



Legislation Text

File #: 07-087, Version: 1

**A LEGISLATIVE ACT AMENDING TITLE 10 OF THE CHEROKEE NATION CODE ANNOTATED -
SECTIONS 1101, 1110 and SECTIONS 40.1
THROUGH 40.9; AND DECLARING AN EMERGENCY
BE IT ENACTED BY THE CHEROKEE NATION:**

SECTION 1. TITLE AND CODIFICATION

This act shall amend Title 10, Sections **1101, 1110 and Sections 40.1 through 40.9.**

SECTION 2. PURPOSE

The purpose of this legislative act is to amend Sections 1101, 1110 and Sections 40.1 through 40.9 of Title 10 of the Cherokee Nation Code Annotated to broaden the definition of "deprived child", limit jury trials to proceedings to terminate parental rights and to set the burden of proof required in involuntary custody placements and actions to terminate the parental rights in certain situations.

SECTION 3. LEGISLATIVE HISTORY

LA 8-91, eff. May 13, 1991.

SECTION 4. SUBSTANTIVE PROVISIONS OF LAW

Title 10 Section 1101 shall have an addition as follows:

§ 1101. Definitions

4. Deprived child" means a child:

- a. who is for any reason destitute, homeless, or abandoned; or
- b. who does not have the proper parental care or guardianship or whose home is an unfit place for the child by reason of neglect, cruelty, or depravity on the part of his parents, legal guardian, or other person in whose care the child may be; or
- c. who is a child in need of special care and treatment because of his physical or mental condition including a child born in a condition of dependence on a controlled dangerous substance, and his parents, legal guardian, or other custodian is unable or willfully fails to provide said special care and treatment; or
- d. who is a handicapped child deprived of the nutrition necessary to sustain life or of the medical treatment necessary to remedy or relieve a life-threatening medical condition in order to cause or allow the death of said child if such nutrition or medical treatment is generally provided to similarly situated nonhandicapped or handicapped children, provided that no medical treatment is necessary if, in the reasonable medical judgment of the attending physician, such treatment would be futile in saving the life of the child; or
- e. who is, due to improper parental care and guardianship, absent from school for fifteen (15) or more days or parts of days within a semester or four (4) or more days or parts of days within a four-week period without a valid excuse as defined by the local school boards if said child is subject to compulsory school attendance; or
- f. whose parent or legal custodian for good cause desires to be relieved of his custody.

g. who is a subsequent child born to a parent whose parental rights to any other child has been terminated by the court; provided, that the applicant shall show that the condition which led to the making of the finding which resulted in the termination of such parent's parental rights to the other child has not been corrected.

Title 10 Section 1110 shall be repealed as follows:

§ 1110. Jury trial

In adjudicatory hearings to determine whether a child is delinquent, in need of supervision, in need of treatment or deprived, the child informed against, or any person entitled to service of summons, shall have the right to demand a trial by jury, which shall be granted as in other cases, unless waived, or the judge on his own motion may call a jury to try any such case. Such jury shall consist of six (6) persons.

And shall be replaced with the following Section

§ 1110 Jury trial.

A. A parent entitled to service of summons, the Cherokee Nation or a child shall have the right to demand a trial by jury only in the following circumstances:

1. When the initial petition to determine if a child is deprived also contains a request for immediate termination of parental rights; or
2. When, following a hearing in which the child is adjudicated deprived, a petition for termination of parental rights is filed by the Cherokee Nation.

B. A jury trial shall be granted only if demanded. Such jury shall consist of six (6) persons. The right to a jury trial may be waived. The right to a jury trial shall be deemed waived by the court when a parent, guardian or custodian or other person entitled to service of summons fails to appear at any hearing set for termination of parental rights. Nothing in this act shall prohibit a termination of parental rights by default should a parent, or other person entitled to service of summons, who has been properly served a summons, fails to appear at a trial or hearing set on the termination of said person's parental rights.

Title 10 Sections 40.1 through 40.10 shall be amended and renumbered as follows:

§ 40. Short title

Sections 40.1 through 40.11 of this act shall be known and may be cited as the "Cherokee Nation Indian Child Welfare Act."

