

WISCONSIN INDIAN CHILD  
WELFARE ACT  
(WICWA)  
FUNDAMENTALS

Webinar  
October 13, 2020

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**Introductions**

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**Poll Question – Profession**

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Poll Question – Experience

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Background

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Poll Question – Wisconsin Tribes

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## Federally Recognized Tribes in Wisconsin

- ❑ Bad River Band of Lake Superior Chippewa
- ❑ Forest County Potawatomi Community
- ❑ Ho-Chunk Nation
- ❑ Lac Courte Oreilles Band of Lake Superior Chippewa
- ❑ Lac du Flambeau Band of Lake Superior Chippewa
- ❑ Menominee Indian Tribe of Wisconsin
- ❑ Oneida Nation
- ❑ Red Cliff Band of Lake Superior Chippewa
- ❑ Sokaogon Chippewa
- ❑ St. Croix Chippewa Indians of Wisconsin
- ❑ Stockbridge-Munsee Band of Mohicans

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## Poll Question – US Tribes

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## ICWA and WICWA

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

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## Purpose

- Intended to protect the best interests of Indian children and promote the stability and security of Indian tribes and families
- “In Indian child custody proceedings, the best interests of the Indian child shall be determined in accordance with the federal Indian Child Welfare Act, 25 USC 1901 to 1963, and the policy specified in this subsection.”  
[Wis. Stat. § 48.01(2)]

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## History of ICWA

- By the 1960s, recognition that Indian families were being broken apart at an alarming rate due to state social service departments removing children and placing them in non-Indian homes.
- Studies in 1969 and 1974 showed that 25% to 35% of all Indian children had been separated from their families and placed in foster care or institutions or with adoptive families.
  - 85% of all Indian children in foster homes were in non-Indian homes
  - Only 1% were removed because of abuse. The rest: “neglect” or “social deprivation.”

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## History of ICWA - Wisconsin



In Wisconsin, the risk of being separated from their children was 1,600 times greater for Indians than for non-Indians.

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Poll Question – Applicability

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**Applicability**

- 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)]

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Poll Question – Membership

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## Tribal Membership

Indian tribes have the inherent authority to determine their membership.

-See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)

- Membership criteria differ from tribe-to-tribe.
- Tribal membership is a political status NOT a racial or ethnic designation.
- County Agency should use:
  - Screening for Child's Status as Indian Form (DCF-F-CFS2322-E)
  - Request for Confirmation of Child's Indian Status Form (DCF-F-CFS2016-E)

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## Poll Question – Case Types

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## Indian Child Custody Proceeding

“Indian child custody proceeding” includes:

- A preadoptive placement
- An out-of-home care placement
- Termination of parental rights
- An adoptive placement

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**Poll Question – Guardianship**

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- Out-of-Home Care Placement**
- CHIPS
  - JIPS
    - Uncontrollable
    - Habitually truant from school
    - School dropout
    - Habitually truant from home
  - Guardianships
    - § 48.977 & § 48.9795 (formerly Chapter 54)
  - Foster care placement in family cases

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**Inquiry & Notice**

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## Inquiry

In all emergency, voluntary, and involuntary custody proceedings, the court must:

1. Ask each case participant whether they know or have reason to know child is an Indian child, and
2. Instruct parties to inform the court if they subsequently receive information of reason to know Indian child.

ICWA Regulations - Language added to 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).

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## Reason to Know

- Under ICWA regulations, 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.

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## Poll Question – Initial Notice

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**Poll Question – TPC Hearing**

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**Notice to Tribes**

- First notice to the Indian child's parents, Indian custodian, and tribe in a proceeding must be by registered mail, return receipt requested.
  - Must be received at least 10 days prior to the first hearing (excludes TPC Hearings).
- The return receipts must be filed with the court.
- If identity or location of parent or tribe cannot be determined, this initial notice must be sent to the BIA via registered mail.

