WYOMING LEGISLATIVE SERVICE OFFICE

Fact Sheet

STATE SAFE HAVEN LAWS AND THE FEDERAL INDIAN CHILD WELFARE ACT

September 2023

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A 2009 Children's Legal Rights Journal article reports only four of 50 state safe haven laws have statutory provisions which attempt to incorporate the policy goals of the federal Indian Child Welfare Act (ICWA); the other 46 state safe haven laws are silent in their Safe Haven provisions on tribal affiliation.[1] LSO research confirms the safe haven or parental termination statutes in Montana, New Mexico, South Dakota, and Wisconsin include provisions regarding ICWA or tribal child welfare laws. LSO also examined the safe haven and parental rights termination laws in five additional surrounding states (Colorado, Idaho, Nebraska, North Dakota, and Utah) and found the laws do not reference ICWA or tribal courts.

See **Appendix A** for the 2009 Children's Legal Rights Journal article regarding Safe Haven Laws and ICWA.

MONTANA

Montana's Safe Haven Newborn Protection Act requires an emergency service provider to whom a newborn is surrendered to make reasonable effort, if possible, to ascertain whether the newborn has a tribal affiliation and, if so, ascertain relevant information pertaining to any Indian heritage of the newborn.[2] The statute also requires the emergency service provider to provide the parent with written material approved or produced by the Montana Department of Public Health and Human Services stating any Indian heritage of the newborn brings the newborn within the jurisdiction of the federal Indian Child Welfare Act, 24 U.S.C. 1901, et seq.[3]

In July 2023, the Montana Legislature enacted House Bill 317 establishing the Montana Indian Child Welfare Act (Montana ICWA) and amending the Montana Safe Haven Newborn Protection Act to require the Department of Public Health and Human Services and courts to abide by

[1] Paul Stenzel, Safe Haven Laws and the Indian Child Welfare Act: *Conflicting Laws and Policy Goals Leave Indian Children at Risk*, 29 Child. Legal Rts. J.1, 7 (Fall 2009).
[2] MCA 40-6-405(2)(d).
[3] MCA 40-6-405(2)(e)(vi).

applicable sections of the Montana ICWA when considering child welfare cases or issuing court orders regarding custody.[4] The Montana ICWA Act took effect July 1, 2023 and will terminate June 20, 2025.[5]

See **Appendix B** for the recently amended Montana Safe Haven Newborn Protection Act.

NEW MEXICO

The New Mexico Safe Haven for Infants Act states the Act is not intended to abridge the rights or obligations created by the federal Indian Child Welfare Act.[6] The Safe Haven Act requires the New Mexico Department of Children, Youth and Families to make reasonable efforts to determine whether a surrendered infant is an Indian child.[7] If the infant is an Indian child, the Department is required to notify the child's tribe as required by New Mexico statutes and the federal Indian Child Welfare Act and place the child in accordance with State statutes regarding Indian child placement preferences.[8]

See **Appendix C** for New Mexico's Safe Haven for Infants Act.

SOUTH DAKOTA

South Dakota's Voluntary Termination of Parental Relations statute includes a requirement that due regard be afforded to the Indian Child Welfare Act, if that Act is applicable.[9]

WISCONSIN

Wisconsin's statute regarding taking a newborn child into custody, allows information about the relinquished child to be disclosed to a tribal court or other adjudicative body exercising jurisdiction over custody proceedings related to the child.[10]

[4] MCA 40-6-407(1)(e); 40-6-413(2); 40-6-414.
[5] 2023 Montana HB 317 Section 54 and Section 55.
[6] N.M. Stat. Ann. 24-22-1.1.
[7] N.M. Stat. Ann. 24-22-5(C).
[8] N.M. Stat. Ann. 24-22-5(C).
[9] S.C. Codified Laws 25-5A-36.
[10] Wis. Stat 48.195(2)(d)(7).

Appendix A

ARTICLE: Safe Haven Laws and the Indian Child Welfare Act: Conflicting Laws and Policy Goals Leave Indian Children at Risk

Fall 2009

Reporter
29 Child. Legal Rts. J. 1 *

Length: 9726 words

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Text

[*1] I. Introduction

By early 2008, all fifty states implemented some form of Safe Haven laws. These laws provide a legal safe haven to a parent or parents who wish to anonymously relinquish their newborn children without facing civil or criminal liability for that act. [1] The laws aim to avoid the loss of infant lives caused by a parent, usually a young mother, who unsafely abandons his or her newborn to avoid the negative personal consequences of the birth. Such a law's policy implications are substantial. Advocacy groups and scholars have raised concerns about the rights of fathers [2] and adoptees. [3] Fathers' rights are implicated because usually mothers anonymously relinquish a newborn child,

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[1] ALA. CODE §§ 26-25-1-5 (2008); ALASKA STAT. § 47.10.013(c) (2008); ARIZ. REV. STAT. § 13-3623.01 (2008); ARK. CODE ANN. § 9-34-202 (2008); CAL. PENAL CODE § 271.5 (2008); COLO. REV. STAT. § 19-3-304.5 (2008); CONN. GEN. STAT. §§ 17a-57, 58, 59 (2008); DEL. CODE ANN. tit. §§ 902, 907a (2008); FLA. STAT. § 383.50 (2008); GA. CODE ANN. §§ 19-10A-2-7 (2008); HAW. REV. STAT. 587D (2008); IDAHO CODE ANN. §§ 39-8202 to 39-8206 (2008); 325 ILL. COMP. STAT. § 2/10, 2/20, 2/25, 2/27, 2/40 (2008); IND. CODE §§ 31-34-2.5-1, 35-46-1-4 (2008); IOWA CODE §§ 233.1-233.5 (2008); KAN. STAT. ANN. §§ 38-2282, 21-3604 (2008); KY. REV. STAT. ANN. §§ 216B.190, 405.075, 620.350 (2008); LA. CHILD. CODE ANN. art. §§ 1150-1152 (2008); ME. REV. STAT. ANN. TIT. § 4018 (2008); MD. CODE ANN. CTS. & JUD. PRO. § 5-641 (2008); MASS. GEN. LAWS CH. 119, § 391/2 (2008); MICH. COMP. LAWS §§ 712.1-712.5, 712.20 (2008); MINN. STAT. §§ 145.902, 609.3785 (2008); MISS. CODE ANN. §§ 43-15-201, 203, 205, 207, 209 (2008); MO. REV. STAT. §§ 210.950 (2008); MONT. CODE ANN. §§ 40-6-402-405, 417 (2008); NEB. REV. STAT. § 29-121 (***2009***); NEV. REV. STAT. §§ 432B.630, 200.508, 201.110 (2008); N.H. REV. STAT. ANN. §§ 132-A:1-4 (2008); N.J. REV. STAT. § 30:4C-15.7 (2008); N.M. Stat. §§ 24-22-3, 4, 5, 7, 8 (2008); N.Y. PENAL LAW §§ 260.03, 260.15 (2008); N.C. GEN. STAT. §§ 7B-500, 14-322.3 (2008); N.D. CENT. CODE §§ 27-20-02, 50-25.1-15 (2008); OHIO REV. CODE ANN. §§ 2151.3516-35.30 (2008); OKLA. STAT. tit. 10, § 7115.1-2-109 (2008); ORE. REV. STAT. §§ 418.017, 163.535(6) (2008); 23 PA. CONS. STAT. §§ 6502-6507 (2008); R.I. GEN. LAWS §§ 23-13.1-3, 4, 5 (2008); S.C. CODE ANN. § 63-7-40 (2008); S.D. CODIFIED LAWS §§ 25-5A-27 to 25-5A-35 (2008); TENN. CODE ANN. § 68-11-255 (2008); TEX. FAM. CODE ANN. §§ 262.301-262.303 (2008); UTAH CODE ANN. §§ 62A-4a-801, 802 (2008); VT. STAT. ANN. tit. 25, § 1303 (2008); VA. CODE ANN. §§ 18.2-371.-1; 40.1-103 (2008); WASH. REV. CODE § 13.34.360 (2008); W. VA. CODE §§ 49-6E-1 to 6E-5 (2008); WIS. STAT. § 48.195 (2008); WYO. STAT. ANN. §§ 14-11-102, 103 (2008).

and as a result, the fathers' rights are often terminated without adequate notice. Adoptee advocates focus on the child's right to know his or her biological parents.

There is another area where Safe Haven laws collide with existing policy: the federally recognized Indian [4] tribes' right to participate in child custody decisions concerning tribal children pursuant to the Indian Child Welfare Act ("Act" or "ICWA"). [5] This article focuses on the impact of Safe Haven laws on Indian tribes' established rights and is divided into five parts. After a brief history and overview of Safe Haven laws and the ICWA, this article identifies where the two conflict. Next, this article analyzes the legal arguments over how to resolve the conflict and concludes by offering suggestions for altering Safe Haven laws so they are consistent with the ICWA. The ICWA imposes substantive requirements on states when they address custody and placement of Indian children. [6] At best, Safe Haven laws undermine tribes' rights; at worst, Safe Haven laws directly contradict the ICWA.