§ 40.1. Purpose-Policy of nation

The purpose of the Cherokee Nation Indian Child Welfare Act is the clarification of nation policies regarding Indian Children.

§ 40.2. Definitions

For the purposes of the Cherokee Nation Indian Child Welfare Act:

1. "Indian" means a person who is either:
 - a. a member of an Indian tribe; or
 - b. is eligible for membership in an Indian tribe.
2. "Indian child" means any unmarried or unemancipated person who is under the age of eighteen (18) and is either:
 - a. a member of an Indian tribe; or
 - b. is eligible for membership in an Indian tribe.
3. "custodian" means any person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody and control has been transferred by the parent of such child; and

4. "Indian tribe" means any Indian 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 Interior because of their status as Indians.

5. "Indian-operated institution" means a residential care facility, group home or crisis foster care facility operated under a governing body or Board of Directors consisting of a minimum fifty percent (50%) whose board members are members of a federally recognized Indian tribe.

6. "involuntary custody proceeding" means any action removing an Indian child from its parent or custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

§ 40.3. Application of act-Exemptions--Determination of Indian status

A. The Cherokee Nation Indian Child Welfare Act, applies to all child custody proceedings involving any Indian child who resides in Indian country with the Cherokee Nation except the following:

1. A child custody proceeding arising from a divorce proceeding; or
2. A child custody proceeding arising from an adjudication of delinquency, unless there has been a request for termination of parental rights.

B. The Cherokee Nation Indian Child Welfare Act applies to a child who is a member of an Indian tribe or who is eligible for membership in an Indian tribe.

C. The court shall seek a determination of the Indian status of the child in accordance with the preceding standard in the following circumstances:

1. The court has been informed by an interested party, an officer of the court, a tribe, an Indian organization or a public or private agency that the child is Indian; or
2. The child who is the subject of the proceeding gives the court reason to believe he is an Indian child; or
3. The court has reason to believe the residence or domicile of the child is a predominantly Indian community.

D. The court shall seek verification of the Indian status of the child from the Indian tribe or the Bureau of Indian Affairs. A determination of membership by an Indian tribe shall be conclusive. A determination of membership by the Bureau of Indian Affairs shall be conclusive in the absence of a contrary determination by the Indian tribe.

E. The determination of the Indian status of a child shall be made as soon as practicable in order to ensure compliance with the notice requirements of Section 40.5 of this title.

§ 40.4. Involuntary Indian child custody proceedings-Notice

In any involuntary Indian child custody proceeding of the Cherokee Nation Indian Child Welfare Act, including review hearings, the court shall send notice to the parents or to the custodians, if any, to the tribe that may be the tribe of the Indian child, and to the appropriate Bureau of Indian Affairs area office, by registered mail return receipt requested. The notice shall be written in clear and understandable language and include the following information:

1. The name and tribal affiliation of the Indian child;
2. A copy of the petition by which the proceeding was initiated,;
3. A statement of the rights of the biological parents or custodians and the Indian tribe:

- a. to intervene in the proceeding,
- b. to request an additional twenty (20) days from receipt of notice to prepare for the proceeding; further extensions of time may be granted with court approval;

4. A statement of the potential legal consequences of an adjudication on the future custodial rights of the parents or custodians;
5. A statement that if the parents or custodians are unable to afford counsel, counsel will be appointed to represent them; and
6. A statement that tribal officials should keep confidential the information contained in the notice.

§ 40.5. Emergency removal of Indian child from parent or custodian - Order

A. When a court order authorizes the emergency removal of an Indian child from the parent or custodian of such child in accordance with 25 U.S.C. Section 1922, the order shall be accompanied by an affidavit containing the following information:

1. The names, tribal affiliations, and addresses of the Indian child, the parents of the Indian child and custodians, if any;
2. A specific and detailed account of the circumstances that lead the agency responsible for the removal of the child to take that action; and
3. A statement of the specific actions that have been taken to assist the parents or custodians so that the child may safely be returned to their custody.

