

Testimony of Professor Dan Lewerenz (University of North Dakota School of Law)
In support of House Bill 1564
Wednesday, March 12, 2025

Chairwoman Lee, Vice-Chairman Weston, and members of the Senate Human Services Committee, thank you for this opportunity to testify in support of HB 1564. Representative Davis, thank you for the invitation. My name is Dan Lewerenz, and I am an Assistant Professor of Law and Director of the Indian Law & Tribal Law Certificate Program at the University of North Dakota School of Law, where I teach the Law School's Indian Child Welfare Act course. I also am a member of the Iowa Tribe of Kansas and Nebraska, and I work with the North Dakota ICWA Best Practices Partnership, a joint Tribal-State-Private collaboration led by UND to improve Indian Child Welfare implementation and cooperation throughout the State. I say that only by manner of introduction; the opinions expressed in my testimony here today are my own, and do not necessarily represent the views of my employer, my Tribe, or the Partnership.

I urge you today to advance HB 1564, which would amend what I will refer to as the North Dakota Indian Child Welfare Act (or North Dakota ICWA), for two reasons. First, the North Dakota ICWA was necessary when it was enacted by this Legislature two years ago, and it remains vitally important today. Second, the proposed amendments in HB 1564 would make important improvements that will both clarify and streamline the existing law. In addition, and with the support of HB 1564's principal sponsor, Representative Davis, I offer three simple (but important) proposed amendments that would further clarify and simplify the law, but which do not change the substance of the bill that passed the House.

First, the North Dakota ICWA was, and still is, vitally important. The Legislature enacted the North Dakota ICWA at a time when the Federal Indian Child Welfare Act faced the existential threat of the *Brackeen* litigation. Fortunately, the U.S. Supreme Court held that the Federal ICWA did not exceed Congress's Indian Affairs power and did not commandeer the States.¹ That battle was won, but the war is not over. In fact, next month the Minnesota Supreme Court will hear argument in a new case, initiated by some of the same anti-ICWA activists behind *Brackeen*, that once again challenges the constitutionality of ICWA.² This Legislature's enactment of the North Dakota ICWA two years ago sent a powerful message that this State stands side-by-side with Tribes, child welfare professionals, and the majority of other States in recognizing that ICWA embodies the gold standard in child welfare policy and practice. If this Committee advances and this Legislature ultimately enacts HB 1564, it will send an equally powerful message that North Dakota will not be cowed by radical activists and their small-minded agenda.

Second, HB 1564 would make important improvements to the North Dakota ICWA. For starters, the bill corrects some drafting errors that inadvertently made their way into the original North Dakota ICWA. The current law, for example, accidentally covers an award of custody to one of the parents

¹ *Haaland v. Brackeen*, 599 U.S. 255 (2023).

² *In re Welfare of Children of L.K. and A.S.*, No. A24-1296 (Minn.) (argument scheduled April 1, 2025).

in a divorce proceeding, and HB 1564 would correct that error. In addition, HB 1564 would clarify some provisions that attorneys and social workers implementing the North Dakota ICWA have found confusing. For example, in an attempt to be comprehensive in describing the proceedings covered by the North Dakota ICWA, the current law makes reference to “foster care or nonfoster care placement.” But “nonfoster care placement” is not a term regularly used in child welfare practice in this State, and practitioners were unsure what that term was intended to cover. So HB 1564 would delete that term. Also, Section 27-19.1-01(3) in the North Dakota ICWA concerns ordinary foster care proceedings, but contains language that looks like it should apply instead to emergency proceedings, which has created confusion. HB 1564 would restructure the North Dakota ICWA in a way that better clarifies which standards apply to which proceedings.

