HLS 18RS-679 ENGROSSED

2018 Regular Session

HOUSE BILL NO. 182

BY REPRESENTATIVE JOHNSON

(On Recommendation of the Louisiana State Law Institute)

CHILDRENS CODE: Provides relative to the Indian Child Welfare Act

1 AN ACT 2 To amend and reenact Children's Code Articles 612(A)(2), 624(D), (E), (F), and (G), 3 634(A), 749(A) and (B), 1019(A) and (B), 1515(B), and 1122(A)(3), to enact 4 Children's Code Articles 103.1, 116(6.1) and (6.2), 624(H), 624.1, 661.1, 767.1, 5 767.2, 1034.1, 1034.2, 1515(A)(8) and (C) and 1518(C), and to provide Comments 6 to Children's Code Article 680, relative to the Indian Child Welfare Act; to provide 7 for the applicability of the Indian Child Welfare Act; to provide definitions; to 8 provide for an inquiry; to provide for the standard for determining whether a child 9 is an Indian child; to provide for procedures and effects; and to provide for related 10 matters. 11 Be it enacted by the Legislature of Louisiana: 12 Section 1. Children's Code Articles 612(A)(2), 624(D), (E), (F), and (G), 634(A), 13 749(A) and (B), 1019(A) and (B), 1515(B), and 1122(A)(3) are hereby amended and 14 reenacted and Children's Code Articles 103.1, 116(6.1) and (6.2), 624(H), 624.1, 661.1, 15 767.1, 767.2, 1034.1, 1034.2, 1515(A)(8) and (C) and 1518(C) are hereby enacted to read 16 as follows: 17 Art. 103.1. Applicability of Indian Child Welfare Act 18 A. The provisions of the federal Indian Child Welfare Act and the 19 regulations promulgated thereunder supersede the Children's Code whenever the 20 outcome of an involuntary or voluntary proceeding may result in the removal of an

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CODING: Words in struck through type are deletions from existing law; words <u>underscored</u> are additions.

| 1 | Indian child from a parent under circumstances in which the parent cannot have the |
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| 2 | child returned upon demand. |
| 3 | B. Child custody proceedings to which the federal Indian Child Welfare Act |
| 4 | and the regulations promulgated thereunder apply include the following: |
| 5 | (a) A child in need of care proceeding. |
| 6 | (b) A certification for adoption proceeding. |
| 7 | (c) A family in need of services proceeding. |
| 8 | (d) A transfer of custody, a surrender for adoption, and any other voluntary |
| 9 | proceeding. |
| 10 | Comments - 2018 |
| 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 | The purpose of the federal Indian Child Welfare Act (ICWA), 25 U.S.C. 1901-1963 and 25 C.F.R. 23, is to express a preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children and placing Indian children who must be removed from their homes within their own families or with their own or other Indian tribes. Among other added responsibilities is a mandate that the court shall ensure and document in the record a timely inquiry about Indian heritage. See Articles 612, 612.1, 624, 634, 661.1, 746, 1004, 1034.1, and 1122. If the court knows or has reason to know the child is an Indian child, then the court must ensure and document in the record adherence to the provisions of ICWA, including a thirty-day limit on emergency removals, a determination of jurisdiction, proper notice to the appropriate tribe(s), placement preferences, use of "qualified expert witnesses," and the burden of proof required for the particular proceeding. ICWA also imposes significant procedural requirements aimed at ensuring that the interests of a child's tribe and any tribal heritage are recognized as important and distinguishable from the interests and rights of the child's parents. Under ICWA, proper notice must be given in "child custody proceedings" which include: "foster care placement; termination of parental rights; pre-adoptive placement; adoptive placements; and some dispositions in families in need of services cases." 25 C.F.R. 23.103. The terminology encompassing "child custody proceedings" as defined in federal law has been adapted to Louisiana law in Paragraph B of this Article. ICWA applies to private placements and adoptions as well as those initiated by the state. 25 U.S.C. 1903(1). See also B.J. Jones, Mark Tilden & Kelly Gaines-Stoner, <i>The Indian Child Welfare Act Handbook</i> (2008) (2d ed.). |
| 35 | * * * |
| 36 | Art. 116. Definitions |
| 37 | Except where the context clearly indicates otherwise, these definitions apply |
| 38 | for the following terms used throughout this Code. |
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| 1 | (6.1) "Indian child" means any unmarried child under eighteen years of age |
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| 2 | who is a member of an Indian tribe or who is eligible for membership in an Indian |
| 3 | tribe and is the biological child of a member of an Indian tribe. |
| 4 | (6.2) "Indian tribe" means any Indian tribe, band, nation, or other organized |
| 5 | group or community of Indians recognized as eligible for the services provided to |
| 6 | Indians by the Secretary of the Interior in accordance with their status as Indians. |
| 7 | * * * |
| 8 | Comments - 2018 |
| 9 10 11 12 13 14 15 16 | (a) The source of these definitions is the federal Indian Child Welfare Act (ICWA), 25 U.S.C. 1903. Recognition of an Indian tribe is signaled by a listing published annually by the Bureau of Indian Affairs in the Federal Register of tribes that are eligible for federal services and programs by the Secretary of the Interior. Not all tribes are recognized. There are over five hundred federally recognized tribes in the United States. Of the more than a dozen tribes in Louisiana, currently only four are federally recognized: the Chitimacha Tribe, the Coushatta Tribe, the Tunica-Biloxi Tribe, and the Jena Band of Choctaw Indians. |
| 17 18 19 20 21 22 23 24 25 26 27 28 | (b) Note that "Indian child" is a limited term. Only a child who is already a member of an Indian tribe or who is eligible for membership because his mother or father is a member of an Indian tribe may be an Indian child. It is not enough that a child is alleged to have "Indian blood" or that he has a grandparent or other relative who is a member of a tribe. As the Guidelines for Implementing the Indian Child Welfare Act note: "[The definition of "Indian child"] is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe." <i>Guidelines for Implementing the Indian Child Welfare Act</i> (Bureau of Indian Affairs, Dec. 2016), at p. 10. |
| 29 30 31 32 33 34 35 36 37 38 | (c) ICWA expressly excludes from its definition of "parent" an alleged unwed father whose paternity has not been acknowledged or established. 25 U.S.C. 1903(9). Thus, a child born outside of marriage, though alleged to be the child of a Native American father, is not necessarily protected by ICWA. The regulations provide that paternity may be established by trial law. See 25 C.F.R. 23. In <i>Adoptive Couple v. Baby Girl</i> , 570 U.S. 637 (2013), the Supreme Court carefully noted that it assumed, without deciding, that an illegitimate child was qualified as an Indian child. In that decision, the alleged biological Indian father acknowledged paternity when giving his consent to the termination of his rights, and later, his paternity was verified by DNA testing. |
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| 40 | Art. 612. Assignment of reports for investigation and assessment |
| 41 | A. |
| 42 | * * * |

