

WISCONSIN INDIAN CHILD WELFARE ACT (WICWA) FUNDAMENTALS FOR CLERKS

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Introductions

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Background

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

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

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)]

Carlisle Indian School Pennsylvania 1879



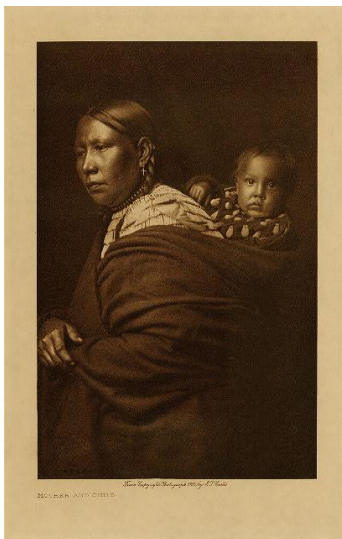
Winnebago Indian School Neillsville, WI (1921-1957)



History of ICWA

- History of Boarding Schools.
- 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.”

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.

Present Day - Wisconsin

**Disproportionate Foster Care of AI/AN Children:
15 States with the Highest Rates³**

State	Disproportionality rate (2017)	% of children who are AI/AN	% of children in foster care who are AI/AN
Minnesota	16	1.7	27.2
Wisconsin	5.4	1.3	7
North Dakota	4.6	8.6	39
South Dakota	4.1	13.8	57
Nebraska	3.88	1.3	4.9
Oregon	3.53	1.6	5.6
Hawaii	3.5	0.2	0.6
Washington	3.2	1.8	5.7
Montana	3.2	10.7	34.2
Utah	3.1	1.1	3.3
Alaska	2.5	21.2	53
Iowa	2.1	0.4	0.9
North Carolina	1.8	1.3	2.4
California	1.8	0.5	0.9
Idaho	1.6	1.4	2.2

Effects on Indian Children



- Cross-racial adoptions have a high likelihood creating a severe identity crisis in Indian children as they become adolescents (Matheson, 1996 - NRCFCPP)
- Indian youth have the highest rate of suicide of any population in the nation (NICWA fact sheet)

Applicability

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)]

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)

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

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

CCAP Codes

- Enter CSTW (Case Subject to WICWA), when the case is subject to WICWA.
 - ▣ Will place case in WICWA maintenance.
 - ▣ Easier to identify when pull up case (bar on top) and can easily search for cases subject to WICWA.
- Use CNSTW (Case Not Subject to WICWA) maintenance code if it is later determined WICWA does not apply.

WICWA Circuit Court Forms

- WICWA circuit court forms should be used
 - ▣ <https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=21>
 - ▣ See list provided in online materials
- WICWA forms in CHIPS and JIPS intended for out-of-home placements only.
 - ▣ WICWA findings would not be required for in-home cases.
 - ▣ If tribe requesting active efforts finding and judge makes, use “Other” section on order.

Inquiry & Notice

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.

Language 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).

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.

Identification Tools

The following DCF forms available to county agency workers (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

Emergency Removal

- ▣ Court must make a finding on the record that emergency placement/removal is necessary to prevent imminent physical damage or harm to the Indian 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.

Legal Representation

- Any indigent parent or Indian custodian shall have the right to court-appointed counsel in a WICWA case. [Wis. Stat. § 48.028(4)(b)]
 - ▣ Applies to both parents, even if not tribal.
- 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.

Notice & Intervention

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.

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.
 - WICWA specifies registered mail.
 - CCIP & DCF pursuing legislation to permit certified.
- 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.

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.

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.]

Entering Tribe in CCAP

- If WICWA applies, Tribe should be entered as Party in CCAP.
- If waiting to determine whether WICWA applies or which tribe is child's Tribe for purposes of WICWA, enter Tribe as Notice Recipient.
- Tribe/tribal social worker not required to eFile.

Tribal Attorney & eFiling

- Any attorney representing the tribe in the case must opt-in. See s. 801.18(3)(a).
- There is no exemption for the eFiling fee for tribal attorneys. See s. 801.18(7)(c).
 - Tribe is a sovereign nation (like federal government). Therefore, they are not considered a "state and local government unit".
 - An eFiling user can request the fee be waived pursuant to s. 801.18(7)(b). See CV-410A, but intended for individuals.

Advisements & Rights

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).

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.

Findings

- Serious Damage
- Active Efforts
- Placement Preferences

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.

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.

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.

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)

Practical Considerations

- If any of the activities were not conducted, the person seeking the out-of-home care placement or involuntary TPR must submit documentation to the court explaining why it 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 Reviews/Hearings and Extension Hearings.

Reasonable Efforts vs. Active Efforts

- Two separate standards; occur concurrently.
 - Both required in WICWA case
 - Different goals: Breakup of Indian family vs. Preserving/reunifying the family (or achieving permanency goal)
 - Procedural consequence of failure to prove:
 - Reasonable=Title IV-E reimbursement
 - Active=Invalidation of proceedings
 - Exceptions exist for reasonable efforts that do not exist for active efforts

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.)

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.

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

Voluntary Placement/TPR

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)

Other Provisions

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)]

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).

Change in Adopted Child's Status

- Court must provide notice, by registered or certified mail with return receipt requested, to the Indian child's biological parent or prior Indian custodian and tribe whenever:
 - Final order of adoption is vacated or set aside, or
 - Adoptive parent voluntarily consents to termination of parent rights to the child.
- The parent or Indian custodian may waive his or her right to such notice through a revocable written waiver.

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>
- Missing Threads video:
<https://www.youtube.com/watch?v=ZCLUbS4FxWo>