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**Initial Notice – ICWA Regulations**

- Allows initial notice to be provided to parents, tribe, and Indian custodian by registered or certified mail with return receipt requested.
  - Note: WICWA specifies registered mail.
- Copies of notices sent to parents, tribe, and Indian custodian must be sent to BIA regional office by registered or certified mail with return receipt or personal service.
  - No timeframe provided in ICWA regulations.
  - This requirement is in addition to providing notice to BIA by registered mail when identity or location of parent or tribe unknown.

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### Initial Notice – ICWA Regulations

- Additional party information, paternity, and tribal affiliation questions added to ICWA petitions (IW-1610, IW-1630, and IW-1721).
- Additional advisements added to IWCA notice (IW-1724) and summons (IW-1633 and IW-1720).
- DCF modified the Notice of Involuntary Child Custody Proceeding of an Indian Child form.

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### Notice to Tribes

- Notice of subsequent hearings must be sent in writing by:
    - Mail
    - Personal service
    - Fax
    - **NOT E-MAIL**
- [Wis. Stat. § 48.028(4)(a)]
- Notice continues even if tribe does not formally intervene in the case.

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### Tribal Intervention

- 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. ]

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### Transfer of Jurisdiction

Upon the petition of the Indian child's parent, Indian custodian, or Tribe, the circuit court shall transfer the case to the Tribal court except when:

- A parent objects to the transfer
- The child's Tribe does not have a court
- The court of the child's tribe declines
- The court finds good cause not to transfer

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### Good Cause to Deny Transfer to Tribal Court

The court may find good cause only if person opposing transfer proves one of the following:

1. Child (12 years+) objects to the transfer.
  2. Providing evidence or testimony in tribal court would result in undue hardship to parties or witnesses that cannot be mitigated.
  3. Tribe received notice as required by WICWA, the tribe has not indicated in writing that it is monitoring the case and may request transfer at a later date, and the tribe's petition to transfer is filed more than 6 months for CHIPS/JIPS cases or 3 months for TPR cases after receiving notice.
- Court may not consider any perceived inadequacy of the tribal social services or the tribal court

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### Advisements & Rights

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Poll Question – Counsel

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Advising Unrepresented Parents/Indian Custodian

If parent or Indian custodian appears without counsel, the court must advise him/her of right to:

1. Court-appointed counsel  
[SPD's Office will appoint if indigent.]
2. Request transfer to tribal court
3. Object to transfer to tribal court
4. Request additional time to prepare for case
5. Right to intervene (if not already a party)

ICWA Regulations - ICWA version of the Notice of Rights and Obligations form (IW-1716) was created.

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Poll Question – Indian Custodian

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## 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.

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## Findings

- Serious Damage
- Active Efforts
- Placement Preferences

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## Poll Question – QEW Testimony

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### Qualified Expert Witness Requirement

- Party seeking to place the Indian child in out-of-home care or to terminate parental rights to the Indian child **must** utilize a qualified expert witness.
- QEW testimony is required even when the tribe is in agreement.
- County social worker regularly assigned to the child may not serve as QEW.

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### QEW: Order of Preference

- In descending order of preference, qualified expert witnesses are the following:
  - A member of the Indian child's tribe
  - A member of another tribe
  - A professional person
  - A lay person
- Must have knowledge of the Indian child's tribe's family organization and child-rearing practices.

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### Serious Damage Finding

- When proving serious damage, including QEW testimony, evidence must show a causal relationship between conditions in the home and likelihood that continued custody of the child will result in serious emotional or physical damage to this child.

ICWA Regulations - Information regarding the causal relationship requirement was added to form summary for orders containing the serious damage finding.

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**Poll Question – Active Efforts**

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**Active Efforts**

The court may not order an Indian child to be removed from the home or involuntarily terminate parental rights unless:

- The court/jury finds that active efforts have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.
- Requires an ongoing, vigorous, and concerted level of case work. [Wis. Stat. § 48.028(4)(g)]
- Statement of Active Efforts (IW-1609)

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**Practical Considerations**

- If any of the activities enumerated in WICWA were not conducted, the person seeking the out-of-home care placement or involuntary TPR shall submit documentation to the court explaining why the activity was not conducted.
- The county/petitioner is responsible for providing active efforts, not the tribe.
- WICWA requires that the court **also** make the active efforts finding at Permanency Hearings and Extension Hearings.
  - ▣ Finding also needs to be made at Permanency Plan Reviews done by the court OR panel.