| (2) Reports of high and intermediate levels of risk shall be investigated |
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| promptly. This investigation shall include a preliminary investigation as to the |
| nature, extent, and cause of the abuse or neglect and the identity of the person |
| actually responsible for the child's condition. This preliminary investigation shall |
| include an inquiry as to whether there is reason to know that the child is an Indian |
| <u>child.</u> This preliminary investigation shall <u>also</u> include an interview with the child |
| and his parent or parents or other caretaker and shall include consideration of all |
| available medical information provided to the department pertaining to the child's |
| condition. Such This preliminary investigation shall also include an immediate |
| assessment of any existing visitation or custody order or agreement involving the |
| alleged perpetrator and the child. The department shall request a temporary |
| restraining order pursuant to Article 617, a protective order pursuant to Article 618, |
| or an instanter safety plan order pursuant to Article 619 or Article 620 if the |
| department determines that any such previously ordered visitation or custody would |
| put the child's health and safety at risk. Admission of the investigator on school |
| premises or access to the child in school shall not be denied by school personnel. |
| However, the request for a temporary restraining order or a protective order in |
| accordance with this Article shall not independently confer exclusive jurisdiction on |
| the juvenile court in accordance with Article 303. |
| * * * |
| Comments - 2018 |
| If, during the investigation of an allegation of abuse or neglect, the department uncovers information that the child is or may be an Indian child as defined by Article 116, the department must pursue that investigation. If there is reason to know that the child is an Indian child, the federal Indian Child Welfare Act applies in all subsequent proceedings. Specifically, 25 U.S.C. 1922 governs the emergency removal of an Indian child. |
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| Art. 624. Continued custody hearing; continued safety plan hearing; federal Indian |
| Child Welfare Act |

| 1 | D. At the commencement of the hearing, on the record, the court shall ask |
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| 2 | each person before the court whether he knows or has reason to know that the child |
| 3 | is an Indian child. Each person before the court shall be instructed to inform the |
| 4 | court if he subsequently discovers information indicating that the child is an Indian |
| 5 | child. |
| 6 | \underline{E} . At this hearing, the state has the burden to prove of proving the existence |
| 7 | of a ground for continued custody or the continued implementation of a safety plan |
| 8 | pursuant to Article 626. |
| 9 | E.F. The child and his parents may introduce evidence, call witnesses, be |
| 10 | heard on their own behalf, and cross-examine witnesses called by the state. |
| 11 | F.G. Hearsay evidence shall be admissible at this hearing. |
| 12 | G.H. A suitable relative or other suitable individual who seeks to become the |
| 13 | custodian of the child must provide evidence of a willingness and ability to provide |
| 14 | a wholesome and stable environment for the child and to protect the health and safety |
| 15 | of the child pending an adjudication hearing. He shall affirm a continued acceptance |
| 16 | of the terms of the safety plan. |
| 17 | Comments - 2018 |
| 18 19 20 21 22 23 24 25 26 27 28 | The regulations promulgated under the federal Indian Child Welfare Act (ICWA), 25 C.F.R. 23, require the court to make an inquiry at the commencement of every child custody proceeding as to whether there is reason to know that the child is an Indian child. Although usually notice must be given to the child's tribe if there is reason to know that the child is an Indian child, no federal law requires notice in this instance due to the short time frame in which emergency proceedings are conducted to secure the safety of the child. In contrast, in a subsequent adjudication hearing when information provided to the court indicates that there is reason to know that the child is an Indian child, the court must proceed in accordance with ICWA, including determining jurisdiction, meeting the higher standard for removal, and following the notice requirements. |
| 29 | Art. 624.1. Reason to know a child is an Indian child; federal Indian Child Welfare |
| 30 | Act |
| 31 | A. Upon conducting the inquiry required by Article 624(D), a court has |
| 32 | reason to know that a child in a continued custody hearing or other child custody |
| 33 | proceeding is an Indian child if any of the following occurs: |