With my testimony, I have also submitted a redline of HB 1564 proposing three simple amendments. I want to stress that none of these amendments changes the substance of the bill already advanced by the House; instead, they would simply further clarify the law. Specifically:

- In Section 27-19.1-01(1)(d) I recommend either an amendment to, or a substitution for, a phrase in the current North Dakota ICWA that is undefined in North Dakota law and that, if it is not amendment, might cause confusion.
- In Section 27-19.1-01(3), where HB 1564 would add some language, I recommend instead adding that language just a few sections below to Section 27-19.1-01(6). This, too, is in the interest of clarity. Both the Federal ICWA and the North Dakota ICWA treat foster care proceedings and emergency proceedings differently, with different rules applying to each. Section 3 mostly concerns foster care proceedings, but the proposed new language in HB 1564 concerns emergency proceedings. My concern is that addressing them both in the same section will create confusion. (In fact, that is the very reason that HB 1564 would delete one sentence from Section 3; it was a sentence that fit better with emergency proceedings than with foster care proceedings.) My recommendation preserves HB 1564’s language in tact, but simply moves it down to Section 6, consolidating it with other provisions that concern emergency proceedings.
- Finally, I recommend a minor reorganization of what the current law provides at Section 27-19.1-02(4) and (5), which HB 1564 had consolidated under a single Section 5. Representative Davis and the sponsors of HB 1564 appropriately recognized that the current law accidentally has some duplication: Sections 4 and 4.a in the current law are exactly the same as Sections 5 and 5.a, and that duplication serves no purpose. Thus, HB 1564 combines them into a single section, a move that I generally endorse. However, one of the subsections, subsection 4.b in the current law (and subsection 5.b in HB 1564) does not fit with the others. These sections generally concern the transfer of Indian child welfare cases from State court to Tribal court when there is concurrent jurisdiction—i.e., when either court could handle a case. Subsection 4.b, on the other hand, describes conditions when Tribal courts have exclusive jurisdiction—i.e., when only Tribal courts can handle a case. My proposed edits would isolate the current Subsection 4.b as a stand-alone Section 5, and otherwise would follow HB 1564 in eliminating

the duplicated language and consolidating the rest of the former Sections 4 and 5 under a new Section 6.

I also am aware of proposed amendments that will be offered by North Dakota Supreme Court's Court Improvement Program. I have discussed that proposal with its backers, and I endorse those proposed amendments as well.

I will close by saying that no legislation, whether enacted or proposed, is perfect. Those of us who work on Indian Child Welfare in North Dakota continue to gather feedback both on the North Dakota ICWA as enacted in 2023 and on HB 1564, and I expect that in years to come we will come back to this body with further amendments to make North Dakota's ICWA even better. But for now, it is important that this Committee advance HB 1564, preferably with the proposed amendments, so that North Dakota can continue to be a leader in Indian Child Welfare best practices.

I am happy to answer any questions the Committee has of me, whether today or in the future.

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HOUSE BILL NO. 1564

Introduced by

Representatives Davis, Beltz, Brown, Finley-DeVill, Holle

Senators Cleary, Cory, Hogan, Lee, Weston

1 A BILL for an Act to amend and reenact sections 27-19.1-01 and 27-19.1-02, subsection 1 of
2 section 27-19.1-03, subsection 1 of section 27-19.1-04, and sections 27-19.1-05 and
3 27-19.1-06 of the North Dakota Century Code, relating to Indian child welfare.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Section 27-19.1-01 of the North Dakota Century Code is
6 amended and reenacted as follows:

7 **27-19.1-01. Active efforts and procedures - Definitions.**

8 1. As used in this chapter, ~~unless context requires otherwise:~~

9 a. "Active efforts" means affirmative, active, thorough, and timely efforts intended
10 primarily to maintain or reunite an Indian child with the Indian child's family. If an
11 agency is involved in the child custody proceeding, active efforts must involve
12 assisting the parent or a parent or Indian custodian with the steps of a case plan
13 and including accessing or developing the resources necessary to satisfy the
14 case plan. To the maximum extent possible, active efforts should be provided in a
15 manner consistent with the prevailing social and cultural conditions and way of
16 life of the Indian child's tribe and should be conducted in partnership with the
17 Indian child and the Indian child's parents, extended family members, Indian
18 custodians, and tribe. Active efforts are to be tailored to the facts and
19 circumstances of the case. The term includes:

20 (1) Conducting a comprehensive assessment of the circumstances of the
21 Indian child's family, with a focus on safe reunification as the most desirable
22 goal, with ongoing timely assessment to determine when the threat is
23 resolved and placement of the Indian child can be returned to the custodian.

