

WICWA WEBINAR SERIES: IDENTIFICATION, NOTICE, & RIGHTS

Outagamie County

April 30, 2021

Introductions

Tania Cornelius
Tribal Affairs Specialist
Department of Children and Families
Tania.Cornelius@wisconsin.gov

Justin Wolff
Legal Advisor
Children's Court Improvement Program
Justin.Wolff@wicourts.gov

Poll Question

Applicability

ICWA and WICWA

Indian Child Welfare Act (ICWA)	Wisconsin Indian Child Welfare Act (WICWA)	ICWA Regulations
Federal Law	Codified into State Statutes	Legally-binding guidance
Enacted in 1978	Enacted 2009	Effective December 12, 2016

WICWA vs. ICWA Regulations

- Both WICWA and ICWA/ICWA Regulations must be complied with in Chapters 48 and 938 proceedings.
 - ▣ Where there is a conflict between the two, the one providing the greater protection would apply.
- WICWA already mandates several of the provisions required under the ICWA Regulations.

Indian Tribe

- Indian tribe: “Any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska native village, which is recognized as eligible for the services provided to Indians by the U.S. Secretary of the Interior, because of Indian status...”
[Wis. Stat. § 48.02(8m)]

Tribal Membership

- Indian tribes have the inherent authority to determine their membership.
-See: *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
 - Eligibility decision of the tribe is definitive, not advisory.
- Tribal membership is a political status **NOT** a racial or ethnic designation.
 - Recognition that an Indian person is a member of a sovereign political entity (the tribe), in effect having dual-citizenship.
- Membership criteria differ from tribe-to-tribe.
- Enrollment is not the same as membership.

Poll Question

Indian Child

- ICWA/WICWA applies in cases involving an Indian child.
- Indian child: “Any unmarried person who is under the age of eighteen and is affiliated with an Indian Tribe in any of the following ways:
 - As a member of *an* Indian Tribe, OR
 - As a person who is eligible for membership in *an* Indian Tribe and is the biological child of a member of an Indian Tribe.”
[Wis. Stat. § 48.02(8g)]
 - Note: membership/eligibility need not be in the same tribe as a parent.

Indian Child Custody Proceeding

- “Indian child custody proceeding” means a proceeding governed by the federal Indian Child Welfare Act, 25 U.S.C. 1901 to 1963, in which any of the following may occur:
 - A pre-adoptive placement,
 - An out-of-home care placement,
 - Termination of parental rights, and/or
 - An adoptive placement.

Out-of-home Care Placement

Types of Cases:

- CHIPS
- JIPS
 - Uncontrollable
 - Habitually truant from school
 - School dropout
 - Habitually truant from home
- Guardianships of minor person
- Foster care placement in family cases
- Exception for emergency removals/holding a child in Temporary Physical Custody.
[Wis. Stat. §§ 48.028(2)(e) & (7)(bm)]

Case Example: Parent Does Not Want Tribe Notified

The child welfare agency has just removed an Indian child from the home in a CHIPS case. One of the parents has told the caseworker that they do not want the tribe notified or involved in the case. How do you proceed?

Applicability

- ICWA/WICWA applies even if:
 - ▣ The Indian child is not part of an Existing Indian Family,
 - ▣ The Indian child's tribe chooses to not participate in the court proceedings, or
 - ▣ Parent(s) do not want the tribe involved.
- ICWA/WICWA rights are derived from the status of the child as an Indian child.

Identification

Identification Tools

- The following tools can be found in the ICWA record in eWiSACWIS:
 - ▣ Screening for Child's Status as Indian
 - Should be created for **all** children.
 - ▣ Child's Biological Family History
 - ▣ Request for Confirmation of Child's Indian Status
 - ▣ Documentation of WICWA Casework
 - eWiSACWIS Desk Guide

Identification

If reason to know the case involves an Indian child, but court lacks sufficient information to determine whether child is an Indian child:

- ▣ Additional steps required, including confirming that agency used due diligence to identify and work with all possible tribes.
- ▣ Court must treat as an Indian child (apply all WICWA requirements) until determined *on the record* that the child is **not** an Indian child.

