

§ 431.18 Care and protection of Indian children.

(a) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Indian child* means any unmarried person:

(i) who either (a) is under the age of 18 years, or (b) is between the ages of 18 and 21 years, is in foster care, and is a student attending a school, college or university or regularly attending a course of vocational or technical training designed to fit him or her for gainful employment or lacks the skills or ability to live independently; and

(ii) who either (a) is a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe, or (c) is the biological child of a member of an Indian tribe who resides on or is domiciled within the reservation of such tribe.

(2) *Indian tribe* shall mean any tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Department of the Interior or by the State of New York or by any other state because of their status as Indians.

(3) *Indian child's tribe* shall mean the Indian tribe of which an Indian child is a member or is eligible for membership or in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the child has the more significant contacts. The determination of the tribe with which a child has the more significant contacts shall be made by the court in which any child custody proceeding with respect to the Indian child is pending. Such determination shall be made after the appropriate social services district presents proof to the court concerning, among other things:

- (i) the length of residence on or near the reservations of each tribe and the frequency of contacts with each tribe;
- (ii) the child's participation in activities of each tribe;
- (iii) the child's fluency in the language of each tribe;
- (iv) the tribal membership of a custodial parent or an Indian custodian; and
- (v) residence on or near one of the tribes' reservations by the child's relatives.

(4) Child custody proceedings shall include the following:

- (i) *foster care placement*, which shall mean any action to remove an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator;
- (ii) the *termination of parental rights*, which shall mean any action to terminate the parent-child relationship; and
- (iii) an *adoptive placement*, which shall mean the permanent placement of an Indian child for adoption, including any action for a final decree of adoption.

Such term or terms shall not apply where an Indian child is found to be a juvenile delinquent pursuant to article 3 of The Family Court Act or in a divorce proceeding, upon an award of custody to one of the parents.

(5) A *qualified expert witness*, which shall mean an expert qualified to speak on whether continued custody by the parents of an Indian child or an Indian custodian is likely to result in serious physical or emotional harm to the child. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness:

- (i) a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices;
- (ii) a lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe; and
- (iii) a professional person having substantial education and experience in the provision of services to Indian children and families.

(b) Each social services district must consider:

- (1) according to section 101(e) of the Indian Child Welfare Act of 1978 (P.L. 95-608), no foster care placement of an Indian child may be ordered by a court unless there is a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and

(2) according to section 101(f) of the Indian Child Welfare Act of 1978 (P.L. 95-608), no termination of parental rights of an Indian child may be ordered by a court unless there is a determination, supported by evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) In any child custody proceeding initiated by a social services official pursuant to section 384-b of the Social Services Law or article 10 of The Family Court Act which involves an Indian child, the official shall notify the child's parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested of the pending proceeding and of their right to intervene in such proceeding. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary of the Interior and the Department of Social Services by registered mail with return receipt requested. Such notice shall be forwarded to the Secretary of the Interior at: Eastern Area Director, Bureau of Indian Affairs, 1951 Constitution Avenue, N.W., Washington, DC 20245. The notice forwarded to the child's parent, custodian, Indian tribe or the Secretary of the Interior shall contain the following information, if known:

- (1) the Indian child's name, date of birth and place of birth;
- (2) the Indian child's tribal affiliation;
- (3) the name of the Indian child's parents or custodian, including the date of birth and place of birth of such parents and the mother's maiden name;
- (4) a copy of the petition, complaint or other document filed with the court to initiate the child custody proceeding;
- (5) a statement of the rights of the biological parents or Indian custodians and the child's tribe to intervene in the proceeding;
- (6) a statement of the right under Federal law to court-appointed counsel; and
- (7) the location, mailing address and telephone number of the court.

(d) In any child custody proceeding initiated by a social services official pursuant to section 358-a or 384-b of the Social Services Law or article 7 or 10 of The Family Court Act which involves an Indian child, the social services official shall demonstrate to the court that prior to the commencement of such proceeding, reasonable efforts were made to alleviate the need to remove the Indian child from his home. Such efforts shall involve and use available resources of the child's extended family, the tribe, Indian social services agencies and individual Indian care givers.

(e) In any child custody proceeding initiated by a social services official pursuant to section 358-a or 384-b of the Social Services Law or article 10 of The Family Court Act, the social services official shall routinely inquire whether the child is a Indian and notify the Family Court in writing where there is reason to believe the child involved is an Indian.

(f) (1) A social services official which provides an Indian child with foster care or an authorized agency which provides foster care to an Indian child pursuant to a purchase of service agreement with such district shall in the absence of good cause to the contrary, place the child according to the following preferences:

- (i) first, with a member of the Indian child's extended family, as such term is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, with a person who has reached the age of 18 and who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin or stepparent;
- (ii) second, in a foster home licensed, approved or specified by the Indian child's tribe and approved by the appropriate social services district;
- (iii) third, with Indian foster parents who have been licensed or certified by an authorized agency to provide foster care services; and
- (iv) fourth, in an institution for children approved by an Indian tribe or operated by a Indian organization which has a program suitable to meet the needs of the child.

