

FINAL BILL REPORT

ESSB 5656

C 309 L 11
Synopsis as Enacted

Brief Description: Creating a state Indian child welfare act.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove, Regala, White, McAuliffe and Kline).

Senate Committee on Human Services & Corrections
House Committee on State Government & Tribal Affairs
House Committee on Early Learning & Human Services

Background: The Indian Child Welfare Act (ICWA) is a federal law passed in 1978. ICWA was passed in response to the high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families” (25 U.S.C. § 1902). ICWA sets federal requirements that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe. These requirements apply to proceedings under chapters 13.32A, 13.34, and 26.33 RCW.

Indian children involved in state child custody proceedings are covered by ICWA. A person may define his or her identity as Indian but in order for ICWA to apply, the involved child must be an Indian child as defined by the law. ICWA defines an Indian child as “any unmarried person who is under age 18 and is either (1) a member of an Indian tribe, or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe” (25 U.S.C. § 1903). Under federal law, individual tribes have the right to determine eligibility, membership, or both. However, in order for ICWA to apply, the child must be a member of or eligible for membership in a federally recognized tribe. ICWA does not apply to divorce proceedings, intra-family disputes, juvenile offender proceedings, or cases under tribal court jurisdiction.

All tribes have the right to determine who is a member of their tribe, and different tribes have different requirements for eligibility.

Caseworkers must make several considerations when handling an ICWA case, including (1) providing active efforts to the family, (2) identifying a placement that fits under the ICWA preference provisions, (3) notifying the child’s tribe and the child’s parents of the child

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custody proceeding, and (4) working actively to involve the child's tribe and the child's parents in the proceedings.

The child's tribe must have exclusive jurisdiction over the child custody proceeding involving the Indian child who resides on a reservation unless the tribe has consented to state's concurrent jurisdiction, or the tribe expressly declined jurisdiction or the state is exercising emergency jurisdiction. If the court or any party knows or has reason to know that a child is or may be an Indian child, the court or party must notify the parent or Indian custodian and the child's tribe, by registered mail, of any pending proceedings and their right of intervention.

In a child custody proceeding involving an Indian child who is not a resident of the reservation and not a ward of the tribal court, the court must transfer the case to tribal court unless either parent objects or there is good cause not to transfer the case. The tribe may decline jurisdiction.

Before an Indian child can be placed in foster care, the Department of Social and Human Services (DSHS) or a supervising agency must show that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that these efforts have been unsuccessful. The court cannot order a foster care placement without a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, that continued custody by the child's parent or Indian custodian is likely to result in serious physical or emotional damage to the child.

A court cannot order the termination of parental rights without a determination, supported by evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that continued custody by the child's parent or Indian custodian or return of custody to the parent or custodian is likely to result in serious physical or emotional damage to the child.

A court may order the emergency removal of an Indian child, including a child who is a resident of or domiciled on a reservation, to prevent imminent physical damage or harm to the child. The court, DSHS, or supervising agency must terminate the emergency removal or placement of a child when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. The party that obtained emergency removal or placement of the child must immediately initiate a child custody proceeding that complies with ICWA, transfers the child to the jurisdiction of the appropriate tribe, or restores the child to the parent or custodian. An emergency removal or placement of an Indian child must immediately terminate and the court order approving the removal vacated when the removal or placement is no longer needed to prevent imminent physical damage or harm to the child.

If the petitioner in a child custody proceeding has improperly removed the child from the parent or custodian's custody or has improperly retained custody after a visit or other temporary relinquishment of custody, the court must decline jurisdiction over the petition and immediately return the child to the parent or custodian unless such return would subject the child to substantial and immediate danger or threat of danger.

Under current law, an Indian child must be placed in a foster care home with the following characteristics which must be given preference in the following order:

1. relatives;
2. an Indian family of the same tribe as the child;
3. an Indian family of a Washington Indian tribe of a similar culture to that tribe;
4. any other family which can provide a suitable home for an Indian child, such suitability to be determined through consultation with a local Indian child welfare advisory committee.

Summary: The provisions of the act are substantially similar to those in the federal ICWA. The state act will apply to child custody proceedings, which are defined as proceedings, to determine (1) foster care placements; (2) terminations of parental rights; (3) pre-adoptive placements, which are placements of children after parental rights have been terminated; and (4) adoptive placements. There are some differences between the federal statute and the provisions in the act regarding definitions, jurisdiction, notice requirements, and placement preferences of the child.

Definitions. *Active Efforts.* The federal ICWA employs the term active efforts. For example, any party seeking to remove an Indian child from a parent or custodian for placement in foster care must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian child family and that the efforts have proved unsuccessful. The federal statute does not define active efforts, and this act includes a definition. Active efforts requires a showing that the party actively worked with the parent to engage in remedial services and rehabilitative programs to prevent the breakup of the family, beyond simply providing referrals to such services.

