Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Early Learning & Human Services Committee

ESSB 5656

Brief Description: Creating a state Indian child welfare act.

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

Brief Summary of Engrossed Substitute Bill

- Creates a Washington State Indian Child Welfare Act to govern child dependency, parental termination, and adoption hearings involving an Indian child.
- Repeals RCW 13.34.250, regarding preference characteristics for foster care placement of an Indian child.

Hearing Date: 3/10/11

Staff: Linda Merelle (786-7092).

Background:

Federal Indian Child Welfare Act.

The Indian Child Welfare Act (ICWA) is a federal law passed in 1978. It is codified under 25 U.S.C. §§ 1902 *et. seq.* The ICWA establishes minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes. The federal statute also contains language directing the courts to apply any state or federal law that provides greater protection than the ICWA to an Indian child's parents or Indian custodian.

Since its passage in 1978, states have been required to act in accord with the federal ICWA when there is an Indian child involved in child custody proceedings. In 2004 the Washington State Legislature passed Substitute House Bill 3051 which expressly placed in statute the notice

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requirements under the federal statute. Pursuant to that act, whenever a court or a petitioning party in a proceeding under RCWs 13.32A, 13.34, 26.10, or 26.33 knows or has reason to know that an Indian child is involved, notice must be given to the child's parent or Indian custodian, or the child's tribe. Notice of any pending proceedings and their right of intervention must be provided by registered mail. The RCW 13.32A relates to children in need of services; RCW 13.34 relates to dependency and termination of parental rights; RCW 26.10 relates to nonparental actions for child custody; and RCW 26.33 relates to adoption proceedings. In 2009, pursuant to Substitute House Bill 2106, the notice requirements were expressly stated in RCW 74.13, the child welfare statutes.

The ICWA does not apply to divorce proceedings, intra-family disputes, juvenile offender proceedings, or cases under tribal court jurisdiction.

Indian Child.

A person may define his or her identity as Indian but in order for the ICWA to apply, the involved child must be an Indian child as defined by statute. The ICWA defines an Indian child as "any unmarried person who is under age 18 and is either (1) a member of an Indian tribe, or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" (25 U.S.C. § 1903). Under federal law, individual tribes have the right to determine eligibility, membership, or both. However, in order for the ICWA to apply, the child must be a member of or eligible for membership in a federally recognized tribe. All tribes have the right to determine who is a member of their tribe, and different tribes have different requirements for eligibility.

Bureau of Indian Affairs.

The Bureau of Indian Affairs (BIA) has established guidelines for the implementation and interpretation of the ICWA, but these guidelines are not published as regulations. Therefore, they are not binding on the courts.

Requirements under the Federal ICWA.

Caseworkers must make several considerations when handling an ICWA case, including (1) providing active efforts to the family; (2) identifying a placement that fits under the ICWA preference provisions; (3) notifying the child's tribe and the child's parents of the child custody proceeding; and (4) working actively to involve the child's tribe and the child's parents in the proceedings. The term "active efforts" is not defined in federal statute. Courts have addressed whether the standard of "active efforts" has been met when addressing appeals from child custody proceedings.

Jurisdiction Over a Case Involving an Indian Child.

The child's tribe must have exclusive jurisdiction over the child custody proceeding involving the Indian child who resides on a reservation unless: (1) the tribe has consented to state's concurrent jurisdiction; (2) the tribe expressly declined jurisdiction; or (3) the state is exercising emergency jurisdiction. For an Indian child who is not a resident of the reservation and not a ward of the tribal court, the court must transfer the case to tribal court unless either parent objects or there is

good cause not to transfer the case. The tribe may decline jurisdiction. The federal statute does not set forth procedures and timelines regarding the transfer and decline of jurisdiction.

Foster Care Placement.

Before an Indian child can be placed in foster care, the Department of Social and Human Services (DSHS) or a supervising agency must show that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that these efforts have been unsuccessful. The court cannot order a foster care placement without a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, that continued custody by the child's parent or Indian custodian is likely to result in serious physical or emotional damage to the child. A "qualified expert witness" is not defined in the federal statute, but the BIA has provided guidelines defining a qualified expert witness, and courts ruled on cases where a challenge has been brought to determine whether an expert witness is "qualified" in a proceeding regarding an Indian child.

Termination of Parental Rights.

Before a court can order the termination of parental rights, it must find that there is evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that continued custody by the child's parent or Indian custodian or return of custody to the parent or custodian is likely to result in serious physical or emotional damage to the child.