| 1 | (1) A person before the court, an officer of the court involved in the |
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| 2 | proceeding, an Indian Tribe, an Indian organization, or an agency informs the court |
| 3 | that the child is an Indian child. |
| 4 | (2) A person before the court, an officer of the court involved in the |
| 5 | proceeding, an Indian Tribe, an Indian organization, or an agency informs the court |
| 6 | that it has discovered information indicating that the child is an Indian child. |
| 7 | (3) The child who is the subject of the proceeding gives the court reason to |
| 8 | know that he is an Indian child. |
| 9 | (4) The court is informed that the domicile or residence of the child, the |
| 10 | child's parent, or the child's Indian custodian is on a reservation or in an Alaska |
| 11 | Native village. |
| 12 | (5) The court is informed that the child is or has been a ward of a Tribal |
| 13 | court. |
| 14 | (6) The court is informed that either parent or the child possesses an |
| 15 | identification card indicating membership in an Indian Tribe. |
| 16 | B. If the court makes a finding that there is reason to know that the child is |
| 17 | an Indian child, the court may enter any order for placement in accordance with |
| 18 | Article 627, but the court shall thereafter proceed as if the child is an Indian child. |
| 19 | Comments - 2018 |
| 20 21 22 23 24 25 26 27 28 29 30 | (a) Paragraph A is in all substantive aspects a verbatim copy of 25 C.F.R. 23.107(c). The identification of a child as an "Indian child" means that the informant has knowledge that the child is already a member of a particular tribe or tribes or that the child is eligible for membership because his parent is a member. See the 2018 Comment to Article 116. The identity of a particular tribe or tribes is important to fulfill the requirements of the federal Indian Child Welfare Act (ICWA) that notice of the pendency of a child custody proceeding be given to all tribes of which there is a reason to know that the child or parent is a member. However, ICWA recognizes that the particular tribe or tribes may not be known although the informant produces credible evidence of a parent's tribal membership; in that case, notice is given to the Bureau of Indian Affairs. |
| 31 32 33 34 35 36 37 38 | (b) Paragraph B reflects the emergency removal provisions of ICWA. 25 U.S.C. 1922 permits emergency removal to prevent "imminent physical damage or harm" to the child. According to 25 C.F.R. 23.113, emergency placement is intended to be short term pending initiation of child in need of care proceedings. The Guidelines for Implementing the Indian Child Welfare Act explain that emergency proceedings - which generally do not include the full suite of due process or ICWA protections for parents and children - must not extend for longer than necessary to prevent harm to the child. If there is sufficient evidence of abuse or neglect, the state |

1 should proceed with a child in need of care proceeding, which provides full due 2 process and ICWA protections. Guidelines for Implementing the Indian Child 3 Welfare Act (Bureau of Indian Affairs, Dec. 2016), Section 23.113(e), at p. 27. 4 (c) According to 25 C.F.R. 23.107(b), if there is reason to know that the 5 child is an Indian child, but the court does not have sufficient evidence to determine 6 that the child is or is not an Indian child, the court must confirm (by a report, 7 declaration, or testimony in the record) that the agency used due diligence to identify 8 and work with the tribe to verify membership. The court must also treat the child as 9 an Indian child until it is determined on the record that the child does not meet the 10 definition of Indian child. 11 (d) Neither ICWA nor the regulations promulgated thereunder require notice 12 prior to an emergency removal because of the short time frame in which emergency 13 proceedings are conducted to secure the safety of the child. Guidelines for 14 Implementing the Indian Child Welfare Act (Bureau of Indian Affairs, Dec. 2016), 15 Section 23.113(c), at p. 29. However, if the child is found to be an Indian child, 16 notice of the proceedings must be immediately given to any identified tribe or, if the 17 tribe cannot be identified, to the Bureau of Indian Affairs of the Department of the 18 Interior, in accordance with ICWA. All other ICWA requirements will apply to the 19 court's proceedings after entry of a continued custody order, unless thereafter the court finds that the child is not an Indian child in accordance with Article 661.1. 20 21 Art. 634. Contents of petition 22 23 A. The petition shall set forth with specificity: (1) The name, date and place of birth, sex, race, and address of the child. If 24 25 the child is in a foster home, the identification of the parish in which he resides shall 26 suffice for his address. 27 (2) The name and current address of each parent. 28 (3) A statement as to whether the petitioner knows or has reason to know 29 that the child is an Indian child and facts that support that statement. 30 (4) Facts which that show that the child is a child in need of care, including 31 the acts or omissions of either parent which caused or contributed to the child's condition. 32 33 34 Comments - 2018 35 25 C.F.R. 23.1 et seq. requires that the court make an inquiry at the 36 commencement of every child custody proceeding about whether there is reason to know that the child is an Indian child. A child in need of care proceeding is a child 37 38 custody proceeding subject to the provisions of the federal Indian Child Welfare Act, 25 U.S.C. 1901-1963. 39 40

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Art. 661.1. Federal Indian Child Welfare Act inquiry

A. At the commencement of the adjudication hearing, the court shall inquire as to whether the petitioner or any person before the court knows or has reason to know that the child is an Indian child. If no person before the court responds affirmatively, the court may proceed, although it shall instruct each person before the court to inform the court if he subsequently discovers information indicating that the child is an Indian child.

B. In accordance with Article 624.1, if the court finds that there is reason to know that the child is an Indian child, the court shall immediately proceed pursuant to the federal Indian Child Welfare Act and the regulations promulgated thereunder.

C. If a tribe fails to respond to multiple requests for verification that the child is an Indian child and the court or department has sought the assistance of the Bureau of Indian Affairs in contacting the tribe, the court may make the determination that the child is not an Indian child based on the information it has available and proceed to adjudication in accordance with this Title.