Reason to Know

- ▣ The court has “reason to know” that the case involves an Indian child if **any** of the following:
 - ▣ Any participant informs the court that child is an Indian child.
 - ▣ Any participant informs the court that they discovered information indicating that the child is an Indian child.
 - ▣ Child gives the court reason to know he/she is an Indian child.
 - ▣ The court is informed that domicile or residence of the child, a parent, or Indian custodian is on a reservation.
 - ▣ The court is informed the child is/has been a ward of Tribal court.
 - ▣ The court is informed that either parent or child possesses an identification card indicating membership in a tribe.
- ▣ Remember to use WICWA forms.

Poll Question

Inquiry

- ▣ In all emergency, voluntary, and involuntary custody proceedings, the court must:
 - Ask each case participant whether they know or have reason to know child is an Indian child, and
 - Instruct parties to inform the court if they subsequently receive information of reason to know Indian child.

Language is included on: TPC Order (JD-1711), CHIPS Dispositional Order (JC-1611), JIPS Dispositional Order (JD-1746), TPR Orders (JC-1638 & JC-1639), Guardianship Order (JC-1606), and Adoption Order (JC-1647).

Emergency Removal

- Court must promptly hold a hearing and make a finding on the record that emergency placement/removal is necessary to prevent imminent physical damage or harm to the child.

- Finding included on Temporary Physical Custody Order-ICWA (IW-1711), Notice of Post-Disposition Emergency Change in Placement (JD-1767), and Post-Disposition Emergency Change in Placement Order (JD-1768).
- ICWA version of Temporary Physical Custody Request form (IW-1608) includes information regarding Indian Child status.

Emergency Removal

- An emergency placement must be terminated immediately when it is no longer necessary to prevent imminent physical damage or harm to the child by:
 - Initiating child custody proceeding (i.e., CHIPS) subject to the provisions of ICWA,
 - Transferring the child to jurisdiction of the tribe, or
 - Restoring child to parent or Indian custodian.

Notice

Poll Question

A.

Initial Notice

- Responsibility for providing proper notice is on the petitioner.
 - ▣ Though county practice may differ as to who may be providing the notice (i.e., county agency, prosecutor's office, juvenile clerk).
 - ▣ **IMPORTANT:** All WICWA requirements apply to privately filed cases, too!
 - Termination of Parental Rights
 - Guardianship of Minor Person (§ 48.9795)
- Notice requirements apply to involuntary-filed case types.
 - ▣ Not required for voluntary TPR or for court approval of voluntary placement agreement.

Initial Notice

- First notice to the Indian child's parents, Indian custodian, and tribe in a proceeding must be by registered mail, return receipt requested.
 - ▣ Federal ICWA regulations indicate that certified mail is allowable; however, WICWA requires registered mail and is binding.
 - ▣ May be notified via other means as required by or allowed under statute, but **must** also provide registered mail notice, even if redundant (includes incarcerated parent notice).
- The return receipts must be filed with the court.

Initial Notice

- No Indian child custody proceeding may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired.
- For known parents and tribes: *at least 10 days* following receipt of the registered mail notice.
 - May be longer depending on circumstances and/or assertion of rights.

Initial Notice

- If the identity or location of the parent or tribe is **unknown**, the first hearing in the case (excluding TPC Hearing) may not be held until *at least 10 days* after receipt by BIA.
 - WICWA states that hearing cannot be held until *at least 15 days* after receipt of notice by BIA.
- Notice must be provided for the above via registered mail with return receipt requested to the corresponding BIA regional office for any prospective tribe (see resources).

Initial Notice

- Copies of all initial notices sent to parents, tribe, and Indian custodian must be sent to Bureau of Indian Affairs (BIA) Midwest Region office (see resources) by registered **or** certified mail with return receipt or personal service.
 - No timeframe provided in ICWA regulations.
 - NOTE: This requirement is in addition to providing notice to BIA by registered mail when identity or location of **parent or tribe** unknown.

Initial Notice

- Some practical considerations:
 - Right to notice (as well as other rights under ICWA) applies to Indian parents **and** non-Indian parents.
 - Should the first notice to parents in a TPR case **also** be provided through personal service? [§ 48.42(4)(a)]
 - What about if a parent is incarcerated and the facility cannot/will not sign for registered mail?
 - Still have to send as required to follow the law.
 - Creates record of attempt for file.
 - Best practice is to provide notice to the tribe in cases involving an Indian child placed in the home.
 - Early collaboration, access to services and active efforts.