- (2) Identifying appropriate services and helping a parent or Indian custodian to overcome barriers, including actively assisting a parent or Indian custodian in obtaining such services.
 - (3) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues.
 - (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parent or Indian custodian.
 - (5) Offering and employing available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the Indian child's tribe.
 - (6) Taking steps to keep siblings together, if possible.
 - (7) Supporting regular visits with a parent or Indian custodian in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the Indian child.
 - (8) Identifying community resources, including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parent or Indian custodian or, as appropriate, the Indian child's family, in utilizing and accessing those resources.
 - (9) Monitoring progress and participation in services.
 - (10) Considering alternative ways to address the needs of the Indian child's parent or Indian custodian and where appropriate, the family, if the optimum services do not exist or are not available.
 - (11) Providing post-reunification services and monitoring.
- b. "Adoptive placement" means the permanent placement of an Indian child for adoption.

- 1 c. "Extended family member" means a relationship defined by the law or custom of
2 the Indian child's tribe or, in the absence of such law or custom, means an
3 individual who has reached the age of eighteen and who is the Indian child's
4 grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece
5 or nephew, first or second cousin, or stepparent.
- 6 d. "~~Foster care or nonfoster care~~ placement" means the removal of an Indian child
7 from the home of his or her parent or Indian custodian for temporary placement in
8 a foster home, qualified residential treatment program, residential care center for
9 Indian children and youth, or certified shelter care facility, in the home of a
10 relative other than a parent or Indian custodian, or in the home of a guardian,
11 from which placement the parent or Indian custodian cannot have the Indian child
12 returned upon demand. The term does not include an adoptive placement, a
13 preadoptive placement, ~~and an~~ emergency change in placement under section
14 27-20.3-06, or holding an Indian child in custody.
- 15 e. "Indian" means an individual who is a member of an Indian tribe, or who is a
16 native and a member of a regional corporation as defined under 43 U.S.C. 1606.
- 17 f. "Indian child" means any unmarried individual who is under the age of eighteen
18 and is either a member of an Indian tribe or is eligible for membership in an
19 Indian tribe and is the biological child of a member of an Indian tribe.
- 20 g. "Indian child custody proceeding" means a proceeding brought by the state
21 involving:
22 (1) Foster care ~~or nonfoster care~~ placement;
23 (2) A preadoptive placement;
24 (3) An adoptive placement; or
25 (4) A termination of parental rights under section 27-20.3-20 for an Indian child.
- 26 h. "Indian child's tribe" means the Indian tribe in which an Indian child is a member
27 or eligible for membership or, in the case of an Indian child who is a member of or
28 eligible for membership in more than one tribe, the Indian tribe with which the
29 Indian child has the more significant contacts.
- 30 i. "Indian custodian" means any Indian individual who has legal custody of an
31 Indian child under tribal law or custom or under state law or to whom temporary

1 physical care, custody, and control has been transferred by the parent of the
2 Indian child.

3 j. "Indian tribe" means an Indian tribe, band, nation, or other organized Indian
4 group or community of Indians recognized as eligible for services provided to
5 Indians by the United States secretary of the interior because of their status as
6 Indians, including any Alaska native village as defined in 43 U.S.C. 1602(c).

7 k. "Parent" means a biological parent or parents of an Indian child or an Indian
8 individual who has lawfully adopted an Indian child, including adoptions under
9 tribal law or custom. The term does not include the unwed father if paternity has
10 not been acknowledged or established.

11 l. "Preadoptive placement" means the temporary placement of an Indian child in a
12 foster home, home of a relative other than a parent or Indian custodian, or home
13 of a guardian after a termination of parental rights but before or in lieu of an
14 adoptive placement, but does not include an emergency change in placement
15 under section 27-20.3-06.

16 m. "Termination of parental rights" means any action resulting in the termination of
17 the parent-child relationship. It does not include a placement based upon an act
18 by an Indian child which, if committed by an adult, would be deemed a crime or a
19 placement upon award of custody to one of the Indian child's parents in a divorce
20 proceeding.

21 2. Before removal of an Indian child from the custody of a parent or Indian custodian for
22 purposes of involuntary foster care placement or the termination of parental rights over
23 an Indian child, the court shall find that active efforts have been made to provide
24 remedial services and rehabilitative services designed to prevent the breakup of the
25 Indian family and that these efforts have proved unsuccessful. The court may not
26 order the removal unless evidence of active efforts shows there has been a vigorous
27 and concerted level of casework beyond the level that would constitute reasonable
28 efforts under section 27-20.3-26. Reasonable efforts may not be construed to be
29 active efforts. Active efforts must be made in a manner that takes into account the
30 prevailing social and cultural values, conditions, and way of life of the Indian child's
31 tribe. Active efforts must utilize the available resources of the Indian child's extended

1 family, tribe, tribal and other relevant social service agencies, and individual Indian
2 caregivers.