B. No pre-adjudicatory custody order shall remain in force or in effect for more than thirty (30) days without a determination by the court, supported by the preponderance of the evidence that the placement is in the best interest of the child. However, the court may, for good and sufficient cause shown, extend the effective period of such order for an additional period of sixty (60) days.

§ 40.6. Placement preference

The placement preferences specified in 25 U.S.C. Section 1915, shall apply to all pre-adjudicatory placements, as well as pre-adoptive, adoptive and foster care placements as defined in the Indian Child Welfare Act, 25 U.S.C. Section 1901 et seq.

§ 40.7. Agreements with Indian tribes for care and custody of Indian children

The Principal Chief of the Cherokee Nation is authorized to enter into agreements with the State of Oklahoma regarding care and custody of Indian children as authorized by the Federal Indian Child Welfare Act, 25 U.S.C. Section 1919.

§ 40.8. Payment of foster care expenses under certain circumstances

A. In the event the Oklahoma Department of Human Services (DHS) has legal custody of an Indian child, and that child is placed with a tribal licensed or approved foster home, the state shall pay the costs of foster care in the same manner and to the same extent the state pays the costs of foster care to state licensed or state-approved foster homes, provided that the tribe shall have entered into an agreement with the state pursuant to Section 40.7 herein, which shall require tribal cooperation with state plans required by federal funding laws.

B. The state shall pay the costs of foster care of a child placed with a tribal licensed or approved foster home where the placement is made by a tribe having jurisdiction of the proceeding, provided that the tribe shall have entered into an agreement with the state pursuant to Section 40.7 herein, which shall require tribal cooperation with state plans required by federal funding laws.

C. The Principal Chief of the Cherokee Nation shall be authorized to enter into agreements to obtain any and all benefits from the state which are available to residents of the state.

D. The Principal Chief of the Cherokee Nation shall be authorized to enter into agreements with the state and other institutions or agencies for providing residential, group home and crisis foster home care.

§ 40.9. Records

The Cherokee Nation shall establish a single location where all records of every involuntary foster care, pre-adoptive placement and adoptive placement by the courts of any Indian child in the custody of the Cherokee Nation or the Oklahoma Department of Human Services or under Department of Human Services supervision will be available within seven (7) days of a request by the state, the tribe of the Indian child or by the Secretary of Interior. The records shall include, but not be limited to, all reports of the nation caseworker, including a summary of the efforts to rehabilitate the parents of the Indian child, a list of the names and addresses of families and tribal approved homes contacted regarding placement, and a statement of reason for the final placement decision.

Section 40.10 Foster care placement orders; evidence; determination of damage to child

No involuntary custody placement may be ordered in an involuntary custody proceeding, in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or custodian is likely to result in serious emotional or physical damage to the child, provided that nothing in this section shall prohibit a default order being entered by the Court in cases where a parent or custodian fails to appear for a hearing after receiving proper notice of that hearing; and provided further that nothing in this section will require the specified testimony if a parent or custodian appears before a judge and admits, stipulates, or enters a no-contest stipulation to the allegations in a petition.

Section 40.11 Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or custodian is likely to result in serious emotional or physical damage to the child, provided that nothing in this section shall prohibit a default order being entered by the Court in cases where a parent or custodian fails to appear for a hearing after receiving proper notice of that hearing; and provided further that nothing in this section will require the specified testimony if a parent or custodian appears before a judge and admits, stipulates, or enters a no-contest stipulation to the allegations in a petition.

SECTION 5. PROVISIONS AS CUMULATIVE

The provisions of this act shall be cumulative to existing law.

SECTION 6. SEVERABILITY

The provisions of this act are severable and if any part of provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

SECTION 7. EFFECTIVE DATE

It being immediately necessary for the welfare of the Cherokee Nation, the Council hereby declares that an emergency exists, by reason whereof this Act shall take effect immediately upon its approval and signatures.

SECTION 8. SELF-HELP CONTRIBUTIONS

To the extent that this Act involves programs or services to citizens of the Nation or others, self-help contributions shall be required, unless specifically prohibited by the funding agency, or a waiver is granted due to physical or mental incapacity of the participant to contribute.