

HOUSE BILL NO. 1536

Introduced by

Representatives Davis, Conmy, Finley-DeVille, Hager, Henderson, Klemin, Pyle, Rohr, Weisz
Senator Luick

1 A BILL for an Act to create and enact sections 27-20.3-19.1, 27-20.3-19.2, 27-20.3-19.3,
2 27-20.3-19.4, and 27-20.3-19.5 of the North Dakota Century Code, relating to adopting a state
3 Indian child welfare act; and to amend and reenact section 27-20.3-19 of the North Dakota
4 Century Code, relating to Indian child welfare.

5 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

6 **SECTION 1. AMENDMENT.** Section 27-20.3-19 of the North Dakota Century Code is
7 amended and reenacted as follows:

8 **27-20.3-19. Indian child welfare - Active efforts and procedures.**

9 1. As used in this section and sections 27-20.3-19.1 through 27-20.3-19.5:

10 a. "Act" means this section and sections 27-20.3-19.2 through 27-20.3-19.5.

11 b. "Active efforts" means affirmative, active, thorough, and timely efforts intended
12 primarily to maintain or reunite an Indian child with the Indian child's family. ~~Active-~~
13 ~~efforts required of the federal Indian Child Welfare Act of 1978 [25 U.S.C. 1901-~~
14 ~~through 1963] apply or may apply, including during the verification process. If an~~
15 agency is involved in the child-custody proceeding, active efforts must involve
16 assisting the ~~parent or parents~~a parent or Indian custodian ~~through~~with the steps
17 of a case plan ~~and with~~including accessing or developing the resources
18 necessary to satisfy the case plan. To the maximum extent possible, active efforts
19 should be provided in a manner consistent with the prevailing social and cultural
20 conditions and way of life of the Indian child's tribe and should be conducted in
21 partnership with the Indian child and the Indian child's parents, extended family
22 members, Indian custodians, and tribe. Active efforts are to be tailored to the
23 facts and circumstances of the case. The term includes:

- 1 (1) Conducting a comprehensive assessment of the circumstances of the
2 Indian child's family, with a focus on safe reunification as the most desirable
3 goal, with ongoing timely assessment to determine when the threat is
4 resolved and placement of the Indian child can be returned to the custodian.
- 5 (2) Identifying appropriate services and helping ~~the parents~~a parent or Indian
6 custodian to overcome barriers, including actively assisting ~~the parents~~a
7 parent or Indian custodian in obtaining such services.
- 8 (3) Identifying, notifying, and inviting representatives of the Indian child's tribe to
9 participate in providing support and services to the Indian child's family and
10 in family team meetings, permanency planning, and resolution of placement
11 issues.
- 12 (4) Conducting or causing to be conducted a diligent search for the Indian
13 child's extended family members, and contacting and consulting with
14 extended family members to provide family structure and support for the
15 Indian child and the Indian child's ~~parents~~parent or Indian custodian.
- 16 (5) Offering and employing available and culturally appropriate family
17 preservation strategies and facilitating the use of remedial and rehabilitative
18 services provided by the Indian child's tribe.
- 19 (6) Taking steps to keep siblings together, if possible.
- 20 (7) Supporting regular visits with ~~parents~~a parent or Indian ~~custodians~~custodian
21 in the most natural setting possible as well as trial home visits of the Indian
22 child during any period of removal, consistent with the need to ensure the
23 health, safety, and welfare of the Indian child.
- 24 (8) Identifying community resources, including housing, financial,
25 transportation, mental health, substance abuse, and peer support services
26 and actively assisting the Indian child's ~~parents~~parent or Indian custodian or,
27 as appropriate, the Indian child's family, in utilizing and accessing those
28 resources.
- 29 (9) Monitoring progress and participation in services.

1 (10) Considering alternative ways to address the needs of the Indian child's
2 ~~parents~~parent or Indian custodian and where appropriate, the family, if the
3 optimum services do not exist or are not available.

4 (11) Providing post-reunification services and monitoring.

5 ~~b-c.~~ "Adoptive placement" means the permanent placement of an Indian child for
6 adoption.

