

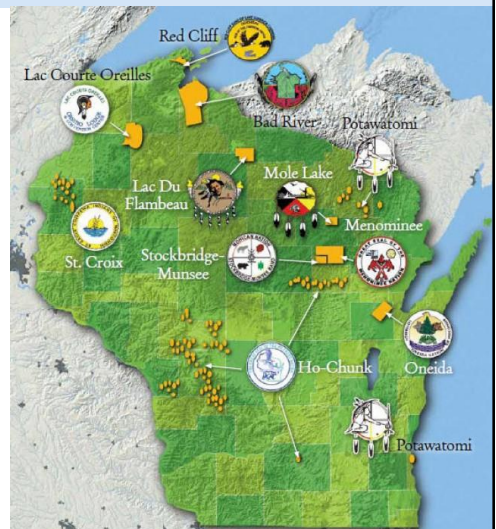
# Wisconsin Indian Child Welfare Act (WICWA)

**Hon. Todd Ziegler**  
Monroe County Circuit Court  
Sparta

**Justin Wolff**  
Children's Court Improvement Program

## 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 / WICWA

### **Indian Child Welfare Act (ICWA)**

**Federal Law**

**Enacted in  
1978**

### **Wisconsin Indian Child Welfare Act (WICWA)**

**Codified into  
State Statutes**

**Enacted 2009**

### **ICWA Regulations**

**Legally-binding  
guidance**

**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)]

# 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.”

## Winnebago Indian School Neillsville, WI (1921-1957)



## Present Day - Wisconsin

Disproportionate Foster Care of AI/AN Children: 15 States with the Highest Rates <sup>3</sup>			
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)

## ICWA / WICWA

- Indian Child Welfare Act (ICWA) and the Wisconsin Indian Child Welfare Act (WICWA), generally:
  - ▶ Establish minimum standards for the removal of Indian children from their homes;
  - ▶ Avoid out of home placements if possible;
  - ▶ Assure out of home placements that reflect the Indian child's heritage; and
  - ▶ Maintain relationships with the family and tribe
    - ✓ § 48.01(2)
- See the WICWA Judicial Checklist provided in materials

## WICWA Applicability

- Indian child is defined as:
  - ▶ An unmarried person under 18 years who is either:
    - ✓ A tribal member; or
    - ✓ Eligible for tribal membership and is the biological child of a tribal member
      - § 48.02(8g)

## WICWA Applicability

- Indian child status is a political designation—**not a race or ethnicity**—since individual tribes are sovereign nations
  - ▶ Indian tribes have the inherent authority to determine their membership (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978))
- The rights and responsibilities of WICWA/ICWA are granted through the child's status, not the parent(s)
  - ▶ This is why a non-Indian parent has the same rights in the case as any Indian parent (e.g., right to an attorney, registered mail notice, etc.)

## WICWA Applicability

- If there's any reason to believe that a child **may** be an Indian child, WICWA/ICWA should be followed until there is confirmation from the tribe that the child is not an Indian child
  - ▶ Ex.—Notice requirements (to tribe, parents, Indian custodian, etc.) apply when the court knows or *has reason to know* child is an Indian child (see: § 48.028(4))
- Failure to participate by the tribe does not waive the case requirements under WICWA/ICWA

## Reason to Know

- Under ICWA regulations, court has “reason to know” 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.

## WICWA Applicability Out-of-Home Placements

- CHIPS
- TPR
- JIPS
  - ▶ Uncontrollable
  - ▶ Habitually truant from school
  - ▶ School dropout
  - ▶ Habitually truant from home
- Guardianships
  - ▶ § 48.977 & § 48.9795
- Foster care placement in family cases
- Exception for emergency removals/TPC





## WICWA Findings

- Serious emotional or physical damage
  - ▶ Requires Qualified Expert Witness (QEW) testimony
- Active efforts to prevent the breakup of the Indian child's family
- Placement preferences (or good cause to depart from order of preference)

## Serious Damage Finding

- CHIPS, JIPS, or guardianship dispositional order may authorize out of home placement of Indian child only if **clear and convincing evidence** that:
    - ▶ Continued placement with parent or Indian custodian would result in serious emotional or physical damage to child, based on testimony of a qualified expert witness (QEW)
  - If involuntary TPR, standard is beyond a reasonable doubt for serious damage finding
- §§ 48.028 (4)(d) & (e)

## Qualified Expert Witness (QEW) Testimony

- Party seeking to place the Indian child in out-of-home care or to involuntarily terminate parental rights to the Indian child must utilize a qualified expert witness to prove the serious damage requirement
- When proving serious damage, 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.

## 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

## QEW: Practical Considerations

- QEW testimony is required even if the tribe is in agreement with removal and the out-of-home placement
- County worker regularly assigned to the child may not serve as QEW
- QEW is required for all full, temporary, and limited guardianships under § 48.9795.
  - Was previously not explicitly required by statute under Ch. 54
- QEW testimony is not required in § 48.977 guardianships if conducted in underlying CHIPS case

## 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** (different than reasonable efforts, *which must also be performed*) have been made to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful
  - ▶ Nine **required** activities under Wisconsin statute
  - ▶ Agency/petitioner must document how the activities were performed OR reason why any of the activities were not conducted - use *optional* Statement of Active Efforts Form [IW-1609]
- Requires an “ongoing, vigorous, and concerted level of case work”
  - ▶ Active efforts must be conducted throughout the life of the case—updated documentation should be provided to the court that reflects activities as they occur, not just a copy and paste of previous efforts

## Placement Preferences

- 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

- 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

## Voluntary Consent to TPR

- Consent by either parent to TPR of an Indian child must be:
  1. In writing,
  2. Recorded before a judge,
  3. Accompanied by judge's written certification that terms and consequences were explained and understood, and
  4. Include an explanation of the limitations on withdrawing consent.
- Use WICWA form: Consent to Termination of Parental Rights-Judicial (IW-1637)

## 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)

## ***Adoptive Couple v. Baby Girl***

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

- Relies upon *Adoptive Couple v. Baby Girl* (US Supreme Court)
- The 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, even if not Native American.

## ***Brackeen v. Haaland* (formerly *Brackeen v. Bernhardt*)**

- U.S. District Court Case from Texas held ICWA & ICWA Regulations violate:
  - ▶ 5<sup>th</sup> Amendment Equal Protection Clause
  - ▶ Non-Delegation Doctrine in Article I of Constitution
  - ▶ 10<sup>th</sup> Amendment Anti-Commandeering Clause
  - ▶ Administrative Procedure Act
  - ▶ Indian Commerce Clause
- 5<sup>th</sup> Circuit Court of Appeals ultimately found certain provisions of ICWA unconstitutional
- Pending in US Supreme Court (oral arguments occurred Nov. 9, 2022)

**Questions or Comments?**