

ACT No. 296

2018 Regular Session

HOUSE BILL NO. 182

BY REPRESENTATIVE JOHNSON

(On Recommendation of the Louisiana State Law Institute)

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), 1122(A)(3), and 1515(B), 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), 1122(A)(3), and 1515(B) 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

1 Indian child from a parent under circumstances in which the parent cannot have the
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 The purpose of the federal Indian Child Welfare Act (ICWA), 25 U.S.C.
12 1901-1963 and 25 C.F.R. 23, is to express a preference for keeping Indian children
13 with their families, deferring to tribal judgment on matters concerning the custody
14 of tribal children and placing Indian children who must be removed from their homes
15 within their own families or with their own or other Indian tribes. Among other
16 added responsibilities is a mandate that the court shall ensure and document in the
17 record a timely inquiry about Indian heritage. See Articles 612, 612.1, 624, 634,
18 661.1, 746, 1004, 1034.1, and 1122. If the court knows or has reason to know the
19 child is an Indian child, then the court must ensure and document in the record
20 adherence to the provisions of ICWA, including a thirty-day limit on emergency
21 removals, a determination of jurisdiction, proper notice to the appropriate tribe(s),
22 placement preferences, use of "qualified expert witnesses," and the burden of proof
23 required for the particular proceeding. ICWA also imposes significant procedural
24 requirements aimed at ensuring that the interests of a child's tribe and any tribal
25 heritage are recognized as important and distinguishable from the interests and rights
26 of the child's parents. Under ICWA, proper notice must be given in "child custody
27 proceedings" which include: "foster care placement; termination of parental rights;
28 pre-adoptive placement; adoptive placements; and some dispositions in families in
29 need of services cases." 25 C.F.R. 23.103. The terminology encompassing "child
30 custody proceedings" as defined in federal law has been adapted to Louisiana law in
31 Paragraph B of this Article. ICWA applies to private placements and adoptions as
32 well as those initiated by the state. 25 U.S.C. 1903(1). See also B.J. Jones, Mark
33 Tilden & Kelly Gaines-Stoner, *The Indian Child Welfare Act Handbook* (2008) (2d
34 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.

39 * * *

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
20 court finds that the child is not an Indian child in accordance with Article 661.1.

21 * * *

22 Art. 634. Contents of petition

23 A. The petition shall set forth with specificity:

24 (1) The name, date and place of birth, sex, race, and address of the child. If
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
32 condition.

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
37 know that the child is an Indian child. A child in need of care proceeding is a child
38 custody proceeding subject to the provisions of the federal Indian Child Welfare Act,
39 25 U.S.C. 1901-1963.

40 * * *

1 Affairs, Dec. 2016), Section 23.108, at p. 22. Thus, additional notice of changes in
2 placement or permanency hearings is not required. However, the Guidelines
3 recommend that state courts give notice of any change of placement as well as any
4 change to the child's permanency plan or concurrent plan. Guidelines for
5 Implementing the Indian Child Welfare Act (Bureau of Indian Affairs, Dec. 2016),
6 Section 23.111, at p. 30. In contrast, if the Department of Children and Family
7 Services seeks to terminate parental rights, notice must again be attempted. See
8 Article 1034.1.

9 * * *

10 Art. 749. Contents of petition

11 A. The petition shall set forth with specificity:

12 (1) The name, date, and place of birth, sex, race, address, and present
13 location of the child.

14 (2) The name, age, sex, race, and current address of the child's parents and
15 caretakers.

16 (3) The name, age, sex, and race of any other family members living within
17 the child's home.

18 (4) The name of any public institution or agency having the responsibility
19 or ability to supply services alleged to be needed by the family.

20 (5) ~~Whether~~ A statement as to whether the child is currently under the
21 supervision of any state or local entity, including but not limited to, the Department
22 of Children and Family Services or the Department of Public Safety and Corrections,
23 youth services, or the office of juvenile justice.

24 (6) A statement as to whether the petitioner knows or has reason to know
25 that the child is an Indian child and facts that support that statement.