7 d. "Extended family member" means a relationship defined by the law or custom of
8 the Indian child's tribe or, in the absence of such law or custom, means an
9 individual who has reached the age of eighteen and who is the Indian child's
10 grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece
11 or nephew, first or second cousin, or stepparent.

12 e. "Foster care or non-foster care placement" means the removal of an Indian child
13 from the home of his or her parent or Indian custodian for temporary placement in
14 a foster home, qualified residential treatment program, residential care center for
15 Indian children and youth, or shelter care facility, in the home of a relative other
16 than a parent or Indian custodian, or in the home of a guardian, from which
17 placement the parent or Indian custodian cannot have the Indian child returned
18 upon demand. The term does not include an adoptive placement, a preadoptive
19 placement, and emergency change in placement under section 27-20.3-06 or
20 holding an Indian child in custody.

21 e-f. "Indian" means an individual who is a member of an Indian tribe, or who is a
22 native and a member of a regional corporation as defined under 43 U.S.C. 1606.

23 d-g. "Indian child" means any unmarried individual who is under the age of eighteen
24 and is either a member of an Indian tribe or is eligible for membership in an
25 Indian tribe and is the biological child of a member of an Indian tribe.

26 e-h. "Indian child custody proceeding" means a proceeding brought by the state
27 involving:

28 (1) Foster care or non-foster care placement;

29 (2) A preadoptive placement;

30 (3) An adoptive placement; or

31 (4) A termination of parental rights under section 27-20.3-20 for an Indian child.

1 Indian family and that these efforts have proved unsuccessful. The court may not
2 order the removal unless evidence of active efforts shows there has been a vigorous
3 and concerted level of casework beyond the level that would constitute reasonable
4 efforts under section 27-20.3-26. Reasonable efforts may not be construed to be
5 active efforts. Active efforts must be made in a manner that takes into account the
6 prevailing social and cultural values, conditions, and way of life of the Indian child's
7 tribe. Active efforts must utilize the available resources of the Indian child's extended
8 family, tribe, tribal and other relevant social service agencies, and individual Indian
9 caregivers.

10 3. The court may order the removal of the Indian child for involuntary foster care
11 placement only if the court determines, by clear and convincing evidence, that
12 continued custody of the Indian child by the parent or Indian custodian is likely to
13 result in serious emotional or physical damage to the Indian child. Evidence must
14 show a causal relationship between the particular conditions in the home and the
15 likelihood that continued custody of the Indian child will result in serious emotional or
16 physical damage to the particular Indian child who is the subject of the proceeding.
17 Poverty, isolation, custodian age, crowded or inadequate housing, substance use, or
18 nonconforming social behavior does not by itself constitute clear and convincing
19 evidence of imminent serious emotional or physical damage to the Indian child. As
20 soon as the threat has been removed and the Indian child is no longer at risk, the state
21 should terminate the removal, by returning the Indian child to the parent or Indian
22 custodian while offering a solution to mitigate the situation that gave rise to the need
23 for emergency removal and placement.

24 4. The court may ~~only~~ order the termination of parental rights over the Indian child only if
25 the court determines, by evidence beyond a reasonable doubt that continued custody
26 of the Indian child by the parent or Indian custodian is likely to result in serious
27 emotional or physical damage to the Indian child.

28 5. In considering whether to involuntarily place an Indian child in foster care or to
29 terminate the parental rights of the parent of an Indian child, the court shall require that
30 a qualified expert witness must be qualified to testify regarding whether the Indian
31 child's continued custody by the parent or Indian custodian is likely to result in serious