3 3. The court may order the removal of the Indian child for involuntary foster care
4 placement only if the court determines, by clear and convincing evidence, that
5 continued custody of the Indian child by the parent or Indian custodian is likely to
6 result in serious emotional or physical damage to the Indian child. Evidence must
7 show a causal relationship between the particular conditions in the home and the
8 likelihood that continued custody of the Indian child will result in serious emotional or
9 physical damage to the particular Indian child who is the subject of the proceeding.
10 Poverty, isolation, custodian age, crowded or inadequate housing, substance use, or
11 nonconforming social behavior does not by itself constitute clear and convincing
12 evidence of imminent serious emotional or physical damage to the Indian child. As
13 soon as the threat has been removed and the Indian child is no longer at risk, the state
14 should terminate the removal, by returning the Indian child to the parent or Indian
15 custodian while offering a solution to mitigate the situation that gave rise to the need
16 for emergency removal and placement.

17 4. The court may order the termination of parental rights over the Indian child only if the
18 court determines, by evidence beyond a reasonable doubt that continued custody of
19 the Indian child by the parent or Indian custodian is likely to result in serious emotional
20 or physical damage to the Indian child.

21 5. In considering whether to involuntarily place an Indian child in foster care or to
22 terminate the parental rights of the parent of an Indian child, the court shall require that
23 a qualified expert witness must be qualified to testify regarding whether the Indian
24 child's continued custody by the parent or Indian custodian is likely to result in serious
25 emotional or physical damage to the Indian child and should be qualified to testify as

1 to the prevailing social and cultural standards of the Indian child's tribe. An individual
2 may be designated by the Indian child's tribe as being qualified to testify to the
3 prevailing social and cultural standards of the Indian child's tribe. If the parties
4 stipulate in writing and the court is satisfied the stipulation is made knowingly,
5 intelligently, and voluntarily, the court may accept a declaration or affidavit from a
6 qualified expert witness in lieu of testimony. If one or more parties have been found to
7 be in default under the North Dakota Rules of Civil Procedure, the court may accept a
8 declaration or affidavit from a qualified expert witness without a stipulation in writing
9 from the defaulted parties. The court or any party may request the assistance of the
10 Indian child's tribe or the bureau of Indian affairs office serving the Indian child's tribe
11 in locating individuals qualified to serve as expert witnesses. The social worker
12 regularly assigned to the Indian child may not serve as a qualified expert witness in
13 child custody proceedings concerning the Indian child. The qualified expert witness
14 should be someone familiar with the particular Indian child and have contact with the
15 parent or Indian custodian to observe interaction between the parent or Indian
16 custodian, Indian child, and extended family members. The child welfare agency and
17 courts should facilitate access to the family and records to facilitate accurate
18 testimony.

26 6. If a court order authorizes the emergency
27 removal of the Indian child from the parent or Indian custodian of the child under this
28 section, the order must be accompanied by a declaration that includes:

29 a. The name, tribal affiliation, and address of the Indian child, each parent of the
30 Indian child, and the Indian custodian of the child, as applicable; and

31 b. A detailed account of the circumstances that led the agency responsible for
19 emergency removal of the child to take that action.

20 An emergency removal or placement of an Indian child under state law must terminate
21 immediately when the removal or placement is no longer necessary to prevent
22 imminent physical damage or harm to the Indian child. If removal or placement is
23 determined to be no longer necessary, the child welfare agency shall terminate the
24 removal by returning the Indian child to the parent or Indian custodian and offer a
25 solution to mitigate the situation that gave rise to the need for emergency removal and
26 placement.

- 27 7. If an Indian child is the subject of a shelter care hearing, the party initiating the hearing
28 shall provide the court with a declaration that includes the specific actions that have
29 been taken to assist the parent or Indian custodian since the emergency removal so
30 the child may be safely returned to the custody of the parent or Indian custodian, and
31 the specific actions the initiating party intends to take so the Indian child may be
32 returned safely without initiating an Indian child custody proceeding.