The policy goals behind Safe Haven laws conflict with the ICWA. Enacted in 1978, the ICWA was Congress' reaction to the 1940's through 1950's removal of Indian children from their families. Non-Indian social workers who were often ignorant to the different childrearing practices of tribal peoples conducted the removal. [7] Aside from the civil rights issues raised by such conduct, the separation of Indian children from their tribal surroundings prevented cultural transmission, which is vital to the perpetuation of tribal peoples. [8] After extensive congressional hearings, Congress sought to prevent past mistakes by placing various requirements and restrictions on states, [9] the

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[2] Jeffrey A. Parness, *Deserting Mothers, Abandoned Babies, Lost Fathers: Dangers In Safe Havens*, 24 QUINNIPIAC L. REV. 335, 394-398 (2006); Dayna R. Cooper, *Fathers Are Parents Too: Challenging Safe Haven Laws With Procedural Due Process*, 31 HOFSTRA L. REV. 877, 878, 884, 895 (2003).

[3] *See* Statement of the Executive Committee of Bastard Nation on Legalized Abandonment Laws (last visited November 15, 2008), *available at* http://www.bastards.org/activism/legalized-abandonment.html. The portion of the Bastard Nation statement directly addressing the issue of a lack of information for abandoned newborn subsequently adopted reads:

> These laws represent a radical change in child welfare policy toward promoting rather than discouraging abandonment. These laws also run counter to the spirit, and perhaps the letter, of many statutes and initiatives, such as relinquishment revocation periods and putative birthfather registries, that empower all parties involved in a child's life to make informed choices regarding the child's best interest. The anonymity built into these laws opens up the door to the potential for abuse, fraud, and the worst excesses of the past, when abandonment was the norm.

[4] Among Indian tribes and tribal peoples in the United States the accepted term for describing themselves is "Indian."

[5] 25 U.S.C. §§ 1901 et seq. (2008).

[6] There are several sections of the Indian Child Welfare Act which impose substantive requirements on state courts. Most relevant for this article are 25 U.S.C. §§ 1911, 1912, 1913, and 1915 (***2009***).

[7] "One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34-35 (1989) (quoting Calvin Isaac testimony) *Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the H. Comm. Committee on Interior and Insular Affairs*, 95th Cong. 191-192 (1978).

[8] "If Indian communities continue to lose their children to the general society through adoptive and foster care placements at the alarming rates of the recent past, if Indian families continue to be disrespected and their parental capacities challenged by non-Indian social agencies as vigorously as they have in the past, then education, the tribe, Indian culture have little meaning or value for the future." *The Indian Child Welfare Act: Hearing on S. 1214 Before the S. Select Comm. Of Indian Affairs*, 95th Cong. 154 (1977) (statement of Chief Calvin Isaac on Behalf of the National Tribal Chairman's Association).

[9] *See* 25 U.S.C. §§ 1911-1916 (***2009***).

ultimate goal of which was to keep Indian children with their families or to have them raised within their tribal culture if they were taken away from their natural parents. [10]

Safe Haven laws are a more recent phenomenon than the ICWA. First enacted in 1999 in Texas, Safe Haven laws permit a parent to anonymously relinquish an infant at a hospital or other designated place and avoid criminal prosecution under child abandonment laws. [11] The breadth and form of these laws vary considerably. Some states, like New York, only permit safe relinquishment as an affirmative defense to a charge of abandonment. [12] Others, like Texas [13] and Wisconsin, [14] have comprehensive provisions which grant a parent the right to relinquish a newborn or infant at a safe place with a near guarantee of anonymity. The conventional wisdom is that a baby abandoned anonymously to a hospital or police station prevents worse outcomes compared to abandonment in an unsafe environment.

The conflict between the two laws sharpens when the anonymity provisions of the Safe Haven laws collide with three of the ICWA's mandates: 1) parents of an Indian child may not terminate their rights within ten days of the child's birth; [15] 2) placement of Indian children follows a priority list with extended and tribal families at the top; [16] and 3) tribes have a federal right to participate in child custody proceedings involving Indian children. [17]

II. A Brief History of Safe Haven Laws and the ICWA

1. Safe Haven laws

The first Safe Haven initiative was not a law, but a community program in one county where the District Attorney agreed to not prosecute parents who left a newborn at a designated safe place. [18] The program was borne out of a tragic incident in 1998 in Mobile, Alabama. After prosecuting a mother and grandmother for drowning an unwanted newborn in a toilet, a television news reporter asked the District Attorney if he would forgo prosecution if a baby **[*2]** were left safely at a hospital. [19] The District Attorney thought it was a good idea, so the reporter organized a meeting with Alabama health officials and hospital staff. [20] They responded postiviely, and the "Secret Safe Place for Newborns" came into being in November 1998.

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[10] "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C. § 1902 (***2009***).

[11] TEX. FAM. CODE ANN. §§ 262.301-309 (2008).

[12] N.Y. PENAL LAW §§ 260.03, 260.15 (2008).

[13] TEX. FAM. CODE ANN. §§ 262.301-309 (2008).

[14] WIS. STAT. § 48.195 (2008).

[15] 25 U.S.C. § 1913(a) (***2009***).

[16] 25 U.S.C. § 1915 (***2009***).

[17] 25 U.S.C. § 1911(c) (***2009***).

[18] John Nagy, *Reporters Query Begets Safe Havens for Abandoned Infants*, Stateline.org, Jun. 1, 2001, *available at* http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=14360.

[19] *Id.*

[20] *Id.*

The first Safe Haven law was enacted in Texas in June, 1999. [21] Texas' statute requires the circumstances to meet four elements for the parents to use the Safe Haven protection: 1) the infant is or appears to be 60 days old or younger; [22] 2) the infant has not been harmed; [23] 3) the infant has been voluntarily delivered to a designated emergency infant care provider; [24] and 4) the person making the delivery does not express an intent to return for the infant. [25] A trend swept the nation with about forty states enacting laws between 1999 and 2002. In 2008, Nebraska became the final state to enact Safe Haven legislation. [26]

Despite a strong trend in favor of the law, there have been several criticisms. Some commentators and communities question whether fathers' rights have been too easily overlooked. [27] When one parent relinquishes the infant, usually the mother, the other parent often has no role in their child's fate. Under Safe Haven laws, relinquishing a parent's right to remain anonymous means the other parent will have almost no way of asserting his or her rights, especially when the non-relinquishing parent is a man who may not even know he is a father.

A second criticism comes from adoption rights groups. They assert children have the right to know their genetic parents' identities. Groups like Bastard Nation advocate for adoptees to have unconditional access to their adoption records. These groups see the right to know one's parents' identities as both a political issue and a fundamental human right. [28] Relinquishments under Safe Haven laws undermine a child's right to know his or her genetic identity.

Finally, a third criticism is that anonymous protected abandonment actually promotes abandonment, [29] does not preserve the children's or mother's future, and does not offer help to young mothers considering relinquishment. [30] Those who have studied the issue also point out that the young women who abandon infants are not capable of taking advantage of a Safe Haven. [31] One of the main reasons is a lack of awareness that Safe Haven laws exist.

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[21] Texas Legislature Online, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=76R&Bill=HB3423 (last visited Oct. 4, ***2009***).

[22] TEX. FAM. CODE ANN. § 262.302(a) (2008).

[23] TEX. FAM. CODE ANN. § 262.302(b) (2008).

[24] TEX. FAM. CODE ANN. § 262.302 (2008).

[25] TEX. FAM. CODE ANN. § 262.302(a) (2008).

[26] NEB. REV. STAT. § 29-121 (***2009***).

[27] *See* Parness, *supra* note 2.

[28] Bastard Nation The Adoptee Rights Organization, *available at* http://www.bastards.org.

[29] There is anecdotal evidence of this when considering what happened in Nebraska in 2008. After legislators could not agree on an age above which abandonment would not be allowed, the law included no age limit. All ages of children were subsequently left at Nebraska hospitals. *See* Wendy Koch, *Safe Haven Law For Kids Has Unintended Results*, U.S.A. TODAY, Sept. 26, 2008, *available at* http://www.usatoday.com/news/health/2008-09-25-Left-kids_N.htm. The situation created media attention and the Nebraska legislature acted quickly to amend the law, placing a 30-day age limit on children who could be left at a safe haven.*See* Act of Nov. 21, 2008, LB 1, *available at* http://www.nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB1.pdf.