26 B. If any of the information required by Paragraph A of this Article is
27 unknown, the petition shall so allege. Any defects in the allegations required by
28 Paragraph A of this Article shall be considered defects of form. The petitioner shall
29 inform the court if he subsequently discovers information indicating that the child
30 is an Indian child.

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Comments - 2018

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.

* * *

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

1 a detailed predisposition report and an affidavit attesting to its "active efforts" to
 2 avoid disruption of the Indian family. 25 U.S.C. 1912(d). Evidence from "qualified
 3 expert witnesses," who, among other attributes, must be familiar with Indian customs
 4 and traditions, must be received about potential placements. 25 U.S.C. 1912(c) and
 5 (f). ICWA mandates the use of specific "placement preferences" unless the court
 6 finds by clear and convincing evidence that there is good cause to depart from those
 7 preferences. 25 U.S.C. 1915(a) and 1916(b).

8 (c) Paragraph C governs the court's duty in the face of tribal inaction. After
 9 a FINS proceeding is commenced, if no response or motion to intervene has been
 10 received from the tribe or the Department of the Interior, the court may determine
 11 based on the information it has available that the child does not qualify as an Indian
 12 child. *Guidelines for Implementing the Indian Child Welfare Act* (Bureau of Indian
 13 Affairs, Dec. 2016), Section 23.108, at p. 22. Thus, additional notice of changes in
 14 placement or permanency hearings is not required. However, the Guidelines
 15 recommend that state courts give notice of any change of placement as well as any
 16 change to the child's permanency plan or concurrent plan. *Guidelines for*
 17 *Implementing the Indian Child Welfare Act* (Bureau of Indian Affairs, Dec. 2016),
 18 Section 23.111, at p. 30.

19 Art. 767.2. Reason to know a child is an Indian child; federal Indian Child Welfare
 20 Act

21 Upon conducting the inquiry required by Article 767.1, a court has reason to
 22 know that a child is an Indian child if any of the following occurs:

23 (1) A person before the court, an officer of the court involved in the
 24 proceeding, an Indian tribe, an Indian organization, or an agency informs the court
 25 that the child is an Indian child.

26 (2) A person before the court, an officer of the court involved in the
 27 proceeding, an Indian tribe, an Indian organization, or an agency informs the court
 28 that it has discovered information indicating that the child is an Indian child.

29 (3) The child who is the subject of the proceeding gives the court reason to
 30 know that he is an Indian child.

31 (4) The court is informed that the domicile or residence of the child, the
 32 child's parent, or the child's Indian custodian is on a reservation or in an Alaska
 33 Native village.

34 (5) The court is informed that the child is or has been a ward of a Tribal
 35 court.

36 (6) The court is informed that either parent or the child possesses an
 37 identification card indicating membership in an Indian tribe.

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Comments - 2018

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 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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Art. 1019. Contents of the petition

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A. The petition shall set forth with specificity:

16

(1) The name, date, and place of birth, sex, race, and address of the child.

17

If the child is in a foster home, the identification of the parish in which he resides shall suffice for his address.

18

19

(2) The name and current address of the child's parents.

20

(3) The name, age, and sex of any other biological relatives of the child who are currently living with the child in his home.

21

22

(4) The name of any public institution or agency having the responsibility or ability to supply services alleged to be needed by the family.

23

24

(5) A statement as to whether the petitioner knows or has reason to know that the child is an Indian child and facts that support that statement.

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B. If any of the information required by Paragraph A of this Article is unknown, the petition shall so allege. Any defects in the information required by Paragraph A of this Article shall be considered defects of form. The petitioner shall inform the court if he subsequently discovers information indicating that the child is an Indian child.

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Comments - 2018

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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

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1 court found at a prior CINC proceeding that there was no reason to believe that the
2 child was an Indian child, the issue of potential tribal affiliation must be readdressed
3 in the termination hearing, and even if notice was given to a tribe and the tribe failed
4 to answer, any tribe to which the child may be affiliated must be given new notice
5 of the termination proceeding. 25 C.F.R. 23.107. Courts must take special caution
6 in any certification action involving an Indian child so as not to destabilize any
7 adoption.