1 8. To facilitate the intent of this chapter, the agency, in cooperation with the Indian child's
2 tribe of affiliation, unless a parent objects, shall take steps to enroll the Indian child in
3 the tribe with the goal of finalizing enrollment before termination.

4 **SECTION 2. AMENDMENT.** Section 27-19.1-02 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **27-19.1-02. Jurisdiction over custody proceedings.**

7 1. This chapter includes requirements that apply if an Indian child is the subject of:

8 a. A child custody proceeding, including:

9 (1) An involuntary proceeding; ~~and~~

10 (2) A voluntary proceeding that could prohibit the parent or Indian custodian
11 from regaining custody of the Indian child upon demand; and

12 (3) A proceeding involving status offenses if any part of the proceeding results
13 in the need for out-of-home placement of the child, including a foster care,
14 preadoptive or adoptive placement, or termination of parental rights.

15 b. An emergency proceeding ~~other than:~~

16 (1) ~~A tribal.~~

17 2. This chapter does not apply to:

18 a. A tribal court proceeding; ~~or~~

19 ~~(2)~~b. A proceeding regarding a delinquent act;


20 c. An award of custody of the Indian child to one of the parents, including an award
21 in a divorce proceeding; or

22 d. A voluntary placement that either parent, both parents, or the Indian custodian
23 has, of his or her or their free will, without a threat of removal by a state agency,
24 chosen for the Indian child and that does not operate to prohibit the Indian child's
25 parent or Indian custodian from regaining custody of the Indian child upon
26 demand.

27 2-3. If a proceeding under subsection 1 concerns an Indian child, this chapter applies to
28 that proceeding. In determining whether this chapter applies to a proceeding, the state
29 court may not consider factors such as the participation of a parent or the Indian child
30 in tribal cultural, social, religious, or political activities; the relationship between the


1 Indian child and the Indian child's parent; whether the parent ever had custody of the
2 Indian child; or the Indian child's blood quantum.

3 ~~3.4.~~ If this chapter applies at the commencement of a proceeding, this chapter does not
4 cease to apply solely because the Indian child reaches age eighteen during the
5 pendency of the proceeding.

6 ~~4.5.~~  An Indian tribe has exclusive jurisdiction over an Indian child custody proceeding
7 involving an Indian child who resides or is domiciled within the reservation of the
8 tribe, except if that jurisdiction is otherwise vested in the state by federal law. If an
9 Indian child is a ward of a tribal court, the Indian tribe retains exclusive
10 jurisdiction regardless of the residence or domicile of the Indian child.

11 6. In an Indian child custody proceeding under this chapter involving an Indian child who
12 is not residing or domiciled within the reservation of the Indian child's tribe, the court
13 assigned to exercise jurisdiction under this chapter, upon the petition of the Indian
14 child's parent, Indian custodian, or tribe, shall transfer the proceeding to the
15 jurisdiction of the tribe unless any of the following apply:

16 a. A parent of the Indian child objects to the transfer.

17  ~~b.c.~~ The Indian child's tribe does not have a tribal court, or the tribal court of the
18 Indian child's tribe declines jurisdiction.

19 ~~c.d.~~ The court determines good cause exists to deny the transfer. In determining
20 whether good cause exists to deny the transfer, the court may not consider any
21 perceived inadequacy of the tribal social services department or the tribal court of
22 the Indian child's tribe. The court may determine good cause exists to deny the
23 transfer only if the person opposing the transfer shows by clear and convincing
24 evidence the evidence or testimony necessary to decide the case cannot be
25 presented in tribal court without undue hardship to the parties or the witnesses

and that the tribal court is unable to mitigate the hardship by making arrangements to receive the evidence or testimony by use of telephone or live audiovisual means, by hearing the evidence or testimony at a location that is convenient to the parties and witnesses, or by use of other means permissible under the tribal court's rules of evidence.

7. An Indian child's tribe may intervene at any point in an Indian child custody proceeding.

8. The state shall give full faith and credit to the public acts, records, and judicial proceedings of an Indian tribe which are applicable to an Indian child custody proceeding to the same extent that the state gives full faith and credit to the public acts, records, and judicial proceedings of any other governmental entity.