[30] Jennifer R. Racine, *A Dangerous Place For Society And Its Troubled Young Women: A Call For An End To Newborn Safe Haven Laws In Wisconsin And Beyond*, 20 WIS. WOMEN'S L. J., 243, 243 (2005); Susan L. Pollet, *Safe Haven Laws-Do Legal Havens To Abandon Babies Save Lives?*, 32 WESTCHESTER B. J. 71, 73 (2005); Stephanie E. Dreyer, *Texas' Safe Haven Legislation: Is Anonymous, Legalized Abandonment A Viable Solution To Newborn Discardment And Death?*, 12 TEX. J. WOMEN & L. 167, 170 (2002); Debbe Magnusen, *From Dumpster To Delivery Room: Does Legalizing Baby Abandonment Really Solve The Problem?*, 22 J. JUV. L. 1, 2-10 (2001-2002).

Another is the basic immaturity of young mothers in being able to accept that they are pregnant and that there is a way out. Mothers who discard their newborn are often in a total state of denial about their pregnancy and therefore unable to deal with the issue in a rational way. [32]

Criticism reached higher political levels in Hawaii in 2003. The governor vetoed the state's proposed Safe Haven law, stating:

> I now believe that any good that might be accomplished by this bill is likely to be outweighed by the harm that it would cause. I am concerned, for example, that the individual dropping off the newborn would not be required to prove that she is the baby's parent, or have to provide even minimal information about the baby. This could jeopardize the child's health and make it exceedingly difficult for the extended families, or the child's father, to learn of the baby's whereabouts and to assert their interests in caring for the child. The abandoned baby would be prevented from ever learning about [its] [sic] medical and genealogical history . . . . I believe that our focus should be on the long-term well being of the newborn, and that safe-haven measures like this one fall short in that critically important respect. Experts around the country are increasingly critical of such laws. [33]

Nevertheless, in 2007, the Hawaiian legislature overrode the governor's veto [34] and Hawaii adopted a comprehensive Safe Haven law. [35]

2. The Indian Child Welfare Act

The ICWA was passed by Congress in response to the shocking rate of removal of Indian children from their homes during the first seventy years of the twentieth century. Studies conducted by the American Association of Indian Affairs in 1969 and 1974 indicated that 25% to 35% of all Indian children had been removed from their homes and placed in adoptive families, foster care, or institutions. [36] In Minnesota, one in every eight Indian children was living in an adoptive home. [37] In South Dakota, 40% of all adoptions consisted of Indian children, but they composed only 7% of the population. [38] Washington State had an Indian adoption rate nineteen times higher than the rate of adoption for non-Indian children. [39] In Wisconsin, the risk of Indian children being separated from their parents was 1,600% greater for Indians. [40] 85% of Indian children foster care placements were in non-Indian homes. [41]

Congress held hearings in 1978 at which tribal officials testified about this problem:

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[31] Patricia Wen, *'Safe Haven' Law Has Doubters*, BOSTON GLOBE, Oct. 31, 2004, *available at* http://www.boston.com/news/local/massachusetts/articles/2004/10/31/safe_haven_law_has_doubters/.

[32] *See* Racine, *supra* note 30, at 254.

[33] Gov. Linda Lingle, "Statement of Objections to House Bill No. 133" (Jun. 20, 2003), *available at* http://capitalhawaii.gove/session2003/guns/hb0133.htm.

[34] Hawaii State Legislature, http://www.capitol.hawaii.gov/session2007/status/hb1830.htm (last visited Oct. 4, ***2009***).

[35] HAW. REV. STAT. §§ 587D-1 et seq. (2008).

[36] H.R. REP. NO. 95-1386 (1978) at 7531, *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 [hereinafter *House Report 1386*).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best **[*3]** ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child. [42]

The Senate report acknowledged the problems associated with the Indian children's removal: "Removal of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." [43]

The Congressional investigation resulted in the Act becoming law in 1978. The ICWA's purpose is to protect an Indian child's rights as an Indian, and the Indian community's and tribe's right to retain its children. [44] The ICWA effectuates this purpose by establishing a federal policy that, when possible, an Indian child should remain in the Indian community. The Act also provides that Indian child welfare determinations should not be based on a white, middle-class standard because such a standard forecloses placement with an Indian family in many cases. [45]

The Act has many provisions aimed at preventing the division of an Indian family and keeping child custody decisions in Indian tribes' control. For example, tribal courts are given exclusive jurisdiction over child custody matters arising on a reservation. [46] In the absence of good cause, state cours must transfer off-reservation child custody cases to tribal courts. [47] When tribal children are placed outside of their home, the Act mandates placement preferences with extended family, with tribal placements receiving first preference. [48] Additionally, Indian tribes have an unqualified right to intervene in cases involving Indian children. [49] For foster care placements and termination of parental rights, an expert witness must testify that returning the child to the natural parents is likely to result in the child suffering serious emotional or physical damage. [50]

All the Act's requirements rest on the identification of the child as an Indian child, which is relevant to Safe Haven laws. Each Indian tribe establishes its own eligibility requirements for membership in the tribe. Tribal membership usually depends upon the applicant's genealogy. [51] Under the Act, voluntary termination of parental rights by an Indian parent is not permitted within ten days of birth. [52] Furthermore, even when a parent voluntarily terminates his or her parental rights, the Indian child placement preferences still apply. [53]

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[42] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34-35 (1989) (quoting Calvin Isaac testimony, *Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs*, 95th Cong. 191-192 (2d Sess. 1978).

[43] *Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs*, 95th Cong. 50 (2d Sess. 1978).

[44] Holyfield, 490 U.S. at 37 (1989) (citing H.R. Rep. No. 95-1386 (1978).

[45] *Id.*

[46] 25 U.S.C. § 1911(a) (2008).

[47] 25 U.S.C. § 1911(b) (2008).

[48] 25 U.S.C. § 1915 (2008).

[49] 25 U.S.C. § 1911(c) (***2009***).

[50] 25 U.S.C. § 1912(e) and (f) (***2009***).

[51] Most Indian tribes' constitutions contain a membership provision which specifies the blood quantum required for membership in the tribe. For examples, see the constitutions at the National Indian Law Library, http://www.narf.org/nill/triballaw/onlinedocs.htm (last visited Nov. 15, 2008).

[52] 25 U.S.C. § 1913(a) (2008).

III. Overview of Safe Haven Provisions

States have approached the Safe Haven policy issues in various ways. However, nearly all have two common elements. First, anonymity of the parent is protected in exchange for delivery of a safe newborn or infant that has not otherwise been harmed. Second, the child must be left at a designated institution such as a hospital, police station, fire station, or with emergency services personnel. Beyond these two elements, states have varying rules about how much effort, if any, will be expended to notify the nonrelinquishing parent, whether reunification efforts are required, whether personnel receiving the child should ask the relinquishing person for information about the child, and how the child will be treated under the law.

Some state Safe Haven provisions are more blatant than others in their regard or disregard for the ICWA. Four states have statutory provisions which attempt to incoporate the policy goals found in the ICWA. Montana's statute requires a reasonable effort to be made to discover whether the child has a tribal affiliation. [54] New Mexico's statute provides that it does not abridge the rights granted under the ICWA. [55] In addition, New Mexico's statute mandates that the person leaving the infant shall be asked whether the infant has a parent who is a member of an Indian tribe or who is eligible for membership, but the person leaving the infant is not required to give the information. [56] Wisconsin's statute permits information about a relinquished child to be released to a tribal court or tribal attorney if the child is the subject of a proceeding in tribal court. [57] South Dakota provides that the ICWA will be given "due regard." [58]

While these provisions are a positive step and acknowledge the unique position tribal children hold under the law, they are insufficient. None require Indian heritage to be disclosed by relinquishing parents. Such a disclosure is necessary in order to trigger the ICWA's protections. All four of these states still favor preserving anonymity in exchange for a safe child.

Beyond these four states, the remaining forty-six states are silent in their Safe Haven provisions on tribal affiliation, and in some cases, Safe Haven provisions directly contradict the ICWA federal law when applied to Indian children. For example, some states terminate parental rights automatically after a certain time has passed. [59] In others, the parental right termination is not automatic, but the relinquishment of the child is considered implied consent to termination of parental rights, or creates a **[*4]** presumption of consent. [60] Both provisions violate the ICWA, which requires consent for voluntary termination of parent rights to occur before a judge in writing and makes voluntary terminations invalid if given within ten days of birth. [61] Reunification efforts are excused in some states. [62] This provision also violates the ICWA, which requires that "active efforts" are made to prevent the break up of the Indian family. [63]

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[53] 25 U.S.C. § 1915(a) and (b) (2008).

[54] MONT. CODE ANN. § 40-6-405 (2008).

[55] N.M. STAT. § 24-22-1 (2008).

[56] N.M. STAT. § 24-22-4(D) (2008).

[57] WIS. STAT. § 48.195(2)(d)(7) (2008).