Comments - 2018

- (a) The threshold issue under the federal Indian Child Welfare Act (ICWA) is whether there is reason to know that the child is an Indian child in a child custody proceeding. See Articles 103.1 and 624.1. Paragraph A reflects the requirement that an inquiry as to whether there is reason to know that the child is an Indian child must be made at the commencement of every proceeding.
- (b) Paragraph B requires the court to comply with ICWA, which is replete with requirements that must be met before an Indian child is placed outside of his parent's or Indian caretaker's home. Notice of the pending proceedings must be given to the child's alleged tribe or tribes as well as to the Bureau of Indian Affairs. 25 U.S.C. 1912(a). The Department of Children and Family Services must submit a detailed predisposition report and an affidavit attesting to its "active efforts" to avoid disruption of the Indian family. 25 U.S.C. 1912(d). Evidence from "qualified expert witnesses," who, among other attributes, must be familiar with Indian customs and traditions, must be received about potential placements. 25 U.S.C. 1912(c) and (f). ICWA mandates the use of specific "placement preferences" unless the court finds by clear and convincing evidence that there is good cause to depart from those preferences. 25 U.S.C. 1915(a) and 1916(b).
- (c) Paragraph C governs the court's duty in the face of tribal inaction. After a CINC proceeding is commenced, if no response or motion to intervene has been received from the tribe or the Department of the Interior, the court may determine based on the information it has available that the child does not qualify as an Indian child. Guidelines for Implementing the Indian Child Welfare Act (Bureau of Indian Affairs, Dec. 2016), Section 23.108, at p. 22. Thus, additional notice of changes in placement or permanency hearings is not required. However, the Guidelines

| 1 2 3 4 5 6 | recommend that state courts give notice of any change of placement as well as any change to the child's permanency plan or concurrent plan. Guidelines for Implementing the Indian Child Welfare Act (Bureau of Indian Affairs, Dec. 2016), Section 23.111, at p. 30. In contrast, if the Department of Children and Family Services seeks to terminate parental rights, notice must again be attempted. See Article 1034.1. |
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| 8 | Art. 749. Contents of petition |
| 9 | A. The petition shall set forth with specificity: |
| 10 | (1) The name, date, and place of birth, sex, race, address, and present |
| 11 | location of the child. |
| 12 | (2) The name, age, sex, race, and current address of the child's parents and |
| 13 | caretakers. |
| 14 | (3) The name, age, sex, and race of any other family members living within |
| 15 | the child's home. |
| 16 | (4) The name of any public institution or agency having the responsibility |
| 17 | or ability to supply services alleged to be needed by the family. |
| 18 | (5) Whether A statement as to whether the child is currently under the |
| 19 | supervision of any state or local entity, including but not limited to, the Department |
| 20 | of Children and Family Services or the Department of Public Safety and Corrections, |
| 21 | youth services, or the office of juvenile justice. |
| 22 | (6) A statement as to whether the petitioner knows or has reason to know |
| 23 | that the child is an Indian child and facts that support that statement. |
| 24 | B. If any of the information required by Paragraph A of this Article is |
| 25 | unknown, the petition shall so allege. Any defects in the allegations required by |
| 26 | Paragraph A of this Article shall be considered defects of form. The petitioner shall |
| 27 | inform the court if he subsequently discovers information indicating that the child |
| 28 | is an Indian child. |
| 29 | * * * |
| 30 | Comments - 2018 |
| 31 32 33 | The federal Indian Child Welfare Act (ICWA) applies to any involuntary proceeding in a state court involving an Indian child when foster care placement is under consideration as an option. 25 U.S.C. 1901-1963. The procedures, known as |

informal FINS, Articles 731-732 are voluntary attempts to resolve the dispute by mediation; hence, ICWA does not apply even if the child is an Indian child. However, if a formal FINS petition is initiated, ICWA applies because Article 780 authorizes the removal of the child from the caretaker's home, and a court order is needed for the child's return.

6 * * *

Art. 767.1. Federal Indian Child Welfare Act inquiry

A. At the commencement of the adjudication hearing, the court shall inquire as to whether the petitioner or any person before the court knows or has reason to know that the child is an Indian child. If no person before the court responds affirmatively, the court may proceed, although it shall instruct each person before the court to inform the court if he subsequently discovers information indicating that the child is an Indian child.

B. In accordance with Article 767.2, if the court finds that there is reason to know that the child is an Indian child, the court shall immediately proceed pursuant to the federal Indian Child Welfare Act and the regulations promulgated thereunder.

C. If a tribe fails to respond to multiple requests for verification that the child is an Indian child and the court or Department of Children and Family Services has sought the assistance of the Bureau of Indian Affairs in contacting the tribe, the court may make the determination that the child is not an Indian child based on the information it has available and proceed to adjudication in accordance with this Title.

Comments - 2018

- (a) The threshold issue under the federal Indian Child Welfare Act (ICWA) is whether there is reason to know that the child is an Indian child in a child custody proceeding. See Articles 103.1 and 767.2. Paragraph A reflects the requirement that an inquiry as to whether there is reason to know that the child is an Indian child must be made at the commencement of every proceeding.
- (b) Paragraph B requires the court to comply with ICWA, which is replete with requirements that must be met before an Indian child is placed outside of his parent's or Indian caretaker's home. Notice of the pending proceedings must be given to the child's alleged tribe or tribes as well as to the Bureau of Indian Affairs. 25 U.S.C. 1912(a). The Department of Children and Family Services must submit a detailed predisposition report and an affidavit attesting to its "active efforts" to avoid disruption of the Indian family. 25 U.S.C. 1912(d). Evidence from "qualified expert witnesses," who, among other attributes, must be familiar with Indian customs and traditions, must be received about potential placements. 25 U.S.C. 1912(c) and (f). ICWA mandates the use of specific "placement preferences" unless the court finds by clear and convincing evidence that there is good cause to depart from those preferences. 25 U.S.C. 1915(a) and 1916(b).