8 * * *

9 Art. 1034.1. Federal Indian Child Welfare Act inquiry

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

16 B. In accordance with Article 1034.2, if the court finds that there is reason
17 to know that the child is an Indian child, the court shall immediately proceed
18 pursuant to the federal Indian Child Welfare Act and the regulations promulgated
19 thereunder.

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

25 Comments - 2018

26 (a) The threshold issue under the federal Indian Child Welfare Act (ICWA)
27 is whether there is reason to know that the child is an Indian child in a child custody
28 proceeding. See Articles 103.1 and 1034.2. Paragraph A reflects the requirement
29 that an inquiry as to whether there is reason to know that the child is an Indian child
30 must be made at the commencement of every proceeding.

31 (b) Paragraph B requires the court to comply with ICWA, which is replete
32 with requirements that must be met before an Indian child is placed outside of his
33 parent's or Indian caretaker's home. Notice of the pending proceedings must be
34 given to the child's alleged tribe or tribes as well as to the Bureau of Indian Affairs.
35 25 U.S.C. 1912(a). The Department of Children and Family Services must submit
36 a detailed predisposition report and an affidavit attesting to its "active efforts" to

1 avoid disruption of the Indian family. 25 U.S.C. 1912(d). Evidence from "qualified
 2 expert witnesses," who, among other attributes, must be familiar with Indian customs
 3 and traditions, must be received about potential placements. 25 U.S.C. 1912(c) and
 4 (f). ICWA mandates the use of specific "placement preferences" unless the court
 5 finds by clear and convincing evidence that there is good cause to depart from those
 6 preferences. 25 U.S.C. 1915(a) and 1916(b).

7 (c) Paragraph C governs the court's duty in the face of tribal inaction. After
 8 a certification for adoption proceeding is commenced, if no response or motion to
 9 intervene has been received from the tribe or the Department of the Interior, the court
 10 may determine based on the information it has available that the child does not
 11 qualify as an Indian child. *Guidelines for Implementing the Indian Child Welfare Act*
 12 (Bureau of Indian Affairs, Dec. 2016), Section 23.108, at p. 22. Even though neither
 13 a tribe nor the Bureau of Indian Affairs responded to notice in an earlier proceeding,
 14 notice must again be attempted if the Department of Children and Family Services
 15 seeks to terminate parental rights.

16 Art. 1034.2. Reason to know a child is an Indian child; federal Indian Child Welfare

17 Act

18 Upon conducting the inquiry required by Article 1034.1, a court has reason
 19 to know that a child is an Indian child if any of the following occurs:

20 (1) A person before the court, an officer of the court involved in the
 21 proceeding, an Indian tribe, an Indian organization, or an agency informs the court
 22 that the child is an Indian child.

23 (2) A person before the court, an officer of the court involved in the
 24 proceeding, an Indian tribe, an Indian organization, or an agency informs the court
 25 that it has discovered information indicating that the child is an Indian child.

26 (3) The child who is the subject of the proceeding gives the court reason to
 27 know that he is an Indian child.

28 (4) The court is informed that the domicile or residence of the child, the
 29 child's parent, or the child's Indian custodian is on a reservation or in an Alaska
 30 Native village.

31 (5) The court is informed that the child is or has been a ward of a Tribal
 32 court.

33 (6) The court is informed that either parent or the child possesses an
 34 identification card indicating membership in an Indian tribe.

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Comments - 2018

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 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.

* * *

Art. 1122. Contents of surrender; form

A. Every Act of Surrender shall contain the following information:

* * *

(3) The birth name, place, ~~and~~ date of birth of the child, and a statement as to whether the child is an Indian child.

* * *

Comments - 2018

If the child to be surrendered is an Indian child, the provisions of the federal Indian Child Welfare Act are triggered and preempt inconsistent state law. 25 U.S.C. 1901-1963. The federal statute differs substantially from the provisions of this Title. For example, in accordance with 25 C.F.R. 23.125, an Indian child cannot be surrendered for adoption until the tenth day following his birth, in contrast to the time delays in Articles 1122 and 1130. More importantly, federal law grants the parent or Indian custodian the right to withdraw his consent to the child's pre-adoptive or adoptive placement at any time prior to the entry of a final decree of adoption, in contrast to Articles 1123 and 1263. Courts must proceed with special caution in any surrender of an Indian child to avoid destabilizing any adoption. 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 Indian Affairs, Dec. 2016). See also B.J. Jones, Mark Tilden & Kelly Gaines-Stoner, *The Indian Child Welfare Act Handbook* (2008) (2d ed.).