1 emotional or physical damage to the Indian child and should be qualified to testify as
2 to the prevailing social and cultural standards of the Indian child's tribe. An individual
3 may be designated by the Indian child's tribe as being qualified to testify to the
4 prevailing social and cultural standards of the Indian child's tribe. If the parties
5 stipulate in writing and the court is satisfied the stipulation is made knowingly,
6 intelligently, and voluntarily, the court may accept a declaration or affidavit from a
7 qualified expert witness in lieu of testimony. The court or any party may request the
8 assistance of the Indian child's tribe or the bureau of Indian affairs office serving the
9 Indian child's tribe in locating individuals qualified to serve as expert witnesses. The
10 social worker regularly assigned to the Indian child may not serve as a qualified expert
11 witness in child-custody proceedings concerning the Indian child. The qualified expert
12 witness should be someone familiar with the particular Indian child and have contact
13 with the ~~parents~~parent or Indian custodian to observe interaction between the
14 ~~parents~~parent or Indian custodian, Indian child, and extended family members. The
15 child welfare agency and courts should facilitate access to the family and records to
16 facilitate accurate testimony.

17 6. An emergency removal or placement of an Indian child under state law must terminate
18 immediately when the removal or placement is no longer necessary to prevent
19 imminent physical damage or harm to the Indian child.

20 7. To facilitate the intent of the act, the agency, in cooperation with the Indian child's tribe
21 of affiliation, unless a parent objects, shall take steps to enroll the Indian child in the
22 tribe with the goal of finalizing enrollment before termination.

23 **SECTION 2.** Section 27-20.3-19.1 of the North Dakota Century Code is created and
24 enacted as follows:

25 **27-20.3-19.1. Indian child welfare - Jurisdiction over custody proceedings.**

26 1. The act includes requirements that apply if an Indian child is the subject of:

27 a. A child-custody proceeding, including:

28 (1) An involuntary proceeding;

29 (2) A voluntary proceeding that could prohibit the parent or Indian custodian

30 from regaining custody of the Indian child upon demand; and

- 1 (3) A proceeding involving status offenses if any part of the proceeding results
2 in the need for out-of-home placement of the Indian child, including a foster
3 care, preadoptive, or adoptive placement, or termination of parental rights.
- 4 b. An emergency proceeding other than:
- 5 (1) A tribal court proceeding; or
6 (2) A proceeding regarding a criminal act that is not a status offense.
- 7 c. An award of custody of the Indian child to one of the parents, including an award
8 in a divorce proceeding; or
- 9 d. A voluntary placement that either parent, both parents, or the Indian custodian
10 has, of his or her or their free will, without a threat of removal by a state agency,
11 chosen for the Indian child and that does not operate to prohibit the Indian child's
12 parent or Indian custodian from regaining custody of the Indian child upon
13 demand.
- 14 2. If a proceeding under subsection 1 concerns an Indian child, the act applies to that
15 proceeding. In determining whether the act applies to a proceeding, the state court
16 may not consider factors such as the participation of a parent or the Indian child in
17 tribal cultural, social, religious, or political activities; the relationship between the Indian
18 child and the Indian child's parent; whether the parent ever had custody of the Indian
19 child; or the Indian child's blood quantum.
- 20 3. If the act applies at the commencement of a proceeding, the act does not cease to
21 apply solely because the Indian child reaches age eighteen during the pendency of the
22 proceeding.
- 23 4. In an Indian child custody proceeding under this chapter involving an Indian child who
24 is not residing or domiciled within the reservation of the Indian child's tribe, the court
25 assigned to exercise jurisdiction under this chapter, upon the petition of the Indian
26 child's parent, Indian custodian, or tribe, shall transfer the proceeding to the
27 jurisdiction of the tribe unless either of the following applies:
- 28 a. A parent of the Indian child objects to the transfer.
- 29 b. An Indian tribe has exclusive jurisdiction over an Indian child custody proceeding
30 involving an Indian child who resides or is domiciled within the reservation of the
31 tribe, except if that jurisdiction is otherwise vested in the state by federal law. If an