| 2 3 4 5 6 7 8 9 | a FINS proceeding is commenced, if no response or motion to intervene has been received from the tribe or the Department of the Interior, the court may determine based on the information it has available that the child does not qualify as an Indian child. <i>Guidelines for Implementing the Indian Child Welfare Act</i> (Bureau of Indian Affairs, Dec. 2016), Section 23.108, at p. 22. Thus, additional notice of changes in placement or permanency hearings is not required. However, the Guidelines recommend that state courts give notice of any change of placement as well as any change to the child's permanency plan or concurrent plan. <i>Guidelines for Implementing the Indian Child Welfare Act</i> (Bureau of Indian Affairs, Dec. 2016), Section 23.111, at p. 30. |
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| 12 | Art. 767.2. Reason to know a child is an Indian child; federal Indian Child Welfare |
| 13 | Act |
| 14 | Upon conducting the inquiry required by Article 767.1, a court has reason to |
| 15 | know that a child is an Indian child if any of the following occurs: |
| 16 | (1) A person before the court, an officer of the court involved in the |
| 17 | proceeding, an Indian Tribe, an Indian organization, or an agency informs the court |
| 18 | that the child is an Indian child. |
| 19 | (2) A person before the court, an officer of the court involved in the |
| 20 | proceeding, an Indian Tribe, an Indian organization, or an agency informs the court |
| 21 | that it has discovered information indicating that the child is an Indian child. |
| 22 | (3) The child who is the subject of the proceeding gives the court reason to |
| 23 | know that he is an Indian child. |
| 24 | (4) The court is informed that the domicile or residence of the child, the |
| 25 | child's parent, or the child's Indian custodian is on a reservation or in an Alaska |
| 26 | Native village. |
| 27 | (5) The court is informed that the child is or has been a ward of a Tribal |
| 28 | court. |
| 29 | (6) The court is informed that either parent or the child possesses an |
| 30 | identification card indicating membership in an Indian Tribe. |
| 31 | Comments - 2018 |
| 32 33 34 35 36 | This Article is in all substantive aspects a verbatim copy of 25 C.F.R. 23.107(c). The identification of a child as an "Indian child" means that the informant has knowledge that the child is already a member of a particular tribe or tribes or that the child is eligible for membership because his parent is a member. See the 2018 Comment to Article 116. The identity of a particular tribe or tribes is important to fulfill the requirements of the federal Indian Child Welfare Act (ICWA) that notice |

| 1 2 3 4 5 | of the pendency of a child custody proceeding be given to all tribes of which there is a reason to know that the child or parent is a member. However, ICWA recognizes that the particular tribe or tribes may not be known although the informant produces credible evidence of a parent's tribal membership; in that case, notice is given to the Bureau of Indian Affairs. |
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| 6 | * * * |
| 7 | Art. 1019. Contents of the petition |
| 8 | A. The petition shall set forth with specificity: |
| 9 | (1) The name, date, and place of birth, sex, race, and address of the child. |
| 10 | If the child is in a foster home, the identification of the parish in which he resides |
| 11 | shall suffice for his address. |
| 12 | (2) The name and current address of the child's parents. |
| 13 | (3) The name, age, and sex of any other biological relatives of the child who |
| 14 | are currently living with the child in his home. |
| 15 | (4) The name of any public institution or agency having the responsibility |
| 16 | or ability to supply services alleged to be needed by the family. |
| 17 | (5) A statement as to whether the petitioner knows or has reason to know |
| 18 | that the child is an Indian child and facts that support that statement. |
| 19 | B. If any of the information required by Paragraph A of this Article is |
| 20 | unknown, the petition shall so allege. Any defects in the information required by |
| 21 | Paragraph A of this Article shall be considered defects of form. The petitioner shall |
| 22 | inform the court if he subsequently discovers information indicating that the child |
| 23 | is an Indian child. |
| 24 | * * * |
| 25 | Comments - 2018 |
| 26 27 28 29 30 31 32 33 34 35 | Subparagraph (A)(5) is new. A termination of parental rights proceeding is a child custody proceeding subject to the federal Indian Child Welfare Act. See Article 103.1. Because certification proceedings can result in the permanent severance of all parental ties, the Act's restrictions on these cases are even more stringent than those governing CINC or FINS proceedings. For example, even if the court found at a prior CINC proceeding that there was no reason to believe that the child was an Indian child, the issue of potential tribal affiliation must be readdressed in the termination hearing, and even if notice was given to a tribe and the tribe failed to answer, any tribe to which the child may be affiliated must be given new notice of the termination proceeding. 25 C.F.R. 23.107. Courts must take special caution |

in any certification action involving an Indian child so as not to destabilize any 2 adoption. 3 4 Art. 1034.1. Federal Indian Child Welfare Act inquiry 5 A. At the commencement of the hearing, the court shall inquire as to whether 6 the petitioner or any person before the court knows or has reason to know that the 7 child is an Indian child. If no person before the court responds affirmatively, the 8 court may proceed, although it shall instruct each person before the court to inform 9 the court if he subsequently discovers information indicating that the child is an 10 Indian child. 11 B. In accordance with Article 1034.2, if the court finds that there is reason 12 to know that the child is an Indian child, the court shall immediately proceed pursuant to the federal Indian Child Welfare Act and the regulations promulgated 13 14 thereunder. 15 C. If a tribe fails to respond to multiple requests for verification that the child 16 is an Indian child and the court or department has sought the assistance of the Bureau 17 of Indian Affairs in contacting the tribe, the court may make the determination that 18 the child is not an Indian child based on the information it has available and proceed 19 to termination in accordance with this Title. 20 Comments - 2018 21 (a) The threshold issue under the federal Indian Child Welfare Act (ICWA) is whether there is reason to know that the child is an Indian child in a child custody 22 23 proceeding. See Articles 103.1 and 1034.2. Paragraph A reflects the requirement 24 that an inquiry as to whether there is reason to know that the child is an Indian child 25 must be made at the commencement of every proceeding. 26 (b) Paragraph B requires the court to comply with ICWA, which is replete 27 with requirements that must be met before an Indian child is placed outside of his 28 parent's or Indian caretaker's home. Notice of the pending proceedings must be 29 given to the child's alleged tribe or tribes as well as to the Bureau of Indian Affairs. 30 25 U.S.C. 1912(a). The Department of Children and Family Services must submit 31 a detailed predisposition report and an affidavit attesting to its "active efforts" to 32 avoid disruption of the Indian family. 25 U.S.C. 1912(d). Evidence from "qualified 33 expert witnesses," who, among other attributes, must be familiar with Indian customs 34 and traditions, must be received about potential placements. 25 U.S.C. 1912(c) and 35 (f). ICWA mandates the use of specific "placement preferences" unless the court finds by clear and convincing evidence that there is good cause to depart from those 36 37 preferences. 25 U.S.C. 1915(a) and 1916(b).