[58] S.D. CODIFIED LAWS § 25-5A-36 (2008); However other provisions in South Dakota's Safe Haven law undermine the due regard language. For example, fourteen days after the relinquishment, the parental rights are terminated by law. This contradicts the ICWA's requirements regarding voluntary termination of parental rights. 25 U.S.C. § 1913 (2008).

[59] S.D. CODIFIED LAWS § 25-5A-29(1) (2008).

[60] MO. REV. STAT. § 210.950.5 (2008) (implied consent); 325 ILL. COMP. STAT. § 2/15 (2008) (presumption); FLA. STAT. § 383.50(2) (2008) (presumption).

[61] 25 USC § 1913(a) (***2009***).

[62] MONT. CODE ANN. § 40-6-407(2) (***2009***); MINN. STAT. § 260C.217(1) (2008); IND. CODE § 31-34-2.5-3 (2008).

IV. Safe Haven Laws and the ICWA

When applied in an Indian child's case, Safe Haven laws directly conflict with the ICWA's goal of keeping Indian children with Indian families. The ICWA's requirements and limitations apply only when the subject child is an Indian tribe member or is eligible for tribal membership. [64] Therefore, it would be impossible to apply the Act in a voluntary termination of parental rights action when the identities of the child and parents are unknown.

Under the ICWA, a parent who voluntarily terminates his or her parental rights to an Indian child must consent in writing before a judge. [65] The judge must certify that the consequences of consent were explained in detail and that the parent understood them. [66] The nature of Safe Haven relinquishments is that they are anonymous, and the parent is permitted to simply drop off his or her child without leaving identification or any information. Thereafter the parent can simply disappear. Any termination of parental rights conduct by a court after such a relinquishment cannot meet the ICWA requirements that a parent execute consent in writing, for the consequences to be explained to the parent, and for the judge to certify the parent has understood the explanation of consequences. [67] Any termination of parental rights conducted after a Safe Haven abandonment could not comply with these provisions with respect to the parents of an anonymously relinquished Indian child.

In addition, under the ICWA no consent to a termination of parental rights is valid if given within ten days of an Indian child's birth. [68] Several states' Safe Haven laws require the relinquishment to occur less than ten days after birth. [69] In any case, all states permit relinquishment within ten days of birth. [70] Any relinquishment within ten days of birth, if construed as a voluntary termination of parental rights, is inconsistent with, and arguably in violation of, the ICWA. In short, these Safe Haven provisions contradict Congress' core purposes in enacting the ICWA.

These issues are not merely theoretical quibbles. Anonymous relinquishment jeopardizes tribal children the same way misguided social workers did when they adopted out tribal children based on cultural bias. As with mass removal, anonymous adoption severs the critical link between child and his or her tribe. Transmission of tribal culture requires an Indian to be immersed in Indian culture while maturing. [71] Permitting a parent to anonymously

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[63] 25 USC § 1912(d) (***2009***).

[64] 25 U.S.C. § 1903(4) (2008).

[65] 25 U.S.C. § 1913(a) (2008).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See* U.S. Dep't of Health and Hum. Serv. Infant Safe Haven laws: *Summary of State laws* (Jul. 2007), [hereinafter *Summary*], *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/safehavenall.pdf; 72 hours or younger: Alabama, Arizona, California, Colorado, Florida, Illinois, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Ohio, Tennessee, Utah, Washington, and Wisconsin.

[70] *Id*; States permitting relinquishment of child up to 1 month old: Arkansas, Connecticut, Idaho, Louisiana, Maine, Missouri, Montana, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, South Carolina, and West Virginia; Other States specify varying age limits in their statutes: 5 days (New York); 7 days (Georgia, Massachusetts, New Hampshire, North Carolina, and Oklahoma); 14 days (Delaware, Iowa, Virginia, and Wyoming); 45 days (Indiana and Kansas); 60 days (South Dakota and Texas); and 90 days (New Mexico); up to 1 year old (North Dakota).

[71] Long before the *Holyfield* case, Mississippi Choctaw Tribal Chief Calvin Isaac testified before Congress before the passage of the ICWA: "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34 (1989) (citing *Indian Child Welfare Act: Hearings on S. 1214*

relinquish an Indian child without a chance for that child to know his or her culture threatens the tribe's long-term existence. [72]

The consequences of an Indian child's anonymous adoption are suffered not only by the tribe, but also by the child. [73] Children adopted after a Safe Haven relinquishment do not receive the ICWA's benefits regarding adoption records. The ICWA provides that an Indian child who reaches the age of eighteen may apply to the Court to learn his or her tribal affiliation, biological parents, and any other information necessary to protect any rights flowing from the individual's tribal relationship. [74] State courts will be unable to provide the federally required information if the child has been the subject of a Safe Haven relinquishment, termination of parental rights, and adoption.

V. Examining the Conflict

Of the few states who have attempted to address the Indian heritage issue, none take adequate action to preserve the ICWA policy goals. Anonymity, the *sine qua non* of the Safe Haven laws, is always favored. The nod to the ICWA policy goals in the four states mentioned above is only that--a nod. Ultimately, states protect anonymity over compliance with the ICWA.

Safe Haven laws' anonymity provisions strike at the heart of the ICWA. The crux of the Safe Haven bargain is anonymity to the relinquishing parent in exchange for turning over an unharmed baby. The ICWA's core policy goal of keeping Indian children with their families and allowing tribes to make decisions about the children's custody and placement cannot be met if the child's heritage is unknown. The ICWA requires that the child's lineage be known and established. [75] These two policy goals, anonymity and deference to tribes, are diametrically opposed.

The most obvious example of this opposition is the ICWA's placement preferences. The ICWA requires foster care [76] and adoptive placements [77] to follow a preference order of families. For adoptive placements the order is extended family first, then other members of the child's tribe, then other Indians. [78] Deviation from the placement preferences **[*5]** may be only for good cause. [79] A tribe may also establish its own order of preference. [80]

These federally-mandated preferences cannot be met if the child's identity is unknown. At least two states have explicitly excused their social service agencies from searching for relatives with whom the child may be placed when the infant is abandoned pursuant to a Safe Haven law. [81] While this exception may overcome any state law requirements for placement preferences, it would not excuse compliance with the ICWA.

Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs, 95th Cong. 193 (2d Sess. 1978)).

[72] "As the 1977 Final Report of the congressionally established American Indian Policy Review Commission stated, in summarizing these two concerns, '[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.'" Holyfield, 490 U.S. at 50 (citing S. REP. NO. 95-597, at 52 (1977)).

[73] 25 U.S.C. § 1901(3) (2008).

[74] 25 U.S.C. § 1917 (2008).

[75] 25 U.S.C. § 1903(4) (2008).

[76] 25 U.S.C. § 1915(b) (2008).

[77] 25 U.S.C. § 1915(a) (2008).

[78] *Id.*

[79] *Id.* The desire of the mother to remain anonymous has been found in one case not to be good cause. *See* Matter of Baby Girl Doe, 865 P.2d 1090,1095 (Mont. 1993).

[80] 25 U.S.C. § 1915(c) (2008).

[81] MINN. STAT. § 260C.217 (2008); TEX. FAM. CODE ANN. § 262.309 (2008).

Given the establishment of the Safe Haven loophole, it is possible that a parent may anonymously "relinquish" his or her Indian child under a Safe Haven law solely to avoid addressing the child's relatives or placement preferences. [82]

In addition to the problems with placement preferences, several states' statutes directly contradict the ICWA in other ways. For example, some states explicitly eliminate the requirement of family unification. [83] This approach is contrary to the ICWA requirement that "active efforts" be made to prevent the dissolution of the Indian family. [84]

Some statutes assert that relinquishment creates a presumption of parental consent to termination of parental rights [85] or that relinquishment is conclusive evidence of termination of parental rights. [86] These statutes conflict legally with the ICWA's procedural requirements regarding an Indian parent's voluntary termination of parental rights. [87] Those procedural requirements include written consent from the parent recorded before a judge and the judge's certification that the terms and consequences were fully explained in detail and understood by the parent. [88] If the termination of parental rights is within ten days of birth, it directly violates the ICWA's prohibition of such terminations. [89]

The legal presumptions about parental rights termination are also inconsistent with the ICWA's requirement of showing that "active efforts" have been made to prevent dividing the Indian family, and that these efforts have proved unsuccessful. [90]

On the surface, the Supremacy Clause should settle these differences. [91] While Safe Haven statutes promise anonymity in exchange for the hope of extending or saving an infant's life, the ICWA, as federal law, arguably supersedes that promise. As of this article's publication, no published court cases have examined the statutory conflict between the ICWA and Safe Haven laws. However, the United States Supreme Court examined one case where Indian parents desired to avoid the ICWA in connection with voluntary terminations of parental rights and subsequent adoptions.