Initial Notice

Initial notice to parents, tribe, and Indian custodian (if any) must include copy of petition and following:

- Hearing information
- Names, birthdates, birth places, and enrollment info for child & parents
- Same information for direct lineal ancestors (if known)
- Name of petitioner and attorney contact info
- Information on all individuals notified
- Address & phone number for court
- Right to court-appointed attorney
- Right to adjournment for 20 days
- Right to petition for transfer to tribal court
- Potential legal consequences of proceeding

Initial Notice

- Additional party information, paternity, and tribal affiliation questions included on ICWA petitions (IW-1610, IW-1630, and IW-1721).
- Additional advisements included on IWCA notice (IW-1724) and summons (IW-1633 and IW-1720).
- Incorporated into Notice of Involuntary Child Custody Proceeding of an Indian Child (DCF form DCF-F-CFS2017-E).

Subsequent Notice

- Notice for subsequent hearings must be sent to the tribe in writing by:
 - Mail
 - Personal service
 - Fax
 - **NOT E-MAIL**
[Wis. Stat. § 48.028(4)(a)]
- What about e-filing?

Rights

Poll Question

Legal Representation

- Any indigent parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. [Wis. Stat. § 48.028(4)(b)]
- The State Public Defender's Office will appoint counsel for qualifying parents and Indian custodians in CHIPS and JIPS cases subject to WICWA (in addition to providing representation in TPR cases).
- The circuit court has discretion to appoint counsel for any parent in a CHIPS, JIPS, or TPR case.

Poll Question

Definition of Indian Custodian

- Indian custodian means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.
- See also s. 48.02(8p), which has a similar definition.

Advising Unrepresented Parents/Indian Custodian

- ▣ If parent or Indian custodian appears without counsel, the court must advise him/her of right to:
 - Court-appointed counsel
 - Request transfer to tribal court
 - Object to transfer to tribal court
 - Request additional time to prepare for case
 - Right to intervene (if not already a party)

Included on ICWA version Notice of Rights and Obligations form (IW-1716).

Adjournment

- ▣ The parent, Indian custodian, and Indian child's Tribe are entitled to one extension of up to 20 days for each proceeding. Any extension beyond the initial extension up to 20 days is subject to the State court's rules and discretion.
[ICWA Regulations § 23.112]
- ▣ These timeframes begin to run at the time of the receipt of the formal notice—all the more reason to provide informal notice immediately (even if in-home), as to potentially avoid need for extension requests.

Tribal Intervention

- Discussed in previous training.
- WICWA provides that an Indian child's Indian custodian or tribe may intervene at any point in any child custody proceeding. [Wis. Stat. § 48.028(3)(e)]
- The tribe does not have to be represented by an attorney to intervene or participate in the proceeding. [Supreme Court Rule 23.02(2)(n)]
- The tribe has a right to examine all documents filed with the court and the records maintained by the county agency. [Wis. Stat. §§ 48.028(4)(c) & 48.981(7)(a)2., 10m., 10r., 11m.]

Case Example: Change in Indian Child Status

A child is placed in a foster home under a CHIPS Dispositional Order. The mother claimed that she did not know the identity of the father. Subsequently, the father is identified and paternity is established. The father is a member of a federally-recognized tribe, the child is eligible for membership and now meets the definition of an Indian child and the case is subject to WICWA. How should you proceed?

Case Example: Change in Indian Child Status

- Set the case for a revision hearing and provide registered mail notice to the parents, Indian custodian, and tribe as though it was the first hearing in the case.
 - All other requirements (QEW testimony, active efforts, placement preferences) will then be followed at the revision and a new dispositional order issued reflecting WICWA applicability.
- Eligibility can and does change throughout the lifetime of a case—communication with any potential tribe and ongoing inquiry about the child’s status is vital part of case management.