| 1 2 3 4 5 6 7 8 9 | (c) Paragraph C governs the court's duty in the face of tribal inaction. After a certification for adoption proceeding is commenced, if no response or motion to intervene has been received from the tribe or the Department of the Interior, the court may determine based on the information it has available that the child does not qualify as an Indian child. <i>Guidelines for Implementing the Indian Child Welfare Act</i> (Bureau of Indian Affairs, Dec. 2016), Section 23.108, at p. 22. Even though neither a tribe nor the Bureau of Indian Affairs responded to notice in an earlier proceeding, notice must again be attempted if the Department of Children and Family Services seeks to terminate parental rights. |
|--|---|
| 10 | Art. 1034.2. Reason to know a child is an Indian child; federal Indian Child Welfare |
| 11 | Act |
| 12 | Upon conducting the inquiry required by Article 1034.1, a court has reason |
| 13 | to know that a child is an Indian child if any of the following occurs: |
| 14 | (1) A person before the court, an officer of the court involved in the |
| 15 | proceeding, an Indian Tribe, an Indian organization, or an agency informs the court |
| 16 | that the child is an Indian child. |
| 17 | (2) A person before the court, an officer of the court involved in the |
| 18 | proceeding, an Indian Tribe, an Indian organization, or an agency informs the court |
| 19 | that it has discovered information indicating that the child is an Indian child. |
| 20 | (3) The child who is the subject of the proceeding gives the court reason to |
| 21 | know that he is an Indian child. |
| 22 | (4) The court is informed that the domicile or residence of the child, the |
| 23 | child's parent, or the child's Indian custodian is on a reservation or in an Alaska |
| 24 | Native village. |
| 25 | (5) The court is informed that the child is or has been a ward of a Tribal |
| 26 | court. |
| 27 | (6) The court is informed that either parent or the child possesses an |
| 28 | identification card indicating membership in an Indian Tribe. |
| 29 | Comments - 2018 |
| 30 31 32 33 34 35 36 37 | This Article is in all substantive aspects a verbatim copy of 25 C.F.R. 23.107(c). The identification of a child as an "Indian child" means that the informant has knowledge that the child is already a member of a particular tribe or tribes or that the child is eligible for membership because his parent is a member. See the 2018 Comment to Article 116. The identity of a particular tribe or tribes is important to fulfill the requirements of the federal Indian Child Welfare Act (ICWA) that notice of the pendency of a child custody proceeding be given to all tribes of which there is a reason to know that the child or parent is a member. However, ICWA |

| 1 2 3 | recognizes that the particular tribe or tribes may not be known although the informant produces credible evidence of a parent's tribal membership; in that case, notice is given to the Bureau of Indian Affairs. |
|----------------------|---|
| 4 | * * * |
| 5 | Art. 1122. Contents of surrender; form |
| 6 | A. Every Act of Surrender shall contain the following information: |
| 7 | * * * |
| 8 | (3) The birth name, place, and date of birth of the child, and a statement as |
| 9 | to whether the child is an Indian child. |
| 10 | * * * |
| 11 | Comments - 2018 |
| 12 | If the child to be surrendered is an Indian child, the provisions of the federal |
| 12 | Indian Child Welfare Act are triggered and preempt inconsistent state law. 25 U.S.C. |
| 13 14 | 1901-1963. The federal statute differs substantially from the provisions of this Title. |
| 15 | For example, in accordance with 25 C.F.R. 23.125, an Indian child cannot be |
| 13 | * ' |
| 16 17 | surrendered for adoption until the tenth day following his birth, in contrast to the |
| l / 10 | time delays in Articles 1122 and 1130. More importantly, federal law grants the |
| 18 | parent or Indian custodian the right to withdraw his consent to the child's |
| 19 | pre-adoptive or adoptive placement at any time prior to the entry of a final decree of |
| 20 | adoption, in contrast to Articles 1123 and 1263. Courts must proceed with special |
| 21 | caution in any surrender of an Indian child to avoid destabilizing any adoption. |
| 20 21 22 23 | Helpful guidance about the federal Indian Child Welfare Act's requirements can be |
| | found in the Guidelines for Implementing the Indian Child Welfare Act (Bureau of |
| 24 25 | Indian Affairs, Dec. 2016). See also B.J. Jones, Mark Tilden & Kelly Gaines-Stoner, The Indian Child Welfare Act Handbook (2008) (2d ed.). |
| 26 | * * * |
| 27 | Art. 1515. Petition; contents; form |
| 28 | A. A petition for voluntary transfer of custody shall set forth specifically: |
| 29 | * * * |
| 30 | (8) Whether the child is an Indian child. |
| 31 | B. The form for the petition shall be as follows: |
| 32 | "PETITION FOR VOLUNTARY TRANSFER OF CUSTODY |
| 33 | The petition of (all legal custodians of the child unless otherwise indicated |
| 34 | in Paragraph III of the petition), domiciled in the parish of, respectfully |
| 35 | represent(s): |
| 36 | I. |

