

1 SENATE BILL NO. 147

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5 WOLF, F. SMITH, S. WEBBER, M. FOX, L. SMITH, M. CAFERRO, B. CARTER, J. COHENOUR, P.

6 FLOWERS, D. HAWK, D. HAYMAN, S. HOWELL, J. KARLEN, C. KEOGH, K. KORTUM, S. MORIGEAU, A.

7 OLSEN, C. POPE, M. ROMANO, E. STAFMAN, K. SULLIVAN, M. THANE, Z. ZEPHYR, M. MARLER, S.

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9

10 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE MONTANA INDIAN CHILD WELFARE ACT AND

11 RELATED LAWS; ~~REQUIRING CULTURAL COMPACTS IN CERTAIN CIRCUMSTANCES~~; CLARIFYING THE

12 STANDARD FOR EMERGENCY REMOVAL; PROVIDING ADDITIONAL REQUIREMENTS FOR

13 GUARDIANSHIPS; REQUIRING CONSULTATION WITH AN INDIAN CHILD'S TRIBE ON A PERMANENCY

14 PLAN; PROVIDING ADDITIONAL GROUNDS THAT A COURT MAY HAVE REASON TO KNOW A CHILD IS

15 AN INDIAN CHILD; REQUIRING A DENIAL OF A TRANSFER OF JURISDICTION TO BE IN WRITING;

16 REVISING REQUIREMENTS FOR QUALIFIED EXPERT WITNESSES, ACTIVE EFFORTS, EVIDENCE, AND

17 PLACEMENT PREFERENCES; AMENDING SECTIONS 40-6-407, 41-3-306, 41-3-444, 41-3-445, 41-3-1306,

18 41-3-1310, 41-3-1318, 41-3-1319, 41-3-1320, 41-3-1325, 41-3-1328, AND 41-3-1329, MCA; REPEALING

19 SECTION 55, CHAPTER 716, LAWS OF 2023; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

20

21 WHEREAS, the Montana Legislature recognizes the guiding principles it enacted in section 2-15-142,

22 MCA, that in formulating or implementing policies that have direct tribal implications, the state should consider

23 the following principles:

24 (1) a commitment to cooperation and collaboration;

25 (2) mutual understanding and respect;

26 (3) regular and early communication;

27 (4) a process of accountability for addressing issues; and

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

7 **NEW SECTION. Section 1. Cultural compacts.** (1) To ensure that all Indian children have the
8 opportunity to maintain strong connections to their culture, if the household into which an Indian child is placed
9 for adoption or guardianship does not include a parent who is a member of the Indian child's tribe, the court
10 shall require the prospective adoptive parents or guardians and the child's tribe to enter a cultural compact, at
11 the discretion of the Indian child's tribe, that documents the parties' agreement regarding how the Indian child
12 will continue to actively participate in the Indian child's cultural learning and activities and engagement with
13 family members.

14 (2) Each cultural compact must be specific to the Indian child and must articulate the Indian child's
15 understanding as the Indian child grows and matures.

(3) The cultural compact must:

(a) become part of the court record;

(b) be enforced by the court; and

(c) be included in the adoption or guardianship decree.

Section 1. Section 40-6-407, MCA, is amended to read:

"40-6-407. (Temporary) Assumption of care, custody, and control by department -- placement and -- presumptions -- Montana birth certificate. (1) Upon receipt of notice under 40-6-406, the department shall:

- (a) immediately assume the care, control, and temporary protective custody of the newborn;
- (b) if a parent is known and willing, immediately meet with the parent;
- (c) make a temporary placement of the newborn;

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1 returned to the parents, parent, guardian, or other person having physical or legal custody of the child.

2 (7) The emergency protective services hearing is an emergency proceeding for the purposes of
3 the federal Indian Child Welfare Act and is not subject to the notice requirements of that act.

4 (8) The emergency protective services hearing is an emergency proceeding for the purposes of
5 the Montana Indian Child Welfare Act provided for in Title 41, chapter 3, part 13, and is not subject to the notice
6 requirements of the Montana Indian Child Welfare Act. ~~(Subsection (8) terminates June 30, 2025—sec. 55, Ch.~~
7 ~~716, L. 2023.)"~~

8

9 **Section 3.** Section 41-3-444, MCA, is amended to read:

10 **"41-3-444. Abuse and neglect proceedings -- appointment of guardian -- financial subsidies.** (1)
11 The court may, upon on the petition of the department or guardian ad litem, enter an order appointing a
12 guardian for a child who has been placed in the temporary or permanent custody of the department pursuant to
13 41-3-438, 41-3-445, or 41-3-607. The guardianship may be subsidized by the department under subsection (8)
14 (9) if the guardianship meets the department's criteria, or the guardianship may be nonsubsidized.