(2) Good cause not to follow the order of preference set forth in paragraph (1) of this subdivision shall be based on one or more of the following considerations:

(i) the request of the biological parents or of the child when the child is of sufficient age to make decisions concerning where he or she should reside;

(ii) the extraordinary physical or emotional needs of the child which, as attested to be a qualified expert witness as defined in paragraph (a)(5) of this section, do not permit the child to be placed according to the preferences set forth in paragraph (1) of this subdivision;

(iii) the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria established by paragraph (1) of this subdivision. A diligent attempt to find a suitable family shall include at a minimum, contact with the child's tribal social service program, a search of all State or county listings of available Indian homes and contact with nationally or locally known Indian programs with available placement resources; or

(iv) the tribe concurs that the best interests of the child require placement with a non-Indian family or in another setting not within the order of preference set forth in paragraph (1) of this subdivision.

(3) If the Indian child's tribe has established by resolution an order of preference different than that established in paragraph (1) of this subdivision, the social services official or authorized agency shall follow the order of preference established by the resolution, provided the placement would be in the least restrictive setting appropriate to the particular needs of the child.

(4) Where a parent of an Indian child has voluntarily consented to the transfer of care and custody of the child to an authorized agency and has expressed a desire to the agency for anonymity, the social services official or authorized agency shall consider the desire for anonymity in applying the preferences established in paragraph (1) of this subdivision or the preferences established by resolution of the child's Indian tribe.

(5) All foster care placements made by social services officials or authorized agencies pursuant to this subdivision shall be made in homes or institutions which have been certified or approved by an authorized agency or by the social services district in which such homes or institutions are located.

(6) The standards to be applied by a social services official or authorized agency in approving placements that comply with the preference requirements of this subdivision shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(g) (1) A social services official who places an Indian child in an adoptive home or an authorized agency which provides adoption services to an Indian child pursuant to a purchase of service agreement with such district shall, in the absence of good cause to the contrary, place the child according to the following preferences:

(i) first, with a member of the Indian child's extended family, as such term is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, with a person who has reached the age of 18 and who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin or stepparent;

(ii) second, with other members of the Indian child's tribe; and

(iii) third, with other Indian families.

(2) Good cause not to follow the order of preference set forth in paragraph (1) of this subdivision shall be based on one or more of the following considerations:

(i) the request of the biological parents, or the child when the child is of sufficient age to make decisions concerning where he or she should reside;

(ii) the extraordinary physical or emotional needs of the child which, as attested by a qualified expert witness as defined in paragraph (a)(5) of this section, do not laced according to the preferences set forth in paragraph (1) of this subdivision;

(iii) the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria established by paragraph (1) of this subdivision. A diligent attempt to find a suitable family shall include at a minimum, contact with the child's tribal social services program, a search of all State or county listings of available Indian homes and contact with nationally or locally known Indian programs with available placement resources;

(iv) the tribe concurs that the best interests of the child require placement with a non-Indian family or in another setting not within the order of preference set forth in paragraph (1) of this subdivision.

(3) If the Indian child's tribe has established by resolution an order of preference different than that established in paragraph (1) of this subdivision, the social services official or authorized agency shall follow the order of preference established by the resolution, provided the placement would be in the least restrictive setting appropriate to the particular needs of the child.

(4) Where a parent of an Indian child has voluntarily consented to the transfer of guardianship and custody of the child to an authorized agency and has expressed a desire to the agency for anonymity, the social services official or authorized agency shall consider the desire for anonymity in applying the preferences established in paragraph (1) of this subdivision or the preferences established by resolution of the child's Indian tribe.

(5) The standards to be applied by a social services official or authorized agency in approving placements which comply with the preference requirements of this subdivision shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(h) When a local social services official is aware that a child in receipt of foster care or adoption services is an Indian child or that an application for foster care or adoption services is being submitted on behalf of an Indian child, the official shall determine to the extent possible whether the child is a resident, domiciliary or ward of a tribal court in New York State or another state. If the child is a resident, domiciliary or ward of a tribal court in New York State or another state, the local social services official shall advise the Family Court that the child should be returned to the jurisdiction of the tribal court. In the event that the court orders the child returned to the jurisdiction of the appropriate tribal court, the social services official may provide social services and/or foster care services to the child for 30 days after such order. The services provided to the child during this period shall be subject to reimbursement in accordance with the provisions of section 153 of the Social Services Law.

Historical Note

Sec. filed Dec. 22, 1986; amd. filed Sept. 27, 1988 eff. Oct. 12, 1988. Amended (a)(1).