SECTION 3. AMENDMENT. Subsection 1 of section 27-19.1-03 of the North Dakota Century Code is amended and reenacted as follows:

1. In a proceeding involving the foster care ~~or nonfoster care~~ placement of or termination of parental rights to an Indian child whom the court knows or has reason to know may be an Indian child, the party seeking the foster care ~~or nonfoster care~~ placement or termination of parental rights, for the first hearing of the proceeding, shall notify the Indian child's parent, Indian custodian, and tribe, by registered mail, return receipt requested, of the pending proceeding and of the parties' right to intervene in the proceeding and shall file the return receipt with the court. Notice of subsequent hearings in a proceeding must be in writing and may be given by mail, personal delivery, facsimile transmission, or electronic mail. If the identity or location of the Indian child's parent, Indian custodian, or tribe cannot be determined, that notice shall be given to the United States secretary of the interior in like manner. The first hearing in the proceeding may not be held until at least ten days after receipt of the notice by the parent, Indian custodian, and tribe or until at least fifteen days after receipt of the notice by the United States secretary of the interior. On request of the parent, Indian custodian, or tribe, the court shall grant a continuance of up to twenty additional days to enable the requester to prepare for that hearing.

SECTION 4. AMENDMENT. Subsection 1 of section 27-19.1-04 of the North Dakota Century Code is amended and reenacted as follows:

- 1 1. A voluntary consent by a parent or Indian custodian to a foster care ~~or nonfoster care~~
2 placement of an Indian child is not valid unless the consent or delegation is executed
3 in writing, recorded before a judge, and accompanied by a written certification by the
4 judge that the terms and consequences of the consent or delegation were fully
5 explained in detail to and were fully understood by the parent or Indian custodian. The
6 judge also shall certify the parent or Indian custodian fully understood the explanation
7 in English or that the explanation was interpreted into a language the parent or Indian
8 custodian understood. Any consent or delegation of powers given under this
9 subsection before or within ten days after the birth of the Indian child is not valid. A
10 parent or Indian custodian who has executed a consent or delegation of powers under
11 this subsection may withdraw the consent or delegation for any reason at any time,
12 and the Indian child must be returned to the parent or Indian custodian. A parent or
13 Indian custodian who has executed a consent or delegation of powers under this
14 subsection also may move to invalidate the out-of-home care placement.

15 **SECTION 5. AMENDMENT.** Section 27-19.1-05 of the North Dakota Century Code is
16 amended and reenacted as follows:

17 **27-19.1-05. ~~Placements~~Placement preferences.**

- 18 1. Subject to subsections 3 and 4, in placing an Indian child for adoption or in delegating
19 powers, as described in a lawful executed power of attorney regarding an Indian child,
20 preference must be given, in the absence of good cause, as described in
21 subsection 6, to the contrary, to a placement with or delegation to one of the following,
22 in the order of preference listed:
- 23 a. The tribe's statutory adopted placement preference, if applicable;
 - 24 b. An extended family member of the Indian child;
 - 25 ~~b.c.~~ Another member of the Indian child's tribe;
 - 26 ~~c.d.~~ Another Indian family with whom the Indian child has a relationship or an Indian
27 family from a tribe that is culturally similar to or linguistically connected to the
28 Indian child's tribe; or
 - 29 ~~d.e. The tribe's statutory adopted placement preferences~~ Another Indian family.
- 30 2. An Indian child who is accepted for a foster care ~~or nonfoster care~~ placement or a
31 preadoptive placement must be placed in the least restrictive setting that most

approximates a family that meets the Indian child's special needs, if any, and which is within reasonable proximity to the Indian child's home, taking into account those special needs. Subject to subsections 4 and 6, in placing an Indian child in a foster care ~~or nonfoster care~~ placement or a preadoptive placement, preference must be given, in the absence of good cause, as described in subsection 6, to the contrary, to a placement in one of the following, in the order of preference listed:

a. The tribe's statutory adopted placement preference, if applicable;

b. The home of an extended family member of the Indian child;

~~b.c.~~ A foster home licensed, approved, or specified by the Indian child's tribe;

~~c.d.~~ An Indian foster home licensed or approved by the department; or

~~d.e.~~ A qualified residential treatment facility or residential care center for children and youth approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the needs of the Indian child.