* * *

Art. 1515. Petition; contents; form

A. A petition for voluntary transfer of custody shall set forth specifically:

* * *

(8) Whether the child is an Indian child.

1 B. The form for the petition shall be as follows:

2 "PETITION FOR VOLUNTARY TRANSFER OF CUSTODY

3 The petition of _____ (all legal custodians of the child unless otherwise indicated
4 in Paragraph III of the petition), domiciled in the parish of _____, respectfully
5 represent(s):

6 I.

7 That petitioner(s) reside at the following address(es):

8 _____
9 _____

10 II.

11 That petitioner(s) is/are the parent(s) and legal custodian(s) of the minor child(ren),
12 namely _____, whose date of birth is _____ (add
13 same information for all children subject to the petition), as more fully appears from the
14 attached certificate(s) of birth.

15 Is the child an Indian child?

16 _____

17 Yes No

18 III.

19 That there are no other legal custodians of the child(ren) OR that a legal custodian,
20 namely _____, is unable to join in this petition for the following
21 reasons:

22 _____
23 _____
24 _____
25 _____.

26 IV.

27 That petitioner(s) desire(s) to knowingly and voluntarily transfer custody of the
28 above named children to _____, which individual(s), institution
29 or agency reside(s) at the following address:

1 _____ and who have the
2 following relationship with the children:

3 _____
4 _____.

5 V.

6 That petitioner(s) desire to transfer physical custody OR legal custody of the person
7 of the children (indicate one) for the period of time _____ (specify intended
8 duration) in accordance with the following terms and conditions

9 _____
10 _____

11 (may include provisions for support and/or visitation).

12 VI.

13 That petitioners desire this transfer of custody for the following reasons:

14 _____
15 _____
16 _____
17 _____
18 _____.

19 Has the Department of Children and Family Services recommended to you that this
20 petition be filed?

21 _____

22 Yes

No

23 If yes, state name of the Department of Children and Family Services worker
24 making the recommendation and the reasons for the recommendation with particularity.

25 If the department has recommended that this petition be filed, you have a right to
26 counsel. Have you consulted with an attorney?

27 _____

28 Yes

No

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VII.

That _____ has/have agreed to and does/do desire to accept custody of the child(ren) to the extent and under the terms and conditions stated in this petition, as more fully appears in the attached Affidavit of Acceptance.

WHEREFORE, petitioner(s) pray(s) that there be judgment herein transferring custody of the child(ren), _____, _____, _____, _____, to _____, to the extent and under the terms and conditions set forth in this petition.

(Signature and address of Petitioner(s))

or counsel for Petitioner(s)

(If in proper person, petition should be signed in presence of a notary.)

SWORN TO AND SUBSCRIBED BEFORE ME ON THIS THE ____ DAY OF _____, 20 ____.

NOTARY PUBLIC"

C. The petitioner shall inform the court if he subsequently discovers information indicating that the child is an Indian child.

* * *

Art. 1518. Pretrial orders; contribution to costs; appointment of counsel; Indian parent or custodian

* * *

C. If the court finds that the parent or custodian of an Indian child is indigent, it shall appoint counsel for the parent or custodian.

Comments - 2018

The Children's Code clearly calls for the appointment of counsel for indigent 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 rights. However, according to Paragraph B of this Article, the appointment of counsel is required only when the department has been involved in the parental decision-making. Paragraph C was added to make it clear that if the parent or custodian of an Indian child contemplates the child's transfer, the federal Indian Child Welfare Act, 25 U.S.C. 1912, requires that the court appoint counsel if the parent is indigent.

1 Section 2. A Comment to Children's Code Article 680 is hereby provided as follows:

2 Art. 680. Disposition hearing; evidence

3 * * *

4 Comments-2018

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

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____