In *Mississippi Band of Choctaw Indians v. Holyfield*, [92] the United States Supreme Court ruled on the validity of state court action where tribal members had voluntarily surrendered newborn tribal member twins for adoption. In that case, the parents aimed to avoid the ICWA through their actions. The parents, though domiciled on the reservation, traveled to a hospital 200 miles away for the birth. [93] The parents made arrangements for a private adoption with a non-tribal family. [94] The tribe learned of the adoption and intervened, seeking to have the matter

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82 *See* Holyfield, 490 U.S. 30 (1989). The Holyfield case is only one step removed from a safe haven type situation. The parents relinquished their twins through a private adoption rather than to a hospital or police station.

83 Ind. Code § 31-34-2.5-3 (2008); LA. CHILD. CODE ANN. art. 1154(D) (2008); N.J. REV. Stat. § 30:4C-15.8 (2008).

84 25 U.S.C. § 1912(d) (2008). One may ask how reunification might even be attempted where a newborn has been anonymously relinquished. However, it is not a foregone conclusion that exemption from reunification is reasonable. Kentucky law, for example, requires reunification in safe haven relinquishments. See KY. REV. STAT. ANN. § 620.350(2) (b) (2008).

85 325 ILL. COMP. STAT. § 2/15(a) (2008); LA. CHILD CODE ANN. art. § 1158 (2008).

86 S.C. CODE ANN. § 63-7-40(F) (2008).

87 25 U.S.C. § 1913 (2008).

88 25 U.S.C. § 1913(a) (2008).

89 *Id.*

90 25 U.S.C. § 1912(d) (2008).

91 U.S. CONST., Art. VI.

92 Holyfield, 490 U.S. at 37-39.

93 Id. at 37.

transferred to tribal court due to the parents' residence on the reservation, but the trial court denied the tribe's request. [95] After the Mississippi Supreme Court upheld the trial court and the parents' desire for avoidance of the ICWA, [96] the case went to the United States Supreme Court.

In reversing the lower decisions, the Supreme Court noted the voluntary nature of the relinquishment did not override ICWA's policy goals:

> Nor can the result be any different simply because the twins were 'voluntarily surrendered' by their mother. *Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians*. See 25 U.S.C. §§ 1901(3) [25 U.S.C.S. § 1901(3)] ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"), 1902 ("promote the stability and security of Indian tribes"). The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, e.g., §§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over non domiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with States), must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.
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> * * *
>
> *Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the **[*6]** ICWA was intended to accomplish*. [Footnotes omitted]. [97]

The *Holyfield* rationale applies equally to Safe Haven relinquishments: individual parents' desires or states' policy goals cannot override tribes' rights under federal law.

One of the more challenging policy questions presented in this conflict is how traditionally strong parents' custody rights should be balanced against a tribe's interest in perpetuating its existence and having its children raised in tribal culture. Congress answered that question with the ICWA by attempting to recognize both, while still granting tribes the right to thwart parents' wishes in certain circumstances where tribal interests are greatest, such as when the family is domiciled on the reservation. Through *Holyfield*, the United States Supreme Court resoundingly affirmed the Act's legality and the policy supporting it.

Four years after *Holyfield*, the Montana Supreme Court focused on the relinquishment and the ICWA conflict from a related but different angle: a parent's insistence on anonymity in an ICWA proceeding. [98] The tribal member parent desired to remain anonymous after she gave birth, refused to sign the birth certificate, and agreed to a voluntary termination of parental rights. The ICWA states a court must give "weight" to a consenting parent's desire for anonymity. [99] The Tribe intervened and requested the ICWA's placement preferences be applied. [100] The

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94 Id. at 38.

95 *Id.*

96 In re B.B. & G.B., Minors v. Holyfield, 511 So. 2d 918, 921 (Miss. 1987).

97 Holyfield, 490 U.S. at 49 (emphasis added).

98 Matter of Baby Girl Doe, 865 P.2d 1090, 1090 (Mont. 1993)

99 25 U.S.C. § 1915(c) (2008).

100 25 U.S.C. § 1915(a) (2008).

Tribe asked for the mother's identity so extended family could be identified. [101] Extended family is the first priority under the ICWA, [102] but the trial court denied the tribe's request, so the tribe appealed.

This case occurred before Montana Safe Haven laws were enacted, but this case essentially pitted the competing policy questions against each other: anonymity versus the tribe's rights under the ICWA. The Montana Supreme Court had to resolve the somewhat conflicting ICWA provisions: the mandatory placement preferences in 25 U.S.C. § 1915(a) and the weight to be given to a consenting parent's desire for anonymity expressed in 25 U.S.C. § 1915(c).

Faced with this conflict, the Montana Supreme Court reasoned that the ICWA's principal purpose of promoting the security and stability of tribes by preventing further loss of their children outweighed an individual parent's desire for anonymity. [103] The opinion quotes extensively from *Holyfield's* discussion of congressional intent and the ICWA's elevation of tribes' rights above those of individual parents, and held that the tribe must be informed of the natural mother's identity and her extended family. [104] The court added that to the extent possible, without interfering with the tribe's rights, the natural mother's right to privacy should be respected throughout the proceedings. [105]

VI. Resolutions

In theory, the conflict between Safe Haven laws and the ICWA should not be difficult to resolve. Under the Supremacy Clause [106], the ICWA supersedes conflicting state laws. [107] Therefore, under a purely legal analysis, the Act's provisions trump state Safe Haven laws. However, in reality, actual practice is very different.

Despite the Supremacy Clause's legal strength, modifying Safe Haven protections of infants to consider tribal rights will be no easy task. Newborns are understandably viewed as the most vulnerable and most deserving of protection. This status likely accounts for the ease and rapidity with which many states enacted Safe Haven laws in the first place; it was politically popular and seemingly good policy.

Nevertheless, the law is clear: tribes have a right to exert considerable say and influence over child custody issues involving Indian children. Safe Haven laws undermine this thirty-year old federal policy. Both interests must be accommodated in some manner. This article suggests that accommodation lies in the very statutes which have created this conflict.

1. Inquiry Into Possible Indian Heritage

Montana's [108] and New Mexico's [109] statutes provide that an inquiry shall be made as to whether the relinquished child has any Indian heritage. In New Mexico, if the child is an Indian child, the tribe must be notified,

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101 Matter of Baby Girl Doe, 865 P.2d at 1091.

102 *Id.*

103 Matter of Baby Girl Doe, 865 P.2d at 1094.

104 Id. at 1095.

105 *Id.*

106 U.S. CONST., art. VI.

107 *See e.g.,* In re the Custody of S.E.G., 521 N.W.2d 357, 362 (Minn. 1994); In re the Adoption of Baby Boy C., 784 N.Y.S.2d 334, 341 (2004).

108 MONT. CODE ANN. § 40-6-405(2)(c) (2008).

109 N.M. STAT. § 24-22-4(D) (2008).

and pre-adoptive placement must be in accordance with Indian child placement preferences. [110] While neither state requires the person relinquishing the infant to reply, this is a good starting point for preserving tribal rights.

If the person relinquishing indicates the child does have Indian heritage, the next step is to obtain family information. No Safe Haven law currently requires a parent to reveal any identifying information. That must be changed to enforce the ICWA. Attempting to end the anonymity guarantee in order to learn a child's heritage will spark the policy debate underlying this entire article, which is an examination of how to balance the competing interests of Safe Haven laws and the ICWA.

2. Notice To Tribes and the Public

Another option is to seek out tribal affiliation in the manner unknown parents are sought in some states. For example, in Tennessee, the Safe Haven statute **[*7]** requires the social service agency to publish a notice of the relinquishment once a week for four weeks in the county where the relinquishment occurred, [111] presumably to alert the non-relinquishing parent or other relatives. Likewise, in Utah the Safe Haven law requires notice to unknown parents in the same manner as other termination of parental rights proceedings where the identity of a parent is unknown. [112]

Notice could be given to tribes in a similar fashion. For example, when local authorities receive a child they suspect may be of Indian decent, notice may be published within a reasonable area and specific notice sent to all tribes within a two-hundred mile radius. While it may be difficult for a tribe to determine whether the child has Indian heritage, tribes deserve an opportunity to make this inquiry. [113]

3. Intervention rights

Iowa law gives parents the right to intervene in the subsequent dependency or Termination of Parental Rights ("TPR") proceeding after abandonment. [114] Similar grants should be made to tribes in relinquishment TPR proceedings. Intervention is a key tool for tribes under the ICWA. [115] Intervention goes hand in hand with notice. One is not meaningful without the other. In order to be able to intervene, a tribe must be aware of the child.