3. An Indian child who is the subject of an emergency removal or placement under a child custody determination under section 27-20.3-06 must be placed in compliance with foster care ~~or nonfoster care~~ placement or preadoptive placement preferences, unless the person responsible for determining the placement finds good cause, as described in subsection 6, for departing from the order of placement preference under subsection 2 or finds that emergency conditions necessitate departing from that order. When the reason for departing from that order is resolved, the Indian child must be placed in compliance with the order of placement preference under subsection 2.

4. In placing an Indian child under subsections 1 and 2 regarding an Indian child under subsection 1, if the Indian child's tribe has established, by resolution, an order of preference that is different from the order specified in subsection 1 or 2, the order of preference established by that tribe must be followed, in the absence of good cause, as described in subsection 6, to the contrary, so long as the placement under subsection 1 is appropriate for the Indian child's special needs, if any, and the placement under subsection 2 is the least restrictive setting appropriate for the Indian child's needs as specified in subsection 2.

5. The standards to be applied in meeting the placement preference requirements of this subsection must be the prevailing social and cultural standards of the Indian

community in which the Indian child's parent, Indian custodian, or extended family members reside or with which the Indian child's parent, Indian custodian, or extended family members maintain social and cultural ties.

6. a. If a party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child custody proceeding and the court.
- b. The party seeking departure from the placement preferences bears the burden of proving by clear and convincing evidence that there is good cause to depart from the placement preferences.
- c. A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and must be based on one or more of the following considerations:
 - (1) The request of the Indian child's parent, if they attest that they have reviewed the placement options, if any, that comply with the order of preference.
 - (2) The request of the Indian child, if the Indian child is of sufficient age and capacity to understand the decision being made.
 - (3) The presence of a sibling attachment that can be maintained only through a particular placement.
 - (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.
 - (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent, Indian custodian, or extended family resides or with which the Indian child's parent, Indian custodian, or extended family members maintain social and cultural ties.

- 1 d. A placement may not depart from the preferences based on the socioeconomic
- 2 status of any placement relative to another placement.
- 3 e. A placement may not depart from the preferences based solely on ordinary
- 4 bonding or attachment that flowed from time spent in a nonpreferred placement
- 5 that was made in violation of this chapter.
- 6 f. The burden of establishing good cause to depart from the order of placement
- 7 preference is on the party requesting that departure.
- 8 7. The department or a child welfare agency shall maintain a record of each adoptive
- 9 placement, foster care ~~or non-foster care~~ placement, preadoptive placement, and
- 10 delegation of powers, made of an Indian child, evidencing the efforts made to comply
- 11 with the placement preference requirements specified in this section, and shall make
- 12 that record available at any time on the request of the United States secretary of the
- 13 interior or the Indian child's tribe.

14 **SECTION 6. AMENDMENT.** Section 27-19.1-06 of the North Dakota Century Code is
15 amended and reenacted as follows:

16 **27-19.1-06. Adoptee information.**

- 17 1. The state court entering a final adoption decree or order in any voluntary or involuntary
- 18 Indian child adoptive placement must furnish a copy of the decree or order within thirty
- 19 days to the Bureau of Indian Affairs, ~~Chief, Division of Human Services, 1849~~
- 20 ~~C Street NW, Mail Stop 3645 MIB, Washington, DC 20240~~ as prescribed by the Bureau
- 21 of Indian Affairs, along with the following information, in an envelope marked
- 22 "Confidential":
 - 23 a. The birth name and birth date of the Indian child, and tribal affiliation and name of
 - 24 the Indian child after adoption;
 - 25 b. The names and addresses of the biological parents;
 - 26 c. The names and addresses of the adoptive parents;
 - 27 d. The name and contact information for any agency having files or information
 - 28 relating to the adoption;
 - 29 e. Any affidavit signed by the biological parent or parents requesting the parent's
 - 30 identity remain confidential; and

- 1 f. Any information relating to tribal membership or eligibility for tribal membership of
2 the adopted Indian child.
- 3 2. The court shall give the birth parent of an Indian child the opportunity to file an affidavit
4 indicating that the birth parent wishes the United States secretary of the interior to
5 maintain the confidentiality of the birth parent's identity. If the birth parent files that
6 affidavit, the court shall include the affidavit with the information provided to the United
7 States secretary of the interior under subsection 1, and that secretary shall maintain
8 the confidentiality of the birth parent's identity.