- 1 Indian child is a ward of a tribal court, the Indian tribe retains exclusive
2 jurisdiction regardless of the residence or domicile of the Indian child.
- 3 5. In an Indian child custody proceeding under this chapter involving an Indian child who
4 is not residing or domiciled within the reservation of the Indian child's tribe, the court
5 assigned to exercise jurisdiction under this chapter, upon the petition of the Indian
6 child's parent, Indian custodian, or tribe, shall transfer the proceeding to the
7 jurisdiction of the tribe unless any of the following apply:
- 8 a. A parent of the Indian child objects to the transfer.
- 9 b. The Indian child's tribe does not have a tribal court, or the tribal court of the
10 Indian child's tribe declines jurisdiction.
- 11 c. The court determines good cause exists to deny the transfer. In determining
12 whether good cause exists to deny the transfer, the court may not consider any
13 perceived inadequacy of the tribal social services department or the tribal court of
14 the Indian child's tribe. The court may determine good cause exists to deny the
15 transfer only if the person opposing the transfer shows by clear and convincing
16 evidence the evidence or testimony necessary to decide the case cannot be
17 presented in tribal court without undue hardship to the parties or the witnesses
18 and that the tribal court is unable to mitigate the hardship by making
19 arrangements to receive the evidence or testimony by use of telephone or live
20 audiovisual means, by hearing the evidence or testimony at a location that is
21 convenient to the parties and witnesses, or by use of other means permissible
22 under the tribal court's rules of evidence.
- 23 6. An Indian child's tribe may intervene at any point in an Indian child custody
24 proceeding.
- 25 7. The state shall give full faith and credit to the public acts, records, and judicial
26 proceedings of an Indian tribe which are applicable to an Indian child custody
27 proceeding to the same extent that the state gives full faith and credit to the public
28 acts, records, and judicial proceedings of any other governmental entity.

29 **SECTION 3.** Section 27-20.3-19.2 of the North Dakota Century Code is created and
30 enacted as follows:

1 **27-20.3-19.2. Indian child welfare - Court proceedings.**

- 2 1. In a proceeding involving the foster care or non-foster care placement of or termination
3 of parental rights to an Indian child whom the court knows or has reason to know may
4 be an Indian child, the party seeking the foster care or non-foster care placement or
5 termination of parental rights, for the first hearing of the proceeding, shall notify the
6 Indian child's parent, Indian custodian, and tribe, by registered mail, return receipt
7 requested, of the pending proceeding and of the parties' right to intervene in the
8 proceeding and shall file the return receipt with the court. Notice of subsequent
9 hearings in a proceeding must be in writing and may be given by mail, personal
10 delivery, facsimile transmission, or electronic mail. If the identity or location of the
11 Indian child's parent, Indian custodian, or tribe cannot be determined, that notice shall
12 be given to the United States secretary of the interior in like manner. The first hearing
13 in the proceeding may not be held until at least ten days after receipt of the notice by
14 the parent, Indian custodian, and tribe or until at least fifteen days after receipt of the
15 notice by the United States secretary of the interior. On request of the parent, Indian
16 custodian, or tribe, the court shall grant a continuance of up to twenty additional days
17 to enable the requester to prepare for that hearing.
- 18 2. Each party to a child custody proceeding of an Indian child has the right to examine all
19 reports or other documents filed with the court upon which a decision with respect to
20 the out-of-home care placement, termination of parental rights, or return of custody
21 may be based.

22 **SECTION 4.** Section 27-20.3-19.3 of the North Dakota Century Code is created and
23 enacted as follows:

24 **27-20.3-19.3. Indian child welfare - Voluntary proceedings - Consent - Withdrawal.**

- 25 1. A voluntary consent by a parent or Indian custodian to a foster care or non-foster care
26 placement of an Indian child is not valid unless the consent or delegation is executed
27 in writing, recorded before a judge, and accompanied by a written certification by the
28 judge that the terms and consequences of the consent or delegation were fully
29 explained in detail to and were fully understood by the parent or Indian custodian. The
30 judge also shall certify the parent or Indian custodian fully understood the explanation
31 in English or that the explanation was interpreted into a language the parent or Indian

1 custodian understood. Any consent or delegation of powers given under this
2 subsection before or within ten days after the birth of the Indian child is not valid. A
3 parent or Indian custodian who has executed a consent or delegation of powers under
4 this subsection may withdraw the consent or delegation for any reason at any time,
5 and the Indian child must be returned to the parent or Indian custodian. A parent or
6 Indian custodian who has executed a consent or delegation of powers under this
7 subsection also may move to invalidate the out-of-home care placement.