4. Wisconsin provision

Wisconsin law contains a provision not found in any other state. Identifying information about a safe haven relinquishment baby can be released to a tribe if the child is the subject of a tribal court proceeding. [116] Once a tribe becomes aware of a relinquishment with a possible tribal connection, a Baby Doe proceeding could be initiated, thus satisfying the requirement of the statute. The only missing link is that there is no requirement for receiving agencies to notify tribes that a safe haven relinquishment has even occurred.

VII. Conclusion

While the measures suggested above would help resolve the conflict between Safe Haven laws and the ICWA, they are limited. As a matter of practicality and biology, it is difficult to envision how the identity and membership

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[110] N.M. STAT. §§ 24-22-5(C)(1), 24-22-5(C)(2) (2008).

[111] TENN. CODE ANN. § 36-1-142(e)(1) (2008).

[112] UTAH CODE ANN. § 62A-4a-802(5)(c) (2008).

[113] The author is aware of anecdotal evidence where hospitals receiving an unidentified infant have good reasons to suspect the child is Indian. Hospital staff would then involve a local tribe or even several tribes. These scenarios have various outcomes, but what is important is that the policy goals of the ICWA are being fulfilled by maximizing tribes' participation where possible.

[114] IOWA CODE § 233.4 (2008).

[115] 25 U.S.C. § 1911(c) (2008).

[116] WIS. STAT. § 48.195(2d)(7) (***2009***).

eligibility of an Indian child can be established while at the same time preserving the anonymity of the child's parents.

The ideal solution would be to require relinquishing parents to provide a child's Indian heritage, supported with names. However, like the parents in *Holyfield*, Indian parents who want to anonymously relinquish their child are also the least likely to want to provide identifying information. Indian tribes, even large ones, are relatively closeknit communities where families know each other and secrets are difficult to maintain. Indian parents would be wary of providing their identity, even with assurance that it would be kept confidential. However, to verify membership eligibility or have an adoption within a tribal community, some facts simply must be revealed to a small number of people.

Another challenge is the political difficulty of persuading states to alter their Safe Haven laws or inducing Congress to enact newer legislation to create a solution. Public debate on this issue will bring forth the numerous interest groups mentioned in this article including those protective of infants, fathers' rights groups, and adoptee rights groups. More time may be required before better, more comprehensive solutions appear. Safe Haven laws are new, and there are only a few dozen relinquishments per year. [117]

In the end, with over 500 federally recognized Indian tribes, the solutions are likely to vary. Tribes will take different views among themselves based on their traditions and cultures as to how the policy scale should be balanced between providing a Safe Haven for otherwise unwanted infants versus a tribe's right to make child custody decisions about their youngest members when they are no longer part of an intact family.

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[117] *See Boarder Babies, Abandoned Infants, and Discarded Infacts*, NAT'L ABANDONED INFANTS ASSISTANCE RESOURCE (Dec. 2005), *available at* http://aia.berkeley.edu/media/pdf/abandoned_infant_fact_sheet_2005.pdf; It is difficult to get accurate data on infants who have been "discarded," that is, abandoned in public places without supervision. The number of infants in the hospital not medically cleared but who are unlikely to leave with their parents was 17,400 in 1998.

40-6-401, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

LexisNexis® Montana Code Annotated > Title 40 Family Law (Chs. 1 — 16) > Chapter 6 Parent and Child (Pts. 1 — 10) > Part 4 Montana Safe Haven Newborn Protection Act (§§ 40-6-401 — 40-6-417)

40-6-401 Short title.

This part may be cited as the “Montana Safe Haven Newborn Protection Act”.

History

En. Sec. 1, *Ch. 277, L. 2001*.

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40-6-402, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

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Notice

This section has more than one version with varying effective dates.

40-6-402 Definitions.

As used in this part, the following definitions apply:

(1) "Child-placing agency" means an agency licensed under Title 52, chapter 8, part 1.

(2) "Court" means a court of record in a competent jurisdiction and, in Montana, means a district court or a tribal court.

(3) "Department" means the department of public health and human services provided for in 2-15-2201.

(4) "Emergency services provider" means:

(a) a uniformed or otherwise identifiable employee of a fire department, hospital, or law enforcement agency when the individual is on duty inside the premises of the fire department, hospital, or law enforcement agency or is on duty responding to an emergency call; or

(b) any law enforcement officer, as defined in 7-32-201, who is in uniform or is otherwise identifiable.

(5) "Fire department" means a governmental fire agency organized under Title 7, chapter 33.

(6) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

(7) "Guardian ad litem" means a person appointed to represent a newborn under Title 41, chapter 3.

(8) "Hospital" has the meaning provided in 50-5-101.

(9) "Law enforcement agency" means a police department, a sheriff's office, a detention center as defined in 7-32-2241, or a correctional institution as defined in 45-2-101.

(10) "Newborn" means an infant who a physician reasonably believes to be no more than 30 days old.

(11) "Newborn safety device" means a medical device that meets the following requirements:

(a) provides a controlled environment for the care and protection of a newborn;

(b) includes an adequate dual alarm system connected to the newborn safety device:

(i) that is tested at least one time a month to ensure the alarm system is in working order; and

(ii) that dispatches the nearest emergency services provider to retrieve a newborn placed in the device;

(c) is physically located on an exterior structural wall of the premises of a fire department, hospital, or law enforcement agency that is staffed 24 hours a day, except that all emergency services providers located at the premises may be dispatched to an emergency; and

(d) is located in an area that is conspicuous and visible to an emergency services provider.

(12)

(a) "Surrender" means to leave a newborn with an emergency services provider without expressing an intent to return for the newborn.

(b) The term includes but is not limited to:

(i) leaving a newborn in a newborn safety device; or

(ii) placing an emergency call and remaining with a newborn until an emergency services provider arrives to accept the newborn.

History

En. Sec. 2, *Ch. 277, L. 2001*; amd. Sec. 14, *Ch. 36, L. 2005*; amd. Sec. 8, *Ch. 449, L. 2007*; § 1, *Ch. 170, L. 2023*, effective July 1, 2023.

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40-6-403, MCA

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40-6-403 Court jurisdiction — hospital immunity.

(1) The court has jurisdiction over a newborn who is surrendered to an emergency services provider as provided in *40-6-405*. The court may appoint a guardian ad litem to represent a newborn in proceedings under this part.

(2) Except as provided in *40-6-406*, the reporting requirements of *41-3-201* do not apply regarding a newborn who is surrendered to an emergency services provider as provided in *40-6-405*.

(3) A hospital and the agents and employees of the hospital are immune in a civil action for damages for an act or omission in accepting or transferring a newborn under this part, except for an act or omission constituting gross negligence or willful or wanton misconduct.

History

En. Sec. 3, *Ch. 277, L. 2001*.

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40-6-404 Immunity for fire department and law enforcement agency.

A fire department or law enforcement agency and the agents and employees of a fire department or law enforcement agency are immune in a civil action for damages for an act or omission in accepting or transferring a newborn under this part, except for an act or omission constituting gross negligence or willful or wanton misconduct.

History

En. Sec. 4, *Ch. 277, L. 2001*.

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Notice

This section has more than one version with varying effective dates.

40-6-405 Surrender of newborn to emergency services provider — temporary protective custody. [Effective until July 1, 2025]

(1) If a parent surrenders an infant who may be a newborn to an emergency services provider, the emergency services provider shall comply with the requirements of this section under the assumption that the infant is a newborn. The emergency services provider shall, without a court order, immediately accept the newborn, taking the newborn into temporary protective custody, and shall take action necessary to protect the physical health and safety of the newborn.

(2) The emergency services provider shall make a reasonable effort to do all of the following:

(a) if possible, inform the parent that by surrendering the newborn, the parent is releasing the newborn to the department to be placed for adoption according to law;

(b) if possible, inform the parent that the parent has 60 days to petition the court to regain custody of the newborn;

(c) if possible, ascertain whether the newborn has a tribal affiliation and, if so, ascertain relevant information pertaining to any Indian heritage of the newborn;

(d) provide the parent with written material approved by or produced by the department, which includes but is not limited to all of the following statements:

(i) by surrendering the newborn, the parent is releasing the newborn to the department to be placed for adoption and the department shall initiate court proceedings according to law to place the newborn for adoption, including proceedings to terminate parental rights;

(ii) the parent has 60 days after surrendering the newborn to petition the court to regain custody of the newborn;

(iii) the parent may not receive personal notice of the court proceedings begun by the department;

(iv) information that the parent provides to an emergency services provider will not be made public;

(v) a parent may contact the department for more information and counseling; and

(vi) any Indian heritage of the newborn brings the newborn within the jurisdiction of the federal Indian Child Welfare Act, 25 U.S.C. 1901, et seq., and [sections 1 through 18].