15 (2) The court may appoint a guardian for a child pursuant to this section if the following facts are
16 found by the court finds by clear and convincing evidence that the following facts have been established:

17 (a) the department has given its written consent to the appointment of the guardian, whether the
18 guardianship is to be subsidized or not;

19 (b) if the guardianship is to be subsidized, the department has given its written consent after the
20 department has considered initiating or continuing financial subsidies pursuant to subsection (8) (9);

21 (c) the child has been adjudicated a youth in need of care;

22 (d) the department has made reasonable efforts, or, if the case is subject to the federal Indian
23 Child Welfare Act or the Montana Indian Child Welfare Act provided for in Title 41, chapter 3, part 13, active
24 efforts, to reunite the parent and child, further efforts to reunite the parent and child by the department would
25 likely be unproductive, and reunification of the parent and child would be contrary to the best interests of the
26 child;

27 (e) the child has lived with the potential guardian in a family setting and the potential guardian is

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1 committed to providing a long-term relationship with the child;

2 (f) if the case is subject to the federal Indian Child Welfare Act or the Montana Indian Child
3 Welfare Act provided for in Title 41, chapter 3, part 13, and the department is the petitioning party, the
4 department has consulted with the Indian child's tribe regarding the Indian child's potential guardians and
5 whether the Indian child's tribe is in agreement with the proposed guardianship;

6 (g) if the case is subject to the federal Indian Child Welfare Act or the Montana Indian Child
7 Welfare Act provided for in Title 41, chapter 3, part 13, the state has met the requirements for providing the
8 Indian child's tribe with notice of the proceedings pursuant to 41-3-1311;

9 (h) if the case is subject to the federal Indian Child Welfare Act or the Montana Indian Child
10 Welfare Act provided for in Title 41, chapter 3, part 13, that the court has reviewed a cultural compact, if any,
11 entered into between the child's tribe and the child's guardian pursuant to [section 1];

12 (f)(i)(h) it is in the best interests of the child to remain or be placed with the potential guardian; and
13 (g)(i)(i) either termination of parental rights to the child is not in the child's best interests or parental
14 rights to the child have been terminated, but adoption is not in the child's best interests; and,

15 (h) if the child concerning whom the petition for guardianship has been filed is an Indian child, as
16 defined in the [federal] Indian Child Welfare Act, 25 U.S.C. 1901, et seq., [or 41-3-1303,] the [Indian] child's
17 tribe has received notification from the state of the initiation of the proceedings.

18 (3) The entry of a decree of guardianship pursuant to this section terminates the custody of the
19 department and the involvement of the department with the child and the child's parents except for the
20 department's provision of a financial subsidy, if any, pursuant to subsection (8) (9).

21 (4) (a) A guardian appointed under this section may exercise the powers and has the duties
22 provided in 72-5-231.

23 (b) The court shall require a guardian appointed under this section to report annually on the
24 condition of the ward, the ward's estate that has been subject to the guardian's possession or control, and the
25 ward's contact with extended family.

26 (c) If the case is governed by the federal Indian Child Welfare Act or the Montana Indian Child
27 Welfare Act provided for in Title 41, chapter 3, part 13, the guardian's report must also include:

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1 (i) the Indian child's participation in cultural activities involving or reflective of the Indian child's
2 tribe; and

3 (ii) the date the guardian served the report on the Indian child's tribe. Service on the Indian child's
4 tribe must be made by first-class mail to the person identified in the most current federal register as the
5 designated tribal agent for service of notice for the purposes of the federal Indian Child Welfare Act.

6 (5) On failure, as determined by the clerk of court, of the guardian to file an annual report pursuant
7 to subsection (4), the court shall order the guardian to file the report and give good cause for the guardian's
8 failure to file a timely report.

9 (5)(6) The court may revoke a guardianship ordered pursuant to this section if the court finds, after
10 hearing on a petition for removal of the child's guardian, that continuation of the guardianship is not in the best
11 interests of the child. Notice of hearing on the petition must be provided by the moving party to the child's lawful
12 guardian, the department, any court-appointed guardian ad litem, the child's parent if the rights of the parent
13 have not been terminated, the child's tribe if the case is governed by the federal Indian Child Welfare Act or the
14 Montana Indian Child Welfare Act provided for in Title 41, chapter 3, part 13, and other persons directly
15 interested in the welfare of the child.

16 (6)(7) A guardian may petition the court for permission to resign the guardianship. A petition may
17 include a request for appointment of a successor guardian.

18 (7)(8) After notice and hearing on a petition for removal or permission to resign, the court may appoint
19 a successor guardian or may terminate the guardianship and restore temporary legal custody to the department
20 pursuant to 41-3-438.