Invalidation of Action

- An Indian child, parent, Indian custodian, or Tribe may move the court to invalidate an order placing the child in out-of-home care or terminating parental rights on the grounds of a violation of 25 USC 1911, 1912, or 1913. [Wis. Stat. § 48.028(6)]
- If the court finds that grounds exist, the court shall invalidate the order for out-of-home care placement or termination of parental rights. [Wis. Stat. § 48.028(6)]

Implications for Noncompliance with WICWA

- Invalidation of proceedings
- Possible return of custody to parent
- Nullification of adoption orders
- Instability of placements of children
- Delay in permanence for a child
- Malpractice actions

Resources

- Judicial Checklist - WICWA:
www.wicourts.gov/courts/programs/docs/ccipwicwa.pdf
- ICWA circuit court forms:
<https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=21>
- CCIP E-Learning Project: www.wicciptraining.com
- DCF Resources (e.g., Active Efforts Guide, forms):
<https://dcf.wisconsin.gov/wicwa>
- WICWA Online Resource for Case Workers
https://media.wcwpds.wisc.edu/foundation/WICWA_Online_Resource/index.html
- Missing Threads video:
<https://www.youtube.com/watch?v=ZCLUbS4FxWo>

Resources

- Midwest Regional Bureau of Indian Affairs mailing address:
 - ▣ Bureau of Indian Affairs-Midwest Region
Attn: Regional Director/ICWA
Norman Pointe II Building
5600 West American Blvd, Suite 500
Bloomington, MN 55437
- BIA Regional Office Information
 - ▣ <https://www.bia.gov/regional-offices>

Questions?

JUDICIAL CHECKLIST – WISCONSIN INDIAN CHILD WELFARE ACT

The Wisconsin Indian Child Welfare Act (WICWA) codifies the federal Indian Child Welfare Act into state statutes. WICWA protects the best interests of Indian children while promoting stability and security of Indian tribes and families. WICWA **applies** to out-of-home placements in CHIPS, status offenses in JIPS, and guardianship cases, TPR proceedings, and pre-adoptive and adoptive placements. WICWA **does not apply** to placements based on delinquent acts or family court proceedings when one of the parents has custody. Additional information on WICWA can be found at: www.wicciptraining.com/ELearningActivities

APPLICABILITY

An “Indian child” is defined as an unmarried person under the age of 18 who is either:

- 1) A member of a federally recognized Indian tribe, or
- 2) The biological child of a member of a tribe **AND** eligible for membership in a tribe.

There is an ongoing obligation throughout the case to identify an Indian child. Court must instruct parties to inform court if they receive information indicating that there is reason to know the child is Indian child.

- Did the court make an inquiry of all case participants, on the record, as to whether the case involves an Indian child? *If there is “reason to know” that the child is an Indian child, proceed as a WICWA case.*
- Have both parents and any Indian custodian been identified? Has paternity been acknowledged or established? What has been done to locate an absent or missing parent?
- Is the child a member of a tribe? If not, is either parent a member of or eligible for membership in a tribe? Is the child eligible for membership in a tribe? *Each tribe determines membership.*
- If the parents are unable to provide information on tribal affiliation, have family members been consulted?
- Has a Request for Confirmation of Child’s Indian Status form been sent to applicable tribe(s)? Has documentation of eligibility for membership been received back from the tribe(s)?

NOTICE FOR OUT-OF-HOME PLACEMENT AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

First Hearing in the Case (excluding Temporary Physical Custody Hearings)

- Has notice of the proceeding been sent to the tribe, parents, and Indian custodian (if any) by registered mail with return receipt requested?
 - Have at least 10 days elapsed since **receipt** of the notices? *If no, adjourn hearing.*
 - Have return receipts been received and filed with the court?
- If parent or tribe is unknown, was notice sent to Bureau of Indian Affairs at least 15 days prior to hearing?
- Has a parent, tribe, or Indian custodian requested adjournment to prepare? *If yes, adjourn up to 20 days.*
- If the parents/Indian custodian do not have counsel, do they want to be represented? Have they contacted the Public Defender’s Office? *Right to appointed counsel if indigent.*
- Have parents been notified of their right to intervene and to request/object to transfer to tribal court?
- Have parents been notified of potential consequences of case on parental and custodial rights (*form IW-1716*)?