8 2. A voluntary consent by a parent to a termination of parental rights under subdivision d
9 of section 27-20.3-20 is not valid unless the consent is executed in writing, recorded
10 before a judge, and accompanied by a written certification by the judge that the terms
11 and consequences of the consent were fully explained in detail to and were fully
12 understood by the parent. The judge also shall certify the parent fully understood the
13 explanation in English or that the explanation was interpreted into a language that the
14 parent understood. Consent given under this subsection before or within ten days after
15 the birth of the Indian child is not valid. A parent who has executed a consent under
16 this subsection may withdraw the consent for any reason at any time before the entry
17 of a final order terminating parental rights, and the Indian child must be returned to the
18 Indian child's parent.

19 3. After the entry of a final order granting adoption of an Indian child, a parent who has
20 consented to termination of parental rights may withdraw that consent and move the
21 court for relief from the judgment on the grounds the consent was obtained through
22 fraud or duress. This motion must be filed within two years after the entry of an order
23 granting adoption of the Indian child. A motion under this subsection does not affect
24 the finality or suspend the operation of the judgment or order terminating parental
25 rights or granting adoption. If the court finds the consent was obtained through fraud
26 or duress, the court shall vacate the judgment or order terminating parental rights and,
27 if applicable, the order granting adoption and return the Indian child.

28 **SECTION 5.** Section 27-20.3-19.4 of the North Dakota Century Code is created and
29 enacted as follows:

1 **27-20.3-19.4 Indian child welfare - Placements preferences.**

2 1. Subject to subsections 3 and 4, in placing an Indian child for adoption or in delegating
3 powers, as described in a lawful executed power of attorney regarding an Indian child,
4 preference must be given, in the absence of good cause, as described in
5 subsection 6, to the contrary, to a placement with or delegation to one of the following,
6 in the order of preference listed:

7 a. An extended family member of the Indian child;

8 b. Another member of the Indian child's tribe;

9 c. Another Indian family with whom the Indian child has a relationship or an Indian
10 family from a tribe that is culturally similar to or linguistically connected to the
11 Indian child's tribe; or

12 d. The tribe's statutory adopted placement preferences.

13 2. An Indian child who is accepted for a foster care or non-foster care placement or a
14 preadoptive placement must be placed in the least restrictive setting that most
15 approximates a family that meets the Indian child's special needs, if any, and which is
16 within reasonable proximity to the Indian child's home, taking into account those
17 special needs. Subject to subsections 4 and 6, in placing an Indian child in a foster
18 care or non-foster care placement or a pre adoptive placement, preference must be
19 given, in the absence of good cause, as described in subsection 6, to the contrary, to a
20 placement in one of the following, in the order of preference listed:

21 a. The home of an extended family member of the Indian child;

22 b. A foster home licensed, approved, or specified by the Indian child's tribe;

23 c. An Indian foster home licensed or approved by the department; or

24 d. A qualified residential treatment facility or residential care center for children and
25 youth approved by an Indian tribe or operated by an Indian organization that has
26 a program suitable to meet the needs of the Indian child.

27 3. An Indian child who is the subject of an emergency removal or placement under a
28 child custody determination under section 27-20.3-06 must be placed in compliance
29 with foster care or non-foster care placement or preadoptive placement preferences,
30 unless the person responsible for determining the placement finds good cause, as
31 described in subsection 6, for departing from the order of placement preference under

1 subsection 2 or finds that emergency conditions necessitate departing from that order.

2 When the reason for departing from that order is resolved, the Indian child must be

3 placed in compliance with the order of placement preference under subsection 2.

4 4. In placing an Indian child under subsections 1 and 2 regarding an Indian child under

5 subsection 1, if the Indian child's tribe has established, by resolution, an order of

6 preference that is different from the order specified in subsection 1 or 2, the order of

7 preference established by that tribe must be followed, in the absence of good cause,

8 as described in subsection 6, to the contrary, so long as the placement under

9 subsection 1 is appropriate for the Indian child's special needs, if any, and the

10 placement under subsection 2 is the least restrictive setting appropriate for the Indian

11 child's needs as specified in subsection 2.

