide for the separate maintenance of his or her spouse and children as the Court may deem just upon application therefore or in the disposition of a divorce proceeding.

b. The care, custody and maintenance of the minor child of the marriage during the pendency of the proceedings.

c. The restraint of either spouse from, in any manner, molesting or interfering with the other or the minor children.

d. The restraint and enjoining of either spouse or both from disposing of their individually or jointly owned property during the pendency of the action except as approved by the Court.

**8. Provision for Judgment.** In addition to voiding or dissolving the marriage, the Court shall have the power to impose judgment as follows:

a. Custody.

(1) For the future legal custody and physical placement and care of the minor children of the marriage as may be in the best interest of the children and in accordance with Section 9.

(2) Approve any agreement between the parties as to the legal custody and physical placement and care of minor children if deemed by the Court to be in the best interests of the children.

b. For the recovery from either spouse to allow for the care and support of the minor children an amount of money as may be just and proper for the party to contribute toward their education and support.

c. For the recovery from either spouse an amount of money or other personal property as may be just and proper for the maintenance of the other.

(1) In considering an order under this subsection, the Court shall consider the following:

(a) The length of marriage.

(b) The age and physical and emotional health of the parties.

(c) The division of property made under paragraph e, below.

(d) The education level of each party at the time of marriage and at the time the action is commenced.

(e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

(f) The feasibility that the party seeking maintenance can become self-supporting as a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

(g) The tax consequences to each party.

(h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(i) The contribution by one party to the education, training or increased earning power of the other.

(j) Such other factors as the Court may in each individual case determine to be relevant.

d. Property Division. For the approval of any property settlement between the parties or recovery and delivery to each of the parties any of their personal property in the possession or control of the other at the time of the giving of the judgment.

(1) Except as provided in paragraph (2), below, any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this paragraph e.

(a) A gift from a person other than the other party.

(b) By reason of the death of another, including, but not limited to life insurance proceeds; payments made under a deferred employment benefit plan, of an individual retirement account; a property acquired by right of survivorship, by a trust distribution, by bequest or inheritance or by a payable on death or a transfer in death arrangement.

(c) With funds acquired in a manner under paragraphs (a) or (b), above.

(d) A per capita or other payment received by a party other than the spouse.

(2) The Court shall presume that all property not described in paragraph (1), above, is to be equally divided between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

(a) The length of the marriage.

(b) The property brought to the marriage by each party.

(c) Whether one party has substantial assets not subject to division by the Court.

(d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(e) The age and physical and emotional health of the parties.

(f) The contribution by one party to the education, training or increased earning power of the other.

(g) The earning capacity of the party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

(i) The tax consequences to each party.

(j) Any written agreement made by the parties before or during the marriage concerning any arrangements for property distribution; such agreements shall be binding upon.

(3) No party awarded joint legal custody may take any action inconsistent with any applicable physical placement order, unless the Court expressly authorizes that action.

(4) In an order for physical placement, the Court shall specify the right of each party to the physical control of the child in sufficient detail to enable a party deprived of that control to implement any law providing relief for interference with custody or parental rights.

**9. Revision of Legal Custody and Physical Placement Order.** The following provisions are applicable to modifications of legal custody and physical placement orders:

a. Substantial Modifications.

(1) Within 2 Years After Initial Order. Except as provided under paragraph b, below, a Court may not modify any of the following orders before 2 years after the initial order is entered, unless a party seeking the modification, upon petition, motion, or order to show cause shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child:

(a) An order of legal custody.

(b) An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.

(2) After 2-Year Period.

(a) Except as provided under paragraph (1), above, and paragraph b, below, upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the Court finds all the other following:

1 The modification is in the best interest of the child.

2 There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

(b) With respect to paragraph (a), above, there is a rebuttable presumption that:

1 Continuing the current allocation of decision-making under a legal custody order is in the best interest of the child.

2 Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

(c) A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under paragraph (a), above.

b. Modification of Substantially Equal Physical Placement Orders. Notwithstanding paragraph a, above.

(1) If the parties have substantially equal periods of physical placement pursuant to a court order and circumstances make it impractical for the parties to continue to have substantially equal physical placement, a court, upon petition, motion or order to show cause by a party, may modify such an order if it is in the best interest of the child.

(2) In any case in which paragraph (1), above, does not apply and in which the parties have substantially equal periods of physical placement pursuant to a court order, a court, upon petition, motion or order to show cause of a party may modify such an order based on the appropriate standard under paragraph a, above. However, under paragraph a(2)(b), above, there is a rebuttable presumption that having substantially equal periods of physical placement is in the best interest of the child.

c. Modifications of Other Physical Placement Order. Except as provided under paragraphs a and b, above, upon petition, motion or order to show cause by a party, a court may modify an order of physical placement which does not substantially alter the amount of time a parent may spend with his or her child if the Court finds that the modification is in the best interest of the child.

d. Reasons for Modification. If either party opposes modification or termination of a legal custody or physical placement order under this section the Court shall state, in writing, its reasons or the modification or termination.

e. Notice. No court may enter an order for modification under this section until notice of the petition, motion or order to show cause requesting modification has been given to the child's parents, if they can be found, and to any relative or agency having custody of the child.

f. Transfer to the Department of Health and Social Services. The Court may order custody transferred to the Department of Health and Social Services only if that department agrees to accept custody based on the *Hocak Nation Children and Family Code* (4 HCC § 3).

#### **10. Effect of Judgment.**

a. In any action affecting the family under this Ordinance, if the court orders maintenance payment or other allowances for a party or children or retains jurisdiction in such matters, the written judgment shall include a provision that disobedience of the court order with respect to the same is punishable in accordance with the *Ho-Chunk Nation Child Support Enforcement Code* (4 HCC 7) until such judgment is complied with.

b. The Court has the power to vacate or modify the judgment of sufficient cause shown upon its own motion, or upon the application of both parties to the action, at any time within six (6) months from the granting of such judgment. If the judgment is vacated it shall restore the parties to the marital relation that existed before the granting of such judgment.

c. When a judgment of divorce is granted it shall be effective immediately.

**11. Visitation Rights of Certain Persons.** Upon petition by a grandparent, great-grandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the Court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the Court determined that visitation is in the best interest of the child. Whenever possible, in making a determination under this section, the Court shall consider the wishes of the child.

**12. Fees.** The filing fee for a petition for dissolution of marriage shall be set by the Court.

**Ho-Chunk Nation Legislature**  
**Divorce and Custody Ordinance**  
**Page 10 of 10**

- 8/17/04 Legislature places draft Divorce and Custody Ordinance (4 HCC § 9) out for 45-Day Public Review.
- 10/19/04 Enacted as Divorce and Custody Ordinance (4 HCC § 9) by Legislative Resolution 10/19/04E.