21 (8)(9) The department may provide a financial subsidy to a guardian appointed pursuant to this
22 section if the guardianship meets the department's criteria and if the department determines that a subsidy is in
23 the best interests of the child. The amount of the subsidy must be determined by the department.

24 (9)(10) This section does not apply to guardians appointed pursuant to Title 72, chapter 5. (Bracketed
25 language in subsection (2)(h) terminates June 30, 2025—sec. 55, Ch. 716, L. 2023.)"

26

27 **Section 4.** Section 41-3-445, MCA, is amended to read:

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1 strictly comply with the requirements of the federal Indian Child Welfare Act and this part; and

2 (ii) may not enter a final order in a child custody proceeding, except an order dismissing the

3 proceeding and returning the Indian child to the care of the parent or Indian custodian from whose care the

4 child was removed.

5 (b) On receipt of an order from a tribal court accepting jurisdiction, the court shall:

6 (i) dismiss the child custody proceeding with prejudice; and

7 (ii) expeditiously provide the tribal court with all records related to the proceeding, including but not

8 limited to the pleadings and any court record. The state court shall work with the tribal court to ensure the

9 transfer of the custody of the Indian child and the proceeding is accomplished smoothly and in a way that

10 minimizes the disruption of services to the family.

11 (8) If the Indian child's tribe accepts jurisdiction, the state court shall enter an order relieving the

12 office of the state public defender and any public defender assigned pursuant to 41-3-425 and 47-1-104 from

13 further representation.

14 (9) If the Indian child's tribe declines jurisdiction, the state court shall enter an order ~~vacating the~~

15 ~~order~~ transferring jurisdiction and proceed with adjudication of the child custody proceeding in compliance with

16 the federal Indian Child Welfare Act, this part, and any applicable state-tribal agreement. ~~(Terminates June 30,~~

17 ~~2025—sec. 55, Ch. 716, L. 2023.)"~~

18

19 **Section 7.** Section 41-3-1318, MCA, is amended to read:

20 **"41-3-1318. ~~(Temporary)~~ Qualified expert witness -- requirements -- prohibitions.** (1) A qualified

21 expert witness is an individual who provides testimony in a child custody proceeding under this part. The

22 purpose of the testimony is to assist a court in determining whether the continued custody of the child by or the

23 return of the child to the parent or Indian custodian is likely to result in serious emotional or physical damage to

24 the child.

25 (2) The parties may not waive the requirement for the qualified expert witness testimony. The court

26 may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if the parties have

27 so stipulated on the record and the court is satisfied that stipulation is made knowingly, intelligently, and

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1 voluntarily.

2 (2)(3) The petitioning party shall consult with the Indian child's tribe on the selection of the qualified
3 expert witness, including asking whether the tribe has a list of preferred qualified expert witnesses. To the
4 extent possible, the petitioning party shall use an individual preferred by the tribe. The petitioner shall file a
5 declaration with the court describing the efforts the petitioner made under this subsection to identify a
6 qualified expert witness.

7 (3)(4) A qualified expert witness must be qualified to testify regarding whether the child's continued
8 custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
9 and must be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.

10 (4)(5) (a) If the petitioner is the department, the child protection specialist assigned to the case and
11 the child protection specialist's supervisor may not testify as qualified expert witnesses in the case.

12 (b) Nothing in this subsection (4)(5) may be construed as barring:

13 (i) the child protection specialist or the child protection specialist's supervisor from testifying as an
14 expert witness for other purposes in a proceeding under this part; or

15 (ii) the petitioner or another party in a proceeding under this part from providing additional
16 witnesses or expert testimony, subject to the approval of the court, on any issue before the court, including the
17 determination of whether the continued custody of the Indian child by or return of the Indian child to the parent,
18 parents, or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

19 (6) Unless stipulated to by the parties in accordance with subsection (2), a qualified expert witness
20 shall testify as to whether continued custody of an Indian child by or return of the Indian child to the parents or
21 Indian custodian is likely to result in serious emotional or physical damage to the Indian child at the show cause
22 hearing, adjudication hearing, dispositional hearing, guardianship hearing, and termination hearing. (Terminates
23 June 30, 2025 sec. 55, Ch. 716, L. 2023.)"

24

25 **Section 8.** Section 41-3-1319, MCA, is amended to read:

26 **"41-3-1319. (Temporary) Active efforts.** (1) Any party seeking to effect affect a foster care
27 placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that

1 copy of [this act] to each federally recognized tribal government in Montana.

2

3 **NEW SECTION. Section 15. Codification instruction.** ~~[Section 1] is intended to be codified as an~~
4 ~~integral part of Title 41, chapter 3, part 13, and the provisions of Title 41, chapter 3, part 13, apply to [section 1].~~

5

6 **NEW SECTION. Section 15. Effective date.** [This act] is effective on passage and approval.

7

- END -