| | II. | |
|---|--|----------------|
| That petitioner(s | s) is/are the parent(s) and legal custodian(s) of the mino | or child(ren), |
| namely | , whose date of birth is | (add |
| same information for al | l children subject to the petition), as more fully appe | ars from the |
| attached certificate(s) or | f birth. | |
| Is the child an Ir | ndian child? | |
| | | |
| Yes | No | |
| | | |
| | III. | |
| That there are no | III. o other legal custodians of the child(ren) OR that a legal | al custodian, |
| | | |
| namely | o other legal custodians of the child(ren) OR that a legal | |
| namely | o other legal custodians of the child(ren) OR that a legal | |
| | o other legal custodians of the child(ren) OR that a legal | |
| namelyreasons: | o other legal custodians of the child(ren) OR that a legal. , is unable to join in this petition for the | ne following |
| namely | o other legal custodians of the child(ren) OR that a legal, is unable to join in this petition for the | ne following |
| namely | o other legal custodians of the child(ren) OR that a legal. , is unable to join in this petition for the | ne following |
| reasons: | o other legal custodians of the child(ren) OR that a legal, is unable to join in this petition for the strength of the child (ren) OR that a legal | ne following |
| reasons: That petitioner(s | o other legal custodians of the child(ren) OR that a legal, is unable to join in this petition for the legal | ne following |
| That petitioner(sabove named children to | o other legal custodians of the child(ren) OR that a legal, is unable to join in this petition for the legal, is unable to join in this petition for the legal | ne following |
| That petitioner(sabove named children to or agency reside(s) at the | o other legal custodians of the child(ren) OR that a legal, is unable to join in this petition for the legal, is unable to join in this petition for the legal | stody of the |

| | | | | ٧. | | | | |
|-----------------|----------------|-----------|----------|---------|---------------|------------|----------|-----------------|
| That p | petitioner(s) | desire to | o transf | er phys | sical custody | OR legal | custody | of the person |
| of the childre | en (indicate | one) fo | or the p | eriod (| of time | | (spe | ecify intended |
| , | in accord | | | | | | | |
| | provisions for | | | | | | | |
| | petitioners | | | | • | | | ving reasons: |
| | | | | | | | | |
| | | | | | | | | |
| | ne Departmen | | | | | | | o you that this |
| petition be fil | ed? | | | | | | | |
| Yes | | | No | | | | | |
| | | | | tment | of Childrer | and Fam | nilv Ser | vices worker |
| • | ecommendati | | - | | | | • | |
| _ | | | | | | | | ave a right to |
| | ve you consul | | | | - | | | - |
| | | | | | | | | |
| Ye | es |] | No | | | | | |
| | | | | VII. | | | | |
| That_ | | | | has | /have agreed | to and doe | es/do do | esire to accept |
| ustody of th | | | | | | | | |
| | e child(ren) | to the | extent a | and un | der the term | s and con | ditions | stated in this |

| 1 | WHEREFORE, petitioner(s) pray(s) that there be judgment herein transferring |
|----------|---|
| 2 | custody of the child(ren),,,, |
| 3 | , to, to the extent and under the terms and |
| 4 | conditions set forth in this petition. |
| 5 | |
| 6 | (Signature and address of Petitioner(s)) |
| 7 | or counsel for Petitioner(s) |
| 8 | (If in proper person, petition should be signed in presence of a notary.) |
| 9 | SWORN TO AND SUBSCRIBED BEFORE ME ON THIS THE DAY OF |
| 10 | |
| 11 | |
| 12 | Notary Public |
| 13 | C. The petitioner shall inform the court if he subsequently discovers |
| 14 | information indicating that the child is an Indian child. |
| 15 | * * * |
| 16 | Art. 1518. Pretrial orders; contribution to costs; appointment of counsel; Indian |
| 17 | parent or custodian |
| 18 | * * * |
| 19 | C. If the court finds that the parent or custodian of an Indian child is |
| 20 | indigent, it shall appoint counsel for the parent or custodian. |
| 21 | Comments - 2018 |
| 22 | The Children's Code clearly calls for the appointment of counsel for indigent |
| 23 | parents in child in need of care cases and termination of parental rights cases and also requires legal consultation for parents who desire to surrender their parental |
| 24 25 | rights. However, according to Paragraph B of this Article, the appointment of |
| 26 | counsel is required only when the department has been involved in the parental |
| 27 | decision-making. Paragraph C was added to make it clear that if the parent or |
| 28 | custodian of an Indian child contemplates the child's transfer, the federal Indian |
| 29 | Child Welfare Act, 25 U.S.C. 1912, requires that the court appoint counsel if the |
| 30 | parent is indigent. |
| 31 | Section 2. A Comment to Children's Code Article 680 is hereby provided as follows: |
| 32 | Art. 680. Disposition hearing; evidence |
| 33 | * * * |

1 Comments-2018

If the child is an Indian child as defined by Article 116, the federal Indian Child Welfare Act (ICWA) applies in all subsequent proceedings. For example, the court will be required to ensure that proper notice is given, that active efforts to prevent removal are made, that qualified expert witnesses on the culture and customs of Indian tribes are appointed, and that the ICWA standards of evidence are followed in accordance with the strict provisions of the Act.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

HB 182 Engrossed

2018 Regular Session

Johnson

Abstract: Provides for the applicability of the Indian Child Welfare Act in certain Children's Code proceedings.

<u>Proposed law</u> (Ch.C. Art. 103.1) provides that the Indian Child Welfare Act supersedes the Children's Code when a child may be removed from a parent. <u>Proposed law</u> also lists the child custody proceedings to which the Indian Child Welfare Act applies.