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### Active Efforts vs. Reasonable Efforts

- The Indian Child Welfare Act created the concept of Active Efforts in 1978.
- The Adoption Assistance and Child Welfare Act created the concept of Reasonable Efforts in 1980.
- *In the Interest of J.J.*, 158 Wis. 2d 353; 462 N.W.2d 551 (Unpublished Ct. App. 1990) held that for the active efforts finding, the services must at a minimum demonstrate the sensitivity of court-appointed experts toward Indian culture and traditions that would affect the behavior of the parents being evaluated.

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### Case Law

*Kewaunee County D.H.S. v. D.I.*, 2017AP1697 (Wisconsin Court of Appeals)

- Relies upon *Adoptive Couple v. Baby Girl* (U.S. Supreme Court)
- Under ICWA and WICWA, serious damage finding and active efforts are not required for a parent who has never had legal or physical custody of the child
- Practice notes:
  - Fact-specific judicial determination
  - Other provisions of ICWA/WICWA would still apply
  - Serious damage and active efforts findings would be required for the other parent, regardless of tribal status

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### Poll Question – Placement Preferences

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### Placement Preferences: Out-of-Home Care Placements

- Preferences for out-of-home care placements:
- ▣ An extended family member
  - ▣ A foster home licensed, approved, or specified by the Indian child's Tribe
  - ▣ An Indian foster home licensed by another licensing agency
  - ▣ Group home or RCC approved by an Indian Tribe

(Unless preference otherwise indicated by the child's tribe.)

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### Good Cause to Depart from Placement Preferences: WICWA

- ▣ Good cause to depart shall be based on one or more of the following:
  1. Request of parent.
  2. Request of child (if of sufficient age/development).
  3. Extraordinary needs of the child as established by expert witness testimony.
  4. Unavailability of suitable placement after diligent efforts have been made to place in order of preference.
- ▣ Length of time in placement does not in itself constitute an extraordinary need.
- ▣ County agency must maintain records of efforts made to comply with placement preferences.

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### Voluntary Placement/TPR

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## Poll Question – Voluntary TPR

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## Voluntary Consent

- Under ICWA/WICWA, consent by parent to TPR, out-of-home placement, pre-adoptive, or adoptive parent must be in writing, recorded before a judge, accompanied by judge's written certification that terms and consequences were explained and understood. The ICWA regulations also require that the court explain the limitations on withdrawal of consent.
  - ▣ Consent to Termination of Parental Rights-Judicial (IW-1637)
  - ▣ Voluntary Placement Agreement for an Indian Child (DCF form)

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## Other Provisions

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### Adoption of an Indian Child

- Court must send a copy of the adoption order and following information to BIA (in D.C.) within 30 days:
  - Birth/adoptive name, DOB, and Tribal affiliation of Indian child.
  - Names and addresses of biological and adoptive parents.
  - Contact information for any agency with information related to the adoption.
  - Any affidavit from biological parent requesting confidentiality.
  - Any additional information related to Tribal membership.

ICWA Regulations - Created Indian Child Adoptee Information circuit court form to send to BIA and ICWA version of the Order for Adoption (IW-1647).

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### 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)]

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### Case Example: Discover Indian Child After Disposition

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?

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**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. The Indian parent has told the caseworker that they do not want the tribe notified or involved in the case. How do you proceed?

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**Case Example:  
Using an Affidavit for QEW Testimony**

In a CHIPS case subject WICWA, the District Attorney requests that the qualified expert witness from the child's tribe submit their testimony through a written affidavit. None of the parties object. Should the judge permit this?

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**Resources**

- Judicial Checklist - WICWA:  
[www.wicourts.gov/courts/programs/docs/ccipwicwa.pdf](http://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](http://www.wicciptraining.com)
- DCF Resources (e.g., Active Efforts Guide, forms):  
<https://dcf.wisconsin.gov/wicwa>
- Missing Threads video:  
<https://www.youtube.com/watch?v=ZCLUbS4FxWo>

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Questions?

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