Qualified Expert Witness. Testimony from a qualified expert witness is required under the federal statute before a court can place an Indian child in foster care or enter an order terminating parental rights. The term qualified expert witness is not defined in federal law. In this act, a qualified expert witness is defined as (1) a member of the child's Indian tribe or other person of the tribe's choice who is recognized by the tribe as knowledgeable regarding tribal customs of family organization or child rearing practices; (2) any person having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe; (3) a professional person having substantial education and experience in the area of his or her specialty; or (4) any person having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and child rearing practices in Indian tribes with cultural similarities to the Indian child's tribe.

Best Interests of the Indian Child. This term is not defined in the federal ICWA. For purposes of the state act, it is defined as the use of practices designed to accomplish the following: (1) protect the safety, well-being, development and stability of the Indian child; (2) prevent unnecessary out of home placements; (3) acknowledge the right of Indian tribes to maintain their existence and integrity which will promote the stability and security of their children and families; (4) recognize the value to the Indian child of establishing, developing and maintaining ties to the child's tribe; and (5) prioritize placement of a child in accordance with the placement preferences outlined in the act.

Tribal Customary Adoption. This term is not included in the federal ICWA but is defined in the act as an adoption through tribal custom, traditions, or laws of an Indian child's tribe by which the Indian child is permanently placed with a nonparent, who in turn has the rights, privileges, and obligations of a legal parent. Termination of the parent-child relationship between the Indian child and the biological parent is not required to effect or recognize a tribal customary adoption.

Jurisdiction. Jurisdictional provisions over an Indian child in a custody proceeding who, regardless of whether the child resides or is domiciled within the reservation of his or her tribe, are substantially similar to the federal statute. For children who do not reside on the reservation, a parent or other party identified in the statute may make a motion to the court to have the case transferred to the jurisdiction of the Indian child's tribe. The tribe, as in the federal statute, may decline jurisdiction. Unlike the federal law, which is silent on this issue, the act provides a 75-day time frame for the tribe to respond.

Notice. The notice provisions of the federal law are substantially duplicated in the act.

Burden of Proof in an Involuntary Child Custody Proceeding. The burdens of proof for foster care placement and termination of parental rights for a proceeding involving an Indian child are the same as those in the federal ICWA. For foster care placement, the court must find by clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. A termination order cannot be issued unless the court finds beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Not included in federal law but included in the act is the provision that harm that may result from interfering with a bond or attachment between a foster parent and an Indian child can not be the sole basis or the primary reason for keeping an Indian child in foster care or for the termination of parental rights.

Where a child has been determined by the court not to be an Indian child, and an Indian tribe subsequently determines that the child is a member, the tribe may move the court for redetermination during the pendency of the proceeding, rather than at any time.

Voluntary Foster Care Placement or Termination of Parental Rights. The required consent for a voluntary foster care placement or termination of parental rights involving an Indian child is the same as federal law. An Indian child's parent or Indian custodian may withdraw consent to a voluntary foster care placement at any time, and upon the withdrawal of consent, the child must be returned to the parent or Indian custodian.

For a voluntary termination of parental rights or adoptive placement involving an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of an order terminating parental rights or a final decree of adoption. Upon withdrawal of consent, the child must be returned to the parent. If consent to adoption was obtained through fraud or duress, a parent may withdraw consent after the entry of a final decree of adoption if the adoption has been effective for less than two years.

Placement of Indian Child. The federal ICWA sets out placement priorities for adoptive and foster care and pre-adoptive placements. The placement priorities in the act contain two options in addition to those provided in the federal law: (1) an Indian family that is of a similar culture to the child's tribe, and (2) any other family which can provide a suitable home for an Indian child, as determined in consultation with the child's tribe or the Local Indian Child Welfare Advisory Committee, where the child's tribe has not intervened.

Other Provisions. DSHS, in consultation with the Indian tribes, must establish standards and procedures for its review of cases involving Indian children under the newly created chapter and methods for monitoring the DSHS's compliance with the federal and state acts.

Nothing in this chapter shall affect, impair, or limit rights or remedies provided to any party under the federal ICWA, 25 U.S.C. Sec. 1914.

Every order or decree entered in any child custody proceeding must contain a finding that the federal ICWA or state Indian Child Welfare Act applies. The order must also contain a finding that all notice, consent, and evidentiary requirements under the state and federal acts have been satisfied.

Votes on Final Passage:

Senate	46	1	
House	79	18	(House amended)
House	82	16	(House amended)
Senate	44	3	(Senate concurred)

Effective: July 22, 2011.