(3) After providing a parent with the information described in subsection (1), if possible, an emergency services provider shall make a reasonable effort to:

(a) encourage the parent to provide any relevant family or medical information, including information regarding any tribal affiliation;

(b) provide the parent with information that the parent may receive counseling or medical attention;

(c) inform the parent that information that the parent provides will not be made public;

(d) ask the parent for the parent's name;

(e) inform the parent that in order to place the newborn for adoption, the state is required to make a reasonable attempt to identify the other parent and to obtain relevant medical family history and then ask the parent to identify the other parent;

(f) inform the parent that the department can provide confidential services to the parent; and

(g) inform the parent that the parent may sign a relinquishment for the newborn to be used at a hearing to terminate parental rights.

History

En. Sec. 5, *Ch. 277, L. 2001*; amd. Sec. 1, *Ch. 102, L. 2005*; § 19, *Ch. 716, L. 2023*, effective July 1, 2023.

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40-6-406, MCA

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40-6-406 Medical care — report of abuse or neglect — report to department.

(1) An emergency services provider that is not a hospital and that takes a newborn into temporary protective custody under *40-6-405* shall transfer the newborn to a hospital. The hospital shall accept a newborn transferred to the hospital by an emergency services provider in compliance with this part and shall take the newborn into temporary protective custody.

(2) A hospital that takes a newborn into temporary protective custody under this part must have the newborn examined by a physician. If a physician who examines the newborn either determines that there is reason to suspect the newborn has experienced abuse or neglect, other than being surrendered to an emergency services provider under *40-6-405*, or comes to a reasonable belief that the infant is not a newborn, the physician shall immediately report to the department as required under *41-3-201*. If the actual date of birth of the infant is not known, the physician shall determine a birth date based on the physician's examination of the infant.

(3) If a physician is not required to report to the department under subsection (2), the hospital shall, no later than the first business day after taking possession of the newborn, notify the department that the hospital has taken a newborn into temporary protective custody under this part.

History

En. Sec. 6, *Ch. 277, L. 2001*.

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40-6-407, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

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40-6-407 Assumption of care, custody, and control by department — placement of child — presumptions — Montana birth certificate. [Effective until July 1, 2025]

(1) Upon receipt of notice under 40-6-406, the department shall:

(a) immediately assume the care, control, and temporary protective custody of the newborn;

(b) if a parent is known and willing, immediately meet with the parent;

(c) make a temporary placement of the newborn;

(d) immediately request assistance from law enforcement officials to investigate and determine, through the national center for missing and exploited children and any other national and state missing children information programs, whether the newborn is a missing child;

(e) not later than 48 hours after assuming the care, control, and temporary protective custody of the newborn, file a petition with the court under the provisions of Title 41, chapter 3, part 4, and, if applicable, [sections 1 through 18], requesting appropriate relief with the goal of achieving permanent placement for the newborn at the earliest possible date; and

(f) within 30 days, make reasonable efforts to identify and locate a parent who did not surrender the newborn. If the identity and address of that parent are unknown, the department shall provide notice by publication in a newspaper of general circulation in the county where the newborn was surrendered.

(2) The department, after assuming the care, custody, and control of a newborn under subsection (1), is not required to attempt to reunify the newborn with the newborn's parents. The department is not required to search for relatives of the newborn as a placement or permanency option or to implement other placement requirements that give preference to relatives if the department does not have information as to the identity of the newborn or either of the newborn's parents. The department shall place the newborn with prospective adoptive parents as soon as possible. The adoptive parents must be allowed access to information regarding the newborn's medical history, date of birth, or age if the department has that information.

(3) A newborn surrendered under 40-6-405 is presumed to have been born in Montana unless the biological parent otherwise informs the department or the emergency services provider to whom the newborn is surrendered.

(4) A Montana birth certificate may be issued based on the presumption of birth in Montana as provided in subsection (3). A birth certificate issued to a newborn surrendered under 40-6-405 must provide a date of birth based on either the actual date of birth, if known, or on the date of birth determined by the physician who performs the medical examination of the newborn under 40-6-406.

History

En. Sec. 7, *Ch. 277, L. 2001*; § 20, *Ch. 716, L. 2023*, effective July 1, 2023.

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40-6-408, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

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40-6-408 through 40-6-410 reserved.

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40-6-411, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

LexisNexis® Montana Code Annotated > Title 40 Family Law (Chs. 1 — 16) > Chapter 6 Parent and Child (Pts. 1 — 10) > Part 4 Montana Safe Haven Newborn Protection Act (§§ 40-6-401 — 40-6-417)

40-6-411 Rights of parents — custody action.

(1) Any person alleging to be the biological parent of a newborn who was surrendered to an emergency services provider under *40-6-405* may, within 60 days of the date of surrender of the newborn, file an action with the court for custody pursuant to *40-4-211*.

(2) Before making a custody decision, the court shall determine whether the individual filing the custody action is the newborn's biological parent under the provisions of part 1 of this chapter. A determination of the existence or nonexistence of the child-parent relationship is determinative as provided in *40-6-116*.

(3) The putative father registry provisions under Title 42, chapter 2, part 2, apply to any court proceeding under this part.

History

En. Sec. 8, *Ch. 277, L. 2001*.

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40-6-412, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

LexisNexis® Montana Code Annotated > Title 40 Family Law (Chs. 1 — 16) > Chapter 6 Parent and Child (Pts. 1 — 10) > Part 4 Montana Safe Haven Newborn Protection Act (§§ 40-6-401 — 40-6-417)

40-6-412 Custody action — newborn's best interest.

In a custody action under 40-6-411, the court shall determine custody of the newborn based on the newborn's best interest as provided in 40-4-212. The court shall determine the newborn's best interest with the goal of achieving permanent placement for the newborn at the earliest possible date.

History

En. Sec. 9, Ch. 277, L. 2001.

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40-6-413, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

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40-6-413 Custody action — order. [Effective until July 1, 2025]

Based on the court's finding of the newborn's best interest under 40-6-412, the court may issue an order:

(1) granting legal or physical custody, or both, of the newborn to the parent and either retaining or relinquishing jurisdiction; or

(2) denying custody of the newborn to the parent and referring the matter to the department or county attorney for proceedings under Title 41, chapter 3, and, if applicable, [sections 1 through 18].

History

En. Sec. 10, *Ch. 277, L. 2001*; § 21, *Ch. 716, L. 2023*, effective July 1, 2023.

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40-6-414, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

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40-6-414 Presumption of waiver of parental rights — department to file petition. [Effective until July 1, 2025]

(1) Except as provided in [section 15], a parent who surrenders a newborn under 40-6-405 and who does not file a custody action under 40-6-411 is presumed to have knowingly waived the parent's parental rights to the newborn.

(2) If a custody action is not filed under 40-6-411 or if the parent is denied custody of the newborn under 40-6-413, the department shall file a petition under Title 41, chapter 3, part 4, or, if applicable, [sections 1 through 18], requesting appropriate relief with the goal of achieving permanent placement for the newborn at the earliest possible date.

History

En. Sec. 11, *Ch. 277, L. 2001*; § 22, *Ch. 716, L. 2023*, effective July 1, 2023.

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40-6-415, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

LexisNexis® Montana Code Annotated > Title 40 Family Law (Chs. 1 — 16) > Chapter 6 Parent and Child (Pts. 1 — 10) > Part 4 Montana Safe Haven Newborn Protection Act (§§ 40-6-401 — 40-6-417)

40-6-415 Terminated.

Sec. 21, *Ch. 277, L. 2001*.

History

En. Sec. 12, *Ch. 277, L. 2001*.

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40-6-416, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

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40-6-416 Reimbursement of medical expenses.

The department shall reimburse a hospital for the actual expenses incurred by the hospital in accepting and caring for a newborn who is surrendered under *40-6-405*.

History

En. Sec. 13, *Ch. 277, L. 2001*.

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40-6-417, MCA

Current through legislation effective legislation effective October 10, 2023, SB 164.

LexisNexis® Montana Code Annotated > Title 40 Family Law (Chs. 1 — 16) > Chapter 6 Parent and Child (Pts. 1 — 10) > Part 4 Montana Safe Haven Newborn Protection Act (§§ 40-6-401 — 40-6-417)

40-6-417 Surrender to emergency services provider as bar to criminal prosecution.

(1) A criminal investigation may not be initiated solely on the basis of a newborn being surrendered to an emergency services provider under this part in the absence of reasonable suspicion of actual abuse or neglect.

(2) Except when there is intentional infliction of injury to the abandoned infant, a criminal prosecution may not be initiated involving the abandonment of an infant that was not more than 30 days old and was surrendered to an emergency services provider under *40-6-405*.

History

En. Sec. 14, *Ch. 277, L. 2001*.

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N.M. Stat. Ann. § 24-22-1

Current through all chaptered acts of the 2023 regular session of the 56th Legislature.