Present law (Ch.C. Art. 116) provides for definitions.

Proposed law retains present law and defines "Indian child" and "Indian tribe".

<u>Present law</u> (Ch.C. Art. 612) requires Department of Children and Family Services (DCFS) to investigate reports of abuse.

<u>Proposed law</u> retains <u>present law</u> and requires DCFS to inquire whether a child is an Indian child during their investigation.

<u>Present law</u> (Ch.C. Art. 624) provides for a continued custody hearing in a child in need of care proceeding.

<u>Proposed law</u> retains <u>present law</u> and in accordance with the Indian Child Welfare Act, requires the court to ask whether there is reason to know that the child may be an Indian child.

<u>Proposed law</u> (Ch.C. Art. 624.1) lists the factors from the federal regulations that give the court reason to know that a child is an Indian child and, if so, requires the court to proceed as such in accordance with the Indian Child Welfare Act.

Present law (Ch.C. Art. 634) provides for the contents of a child in need of care petition.

<u>Proposed law</u> retains <u>present law</u> and additionally requires the petitioner to state whether he knows or has reason to know that the child is an Indian child.

<u>Proposed law</u> (Ch.C. Art. 661.1) provides that prior to adjudication of a child in need of care proceeding, the court is required to inquire as to whether the child is an Indian child, and if the child is not, the court may proceed with the adjudication. However, if there is reason to know that the child is an Indian child, the court shall immediately proceed in accordance with the Indian Child Welfare Act.

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CODING: Words in struck through type are deletions from existing law; words <u>underscored</u> are additions.

<u>Proposed law</u> further provides that if a tribe receiving notice of a proceeding fails to respond, the court may determine that the child is not an Indian child and proceed to adjudication.

<u>Proposed law</u> adds a Comment to <u>present law</u> (Ch.C. Art. 680) to clarify that if the court knows that the child is an Indian child, it must proceed in accordance with the Indian Child Welfare Act which requires notice to the tribe, active efforts to prevent removal of the child, the appointment of experts, and strict standards of evidence.

<u>Present law</u> (Ch.C. Art. 749) provides for the contents of a families in need of services petition.

<u>Proposed law</u> retains <u>present law</u> and additionally requires the petition to state whether the petitioner knows or has reason to know that the child is an Indian child.

<u>Proposed law</u> (Ch.C. Art. 767.1) provides that prior to adjudication of a families in need of services proceeding, the court is required to inquire as to whether the child is an Indian child, and if the child is not, the court may proceed with the adjudication. However, if there is reason to know that the child is an Indian child, the court shall immediately proceed in accordance with the Indian Child Welfare Act.

<u>Proposed law</u> further provides that if a tribe receiving notice of a proceeding fails to respond, the court may determine that the child is not an Indian child and proceed to adjudication.

<u>Proposed law</u> (Ch.C. Art. 767.2) lists the factors from the federal regulations that give the court reason to know that a child is an Indian child, and, if so, requires the court to proceed as such in accordance with the Indian Child Welfare Act.

Present law (Ch.C. Art. 1019) provides for the contents of a petition for adoption.

<u>Proposed law</u> retains <u>present law</u> and additionally requires the petitioner to state whether he knows or has reason to know that the child is an Indian child.

<u>Proposed law</u> (Ch.C. Art. 1034.1) provides that at the termination of parental rights hearing, the court is required to inquire as to whether the child is an Indian child, and if the child is not, the court may proceed with termination. However, if there is reason to know that the child is an Indian child, the court shall immediately proceed in accordance with the Indian Child Welfare Act.

<u>Proposed law</u> further provides that if a tribe receiving notice of a proceeding fails to respond, the court may determine that the child is not an Indian child and proceed to termination.

<u>Proposed law</u> (Ch.C. Art. 1034.2) lists the factors from the federal regulations that give the court reason to know that a child is an Indian child, and, if so, requires the court to proceed as such in accordance with the Indian Child Welfare Act.

Present law (Ch.C. Art. 1122) provides for the surrender of parental rights form.

<u>Proposed law</u> retains <u>present law</u> and requires the petitioner to state whether the child is an Indian child.

Present law (Ch.C. Art. 1515) provides for a petition for voluntary transfer of custody.

<u>Proposed law</u> retains <u>present law</u> and requires the petitioner to state whether the child is an Indian child.

<u>Present law</u> (Ch.C. Art. 1518) authorizes the court to render orders it deems necessary to protect the best interests of a child in a voluntary transfer of custody proceeding.

<u>Proposed law</u> retains <u>present law</u> and, in accordance with the Indian Child Welfare Act, requires the court to appoint counsel for an indigent parent or custodian of an Indian child.

<u>Present law</u> provides a form for the voluntary transfer of custody. <u>Proposed law</u> adds to this form a question regarding if a child is an Indian child for the purposes of complying with the federal Indian Child Welfare Act.

Proposed law makes technical changes.

(Amends Ch.C. Arts. 612(A)(2), 624(D), (E), (F), and (G), 634(A), 749(A) and (B), 1019(A) and (B), 1515(B), and 1122(A)(3); Adds Ch.C. Arts. 103.1, 116(6.1) and (6.2), 624(H), 624.1, 661.1, 767.1, 767.2, 1034.1, 1034.2, 1515(A)(8) and (C) and 1518(C); Provides Comments to Ch.C. Art. 680)

Summary of Amendments Adopted by House

The Committee Amendments Proposed by <u>House Committee on Health and Welfare</u> to the original bill:

- 1. Add to the voluntary transfer of custody form a question regarding if a child is an Indian child for the purpose of complying with the federal Indian Child Welfare Act.
- 2. Make technical corrections.