12 5. The standards to be applied in meeting the placement preference requirements of this

13 subsection must be the prevailing social and cultural standards of the Indian

14 community in which the Indian child's parent, Indian custodian, or extended family

15 members reside or with which the Indian child's parent, Indian custodian, or extended

16 family members maintain social and cultural ties.

17 6. a. If a party asserts that good cause not to follow the placement preferences exists,

18 the reasons for that belief or assertion must be stated orally on the record or

19 provided in writing to the parties to the child-custody proceeding and the court.

20 b. The party seeking departure from the placement preferences bears the burden of

21 proving by clear and convincing evidence that there is good cause to depart from

22 the placement preferences.

23 c. A court's determination of good cause to depart from the placement preferences

24 must be made on the record or in writing and must be based on one or more of

25 the following considerations:

26 (1) The request of the Indian child's parent, if they attest that they have

27 reviewed the placement options, if any, that comply with the order of

28 preference.

29 (2) The request of the Indian child, if the Indian child is of sufficient age and

30 capacity to understand the decision being made.

1 (3) The presence of a sibling attachment that can be maintained only through a
2 particular placement.

3 (4) The extraordinary physical, mental, or emotional needs of the Indian child,
4 such as specialized treatment services that may be unavailable in the
5 community where families who meet the placement preferences live.

6 (5) The unavailability of a suitable placement after a determination by the court
7 that a diligent search was conducted to find suitable placements meeting
8 the preference criteria, but none has been located. For purposes of this
9 analysis, the standards for determining whether a placement is unavailable
10 must conform to the prevailing social and cultural standards of the Indian
11 community in which the Indian child's parent, Indian custodian, or extended
12 family resides or with which the Indian child's parent, Indian custodian, or
13 extended family members maintain social and cultural ties.

14 d. A placement may not depart from the preferences based on the socioeconomic
15 status of any placement relative to another placement.

16 e. A placement may not depart from the preferences based solely on ordinary
17 bonding or attachment that flowed from time spent in a nonpreferred placement
18 that was made in violation of the act.

19 f. The burden of establishing good cause to depart from the order of placement
20 preference is on the party requesting that departure.

21 7. The department or a child welfare agency shall maintain a record of each adoptive
22 placement, foster care or non-foster care placement, preadoptive placement, and
23 delegation of powers, made of an Indian child, evidencing the efforts made to comply
24 with the placement preference requirements specified in this section, and shall make
25 that record available at any time on the request of the United States secretary of the
26 interior or the Indian child's tribe.

27 **SECTION 6.** Section 27-20.3-19.5 of the North Dakota Century Code is created and
28 enacted as follows:

29 **27-20.3-19.5. Adoptee information.**

30 1. The state court entering a final adoption decree or order in any voluntary or involuntary
31 Indian child adoptive placement must furnish a copy of the decree or order within thirty

- 1 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849
2 C Street NW, Mail Stop 3645 MIB, Washington, DC 20240, along with the following
3 information, in an envelope marked "Confidential":
- 4 a. The birth name and birth date of the Indian child, and tribal affiliation and name of
5 the Indian child after adoption;
 - 6 b. The names and addresses of the biological parents;
 - 7 c. The names and addresses of the adoptive parents;
 - 8 d. The name and contact information for any agency having files or information
9 relating to the adoption;
 - 10 e. Any affidavit signed by the biological parent or parents requesting the parent's
11 identity remain confidential; and
 - 12 f. Any information relating to tribal membership or eligibility for tribal membership of
13 the adopted Indian child.
- 14 2. The court shall give the birth parent of an Indian child the opportunity to file an affidavit
15 indicating that the birth parent wishes the United States secretary of the interior to
16 maintain the confidentiality of the birth parent's identity. If the birth parent files that
17 affidavit, the court shall include the affidavit with the information provided to the United
18 States secretary of the interior under subsection 1, and that secretary shall maintain
19 the confidentiality of the birth parent's identity.