Subsequent Hearings

- Has tribal contact information (names, addresses, and phone numbers) been documented in the court record for notification of future court proceedings?
- Has written notice to tribe, parents, and Indian custodian been provided by mail, personal delivery, or fax?
- Has the tribe received copies of all reports, orders, and other documents submitted to the court?

INTERVENTION AND TRANSFER OF JURISDICTION

- Has the tribe or Indian custodian made a motion to intervene? *Right to intervene at any stage.*
- Is there a request by the tribe, Indian custodian, or parent to transfer the case to tribal court?
- If transfer requested, the case **shall be** transferred to tribal court **unless one of the following applies**:
 - Does one of the parents object to the transfer?
 - Has the tribal court declined jurisdiction or does the tribe lack a tribal court?
 - Is there good cause under ss. 48.028(3)(c)3. or 938.028(3)(c)3. to deny the transfer?

PLACEMENT PREFERENCES

The child must be placed according to placement preferences in ss. 48.028(7) or 938.028(6) in any out-of-home, pre-adoptive, or adoptive placement, unless good cause is shown, per ss. 48.028(7)(e) or 938.028(6)(d).

- Has the tribe established its own order of placement preferences? *If yes, that order applies.*
- Is the current or proposed placement in compliance with the applicable placement preferences?
- What efforts have been made to place the child in the order of preference?
- Have both parents been asked for names of extended family members?
- Was the tribe contacted for a placement approved, licensed, or operated by the tribe?
- If placement preferences not followed, is there good cause to depart from order of preference? *Reasons for asserting good cause must be made on the record or provided to court and parties in writing.*

Additional Considerations for Out-of-Home and Pre-adoptive Placements:

- Is the child's placement the least restrictive, family-like setting that meets the child's special needs, if any?
- Is the child placed in reasonable proximity to the child's home, taking into account any special needs?

FINDINGS FOR OUT-OF-HOME PLACEMENT AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

Emergency Removal

- Is emergency removal necessary to prevent imminent physical damage or harm to the child?

Active Efforts to Prevent Breakup of Indian Family*

- Have all of the required activities under ss. 48.028(4)(g) or 938.028(4)(f) for *active* efforts been conducted?
 - Were appropriate tribal representatives requested to evaluate the family and assist in developing a case plan that uses resources of the tribe and Indian community?
 - Has a comprehensive assessment of the family been completed?
 - Have tribal representatives been identified, notified, and invited to participate in the proceeding?
 - Have extended family members been consulted for support, cultural connections, and placement?
 - Were arrangements made to provide family interaction in the most natural and unsupervised setting?
 - Were all available family preservation strategies offered or employed, while also involving the tribe?
 - Were community resources offered and the family actively assisted in accessing those resources?
 - Was monitoring of client progress and participation in services provided?
 - If services were unavailable, were alternative ways of addressing the family's needs considered?
- If any activity was not conducted, has documentation been provided to the court with an explanation?
- Why have the activities and efforts been unsuccessful in reunifying the Indian family?

**Under WICWA, the active efforts finding is also required at Extension and Permanency Hearings.*

Serious Emotional or Physical Damage

- Has the petitioner provided the requisite qualified expert witness (QEW) testimony?
- Was the QEW chosen in the order of preference under ss. 48.028(4)(f) or 938.028(4)(e)? If not, what efforts were made to secure a QEW from a higher order of preference?
- Is the QEW knowledgeable in the tribe's customs and child-rearing practices? In what capacity?
- Are any of the reasons for the child's removal related to cultural child-rearing practices?
- Does a causal relationship exist between the conditions in the home and the likelihood that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, based on the QEW testimony? *Burden of proof of clear and convincing evidence for out-of-home placement and beyond a reasonable doubt for involuntary TPR.*

VOLUNTARY TPR, VOLUNTARY PLACEMENT AGREEMENT, OR DELEGATION OF POWERS

- Has the Indian parent or Indian custodian consented in writing?
- Were the terms and consequences of the consent, including limitation on withdrawing consent, fully explained and understood?
- Was the consent recorded before a judge and accompanied by the judge's certificate?
- Is the child at least 11 days old at the time of the consent?
- Have placement preferences been followed or is there good cause to depart from the order of preference?