Emergency Removal of an Indian Child.

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

Improper Removal of an Indian Child.

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

Summary of Bill:

Engrossed Substitute Senate Bill 5656 creates a state Indian Child Welfare Act for Washington. The provisions of the bill are substantially similar to those of the federal ICWA. The act will

apply to "child custody proceedings," which are defined as proceedings, to determine: (1) foster care placement; (2) termination of parental rights; (3) preadoptive placement, which is placement of a child after parental rights have been terminated; and (4) adoptive placement. There are some differences between the federal statute and the state statute proposed in the bill regarding definitions, jurisdiction, notice requirements, and placement preferences of the child.

Definitions.

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

Qualified expert witness. A "qualified expert witness" is required under the federal statute before a court can issue a disposition order regarding foster care placement or an order terminating parental rights. It is not defined. The BIA guidelines regarding the criteria for a "qualified expert witness" are substantially incorporated into the bill. Under the BIA guidelines, a qualified expert witness is: (1) a member of the child's Indian tribe or other person of the tribe's choice who is recognized by the tribe as knowledgeable regarding tribal customs of family organization or child rearing practices; (2) any person having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe; or (3) a professional person having substantial education and experience in the area of his or her specialty. An additional category is included in the bill: any person having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and child rearing practices in Indian tribes *with cultural similarities* to the Indian child's tribe.

Best interests of the Indian child. If an Indian child is in an out-of-home placement and involved in a proceeding to move the child from that placement to another out-of-home placement, the parent or Indian custodian may petition to have the child returned to his or her custody. The court shall grant the request unless there is a showing by clear and convincing evidence that the return of custody is not in the "best interests of the Indian child." This term not defined in the federal statute, but it is defined in the bill.

Tribal customary adoption. A new term not included in the federal statute is added to the bill, a "tribal customary adoption." This is an adoption through tribal custom, traditions, or laws of an Indian child's tribe by which the Indian child is permanently placed with a nonparent, who in turn has the rights, privileges, and obligations of a legal parent. Termination of the parent-child relationship between the Indian child and the biological parent is not required to effect or recognize a tribal customary adoption.

Jurisdiction.

The provisions of the bill regarding the jurisdiction over an Indian child in a custody proceeding who, regardless of whether he or she resides or is domiciled within the reservation of his or her tribe, are substantially similar to the federal statute. For children who do not reside on the reservation, a parent or other party identified in the statute may make a motion to the court to have the case transferred to the jurisdiction of the Indian child's tribe. The tribe, as in the federal statute, may decline jurisdiction. The bill provides a 75-day time frame for the tribe to respond, and actions that the court must take if the child's tribe declines jurisdiction.

Notice.

Under the bill, in any involuntary child custody proceeding, no foster care placement or termination of parental rights proceeding involving an Indian child shall be held until at least 10 days after the receipt of notice by the parent or Indian custodian and the tribe. The federal statute does not allow a proceeding to go forward until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe *or the Secretary of the Interior*.

Burden of Proof in Involuntary Child Custody Proceeding.

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

Voluntary Foster Care Placement or Termination of Parental Rights.

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

For a voluntary termination of parental rights or adoptive placement involving an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of an order terminating parental rights or a final decree of adoption. Upon withdrawal of consent, the child must be returned to the parent.

If consent to adoption was obtained through fraud or duress, a parent may withdraw consent after the entry of a final decree of adoption if the adoption has been effective for less than two years.

Placement of Indian Child.

The federal ICWA sets out placement priorities for adoptive and foster care and preadoptive placements. The placement priorities in this bill contain two additional options in the placement hierarchy: (1) an Indian family that is of a similar culture to the child's tribe, and (2) any other family which can provide a suitable home for an Indian child, as determined in consultation with

the child's tribe or the local Indian Child Welfare Advisory Committee, where the child's tribe has not intervened.

If a different order of placement is established by the child's tribe, the court of agency effecting the placement shall follow the order of preference established by the tribe as long as it is in the least restrictive setting appropriate for the needs of the child. The preference of the Indian child or his or her parent must be considered, where appropriate. This provision also exist in federal law.

Other Provisions.

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

The provisions of this bill are referenced throughout the relevant sections of RCWs 13.32A, 13.34, 26.10, 26.33, and 74.13.

The RCW 13.34.250, regarding preference characteristics foster care placement of an Indian child, is repealed.

Appropriation: None.

Fiscal Note: Available on Substitute Senate Bill 5656.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.