Michie's ™ Annotated Statutes of New Mexico > Chapter 24 Health and Safety (Arts. 1 — 35) > Article 22 Safe Haven for Infants (§§ 24-22-1 — 24-22-8)

24-22-1. Short title.

Chapter 24, Article 22 NMSA 1978 may be cited as the "Safe Haven for Infants Act".

History

Laws 2001, ch. 31, § 1 and Laws 2001, ch. 132, § 1; 2005, ch. 26, § 1.

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N.M. Stat. Ann. § 24-22-1.1

Current through all chaptered acts of the 2023 regular session of the 56th Legislature.

Michie's ™ Annotated Statutes of New Mexico > Chapter 24 Health and Safety (Arts. 1 — 35) > Article 22 Safe Haven for Infants (§§ 24-22-1 — 24-22-8)

24-22-1.1. Purpose.

The purpose of the Safe Haven for Infants Act [Chapter 24, Article 22 NMSA 1978] is to promote the safety of infants and to immunize a parent from criminal prosecution for leaving an infant, ninety days of age or less, at a safe haven site. This act is not intended to abridge the rights or obligations created by the federal Indian Child Welfare Act of 1978 [25 USCS § 1901 et seq.] or the rights of parents.

History

Laws 2005, ch. 26, § 2; 2013, ch. 20, § 1.

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N.M. Stat. Ann. § 24-22-2

Current through all chaptered acts of the 2023 regular session of the 56th Legislature.

Michie's ™ Annotated Statutes of New Mexico > Chapter 24 Health and Safety (Arts. 1 — 35) > Article 22 Safe Haven for Infants (§§ 24-22-1 — 24-22-8)

24-22-2. Definitions.

As used in the Safe Haven for Infants Act [Chapter 24, Article 22 NMSA 1978]:

A. "fire station" means a fire station that is certified by the state fire marshal's office;

B. "hospital" means an acute care general hospital or health care clinic licensed by the state;

C. "Indian child" means an Indian child as defined by the federal Indian Child Welfare Act of 1978 [25 USCS § 1901 et seq.];

D. "infant" means a child no more than ninety days old, as determined within a reasonable degree of medical certainty;

E. "law enforcement agency" means a law enforcement agency of the state or a political subdivision of the state;

F. "safe haven site" means a hospital, law enforcement agency or fire station that has staff on site at the time an infant is left at such a site; and

G. "staff" means an employee, contractor, agent or volunteer performing services as required and on behalf of the safe haven site.

History

Laws 2001, ch. 31, § 2 and Laws 2001, ch. 132, § 2; 2005, ch. 26, § 3; 2013, ch. 20, § 2; 2020, ch. 9, § 28, effective July 1, 2021.

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N.M. Stat. Ann. § 24-22-3

Current through all chaptered acts of the 2023 regular session of the 56th Legislature.

Michie's ™ Annotated Statutes of New Mexico > Chapter 24 Health and Safety (Arts. 1 — 35) > Article 22 Safe Haven for Infants (§§ 24-22-1 — 24-22-8)

24-22-3. Leaving an infant.

A. A person may leave an infant with the staff of a safe haven site without being subject to criminal prosecution for abandonment or abuse if the infant was born within ninety days of being left at the safe haven site, as determined within a reasonable degree of medical certainty, and if the infant is left in a condition that would not constitute abandonment or abuse of a child pursuant to Section 30-6-1 NMSA 1978.

B. A safe haven site may ask the person leaving the infant for the name of the infant's biological father or biological mother, the infant's name and the infant's medical history, but the person leaving the infant is not required to provide that information to the safe haven site.

C. The safe haven site is deemed to have received consent for medical services provided to an infant left at a safe haven site in accordance with the provisions of the Safe Haven for Infants Act [Chapter 24, Article 22 NMSA 1978] or in accordance with procedures developed between the children, youth and families department and the safe haven site.

History

Laws 2001, ch. 31, § 3 and Laws 2001, ch. 132, § 3; 2005, ch. 26, § 4; 2013, ch. 20, § 3.

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N.M. Stat. Ann. § 24-22-4

Current through all chaptered acts of the 2023 regular session of the 56th Legislature.

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24-22-4. Safe haven site procedures.

A. A safe haven site shall accept an infant who is left at the safe haven site in accordance with the provisions of the Safe Haven for Infants Act [Chapter 24, Article 22 NMSA 1978].

B. In conjunction with the children, youth and families department, a safe haven site shall develop procedures for appropriate staff to accept and provide necessary medical services to an infant left at the safe haven site and to the person leaving the infant at the safe haven site, if necessary.

C. Upon receiving an infant who is left at a safe haven site in accordance with the provisions of the Safe Haven for Infants Act, the safe haven site may provide the person leaving the infant with:

(1) information about adoption services, including the availability of private adoption services;

(2) brochures or telephone numbers for agencies that provide adoption services or counseling services; and

(3) written information regarding whom to contact at the children, youth and families department if the parent decides to seek reunification with the infant.

D. A safe haven site shall ask the person leaving the infant whether the infant has a parent who is either a member of an Indian tribe or is eligible for membership in an Indian tribe, but the person leaving the infant is not required to provide that information to the safe haven site.

E. Immediately after receiving an infant in accordance with the provisions of the Safe Haven for Infants Act, a safe haven site shall inform the children, youth and families department that the infant has been left at the safe haven site. The safe haven site shall provide the children, youth and families department with all available information regarding the child and the parents, including the identity of the child and the parents, the location of the parents and the child's medical records.

History

Laws 2001, ch. 31, § 4 and Laws 2001, ch. 132, § 4; 2005, ch. 26, § 5; 2013, ch. 20, § 4.

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N.M. Stat. Ann. § 24-22-5

Current through all chaptered acts of the 2023 regular session of the 56th Legislature.

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24-22-5. Responsibilities of the children, youth and families department.

A. The children, youth and families department shall be deemed to have emergency custody of an infant who has been left at a safe haven site according to the provisions of the Safe Haven for Infants Act [Chapter 24, Article 22 NMSA 1978].

B. Upon receiving a report of an infant left at a safe haven site pursuant to the provisions of the Safe Haven for Infants Act, the children, youth and families department shall immediately conduct an investigation, pursuant to the provisions of the Abuse and Neglect Act [Chapter 32A, Article 4 NMSA 1978].

C. When an infant is taken into custody by the children, youth and families department, the department shall make reasonable efforts to determine whether the infant is an Indian child. If the infant is an Indian child:

(1) the child's tribe shall be notified as required by Section 32A-1-14 NMSA 1978 and the federal Indian Child Welfare Act of 1978 [25 USCS § 1901 et seq.]; and

(2) pre-adoptive placement and adoptive placement of the Indian child shall be in accordance with the provisions of Section 32A-5-5 NMSA 1978 regarding Indian child placement preferences.

D. The children, youth and families department shall perform public outreach functions necessary to educate the public about the Safe Haven for Infants Act, including developing literature about that act and distributing it to safe haven sites.

E. An infant left at a safe haven site in accordance with the provisions of the Safe Haven for Infants Act shall presumptively be deemed eligible and enrolled for medicaid benefits and services.

History

Laws 2001, ch. 31, § 5 and Laws 2001, ch. 132, § 5; 2005, ch. 26, § 6; 2013, ch. 20, § 5.

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N.M. Stat. Ann. § 24-22-6

Current through all chaptered acts of the 2023 regular session of the 56th Legislature.

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24-22-6. Confidentiality. [Repealed]

History

Laws 2001, ch. 31, § 6 and Laws 2001, ch. 132, § 6; repealed by 2005, ch. 26, § 8, effective June 17, 2005.

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N.M. Stat. Ann. § 24-22-7

Current through all chaptered acts of the 2023 regular session of the 56th Legislature.

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24-22-7. Procedure if reunification is sought.

A. A person established as a parent of an infant previously left at a safe haven site shall have standing to participate in all proceedings regarding the child pursuant to the provisions of the Abuse and Neglect Act [Chapter 32A, Article 4 NMSA 1978].

B. If a person not previously established as a parent seeks reunification with an infant previously left at a safe haven site and the person's DNA indicates parentage of the infant, that person shall have standing to participate in all proceedings regarding the infant pursuant to the provisions of the Abuse and Neglect Act.

History

Laws 2001, ch. 31, § 7 and Laws 2001, ch. 132, § 7; 2005, ch. 26, § 7; 2013, ch. 20, § 6.

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N.M. Stat. Ann. § 24-22-8

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24-22-8. Immunity.

A safe haven site and its staff are immune from criminal liability and civil liability for accepting an infant in compliance with the provisions of the Safe Haven for Infants Act [Chapter 24, Article 22 NMSA 1978] but not for subsequent negligent medical care or treatment of the infant.

History

Laws 2001, ch. 31, § 8 and Laws 2001, ch. 132, § 8; 2013, ch. 20, § 7.

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