

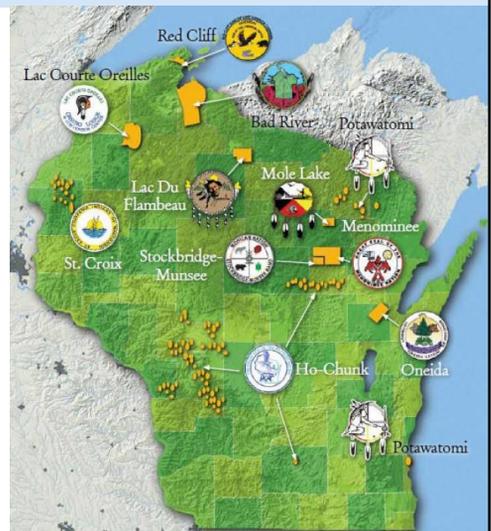
# Wisconsin Indian Child Welfare Act (WICWA)

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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



## 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

# ICWA / WICWA

- If you have an ICWA/WICWA child, go to Ch. 17 in the Benchbook and follow it exactly and to the letter
  - Do not deviate!
  - Do not take shortcuts!
  - Do not make assumptions!
- Use ICWA/WICWA circuit court forms
- Use/refer to Indian Child Welfare jury instructions to apply correct burdens of proof for all ICWA/WICWA required findings
- Review WICWA e-learning activity: [www.wicciptraining.com](http://www.wicciptraining.com)

## ICWA Forms

### Juvenile

View [all juvenile forms](#)

#### Categories

- > [Adoption and Adoptive Placements](#)
- > [Child Abuse/Juvenile Harassment Orders/Injunction](#)
- > [Juvenile \(Chapter 48\)](#)
- > [Juvenile \(Chapter 938\)](#)
- > [Termination of Parental Rights \(Voluntary or Involuntary\)](#)

#### Indian Child Welfare Act (ICWA)

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- > [Juvenile \(Chapter 938 - ICWA\)](#)
- > [Termination of Parental Rights \(Voluntary or Involuntary - ICWA\)](#)

See list in online materials!

INDIAN CHILD WELFARE ACT (ICWA) CIRCUIT COURT FORMS	
Link to Circuit Court Forms: <a href="http://www.wiccuptraining.com/forms/CircuitCourtForms.htm">http://www.wiccuptraining.com/forms/CircuitCourtForms.htm</a>	
Form 1	Form 100B
Form 100A	Petition for Appointment of Guardian (P/G) (Continual/Termination/Emergency Oversight)
Form 100B	ICWA, Wis. Stats. 1 - ICWA
Form 100C	Letters of Guardianship and Dispositive Order Appointing Guardian (P/G) (Letters/Termination/ Oversight) (WS 938, Wis. Stats. 1 - ICWA)
Form 100D	Petition for Appointment of Guardian (AG ST, Wis. Stats.) - ICWA
Form 100E	Dispositive Order Appointing Guardian (AG ST, Wis. Stats.) - ICWA
Form 100F	Temporary Physical Custody Request (Chapter 48) - ICWA
Form 100G	Statement of Action Effects - ICWA
Form 100H	Petition for Protection or Services (Chapter 48) - ICWA
Form 100I	Dispositive Order - Protection or Services with TFR Notice (Chapter 48) - ICWA
Form 100J	Petition for Termination of Parental Rights - ICWA
Form 100K	Indictment - Termination of Parental Rights - ICWA
Form 100L	Consent to Termination of Parental Rights (Indict) - ICWA
Form 100M	Order Concerning Termination of Parental Rights (Indictment) - ICWA
Form 100N	Order Concerning Termination of Parental Rights (Continual) - ICWA
Form 100O	Order for Notice for Notice (Continual) - ICWA
Form 100P	Indian Child Adoption Information - ICWA
Form 100Q	Notice of Permanency Hearing - ICWA
Form 100R	Order for Temporary Physical Custody (Threats/Retaliation) - ICWA
Form 100S	Notice of Rights and Obligations - ICWA
Form 100T	Indictment - ICWA
Form 100U	Petition for Protection or Services (Chapter 938) - ICWA
Form 100V	Notice of Hearing (Continual) - ICWA
Form 100W	Notice for Transfer to Tribal Court - ICWA
Form 100X	Order on Motion for Transfer to Tribal Court - ICWA
Form 100Y	Dispositive Order - Protection or Services with TFR Notice (Chapter 938) - ICWA
Form 100Z	Notice of Change in Placement (Out of Home/Out of Home to In Home/In Home to In Home) - ICWA
Form 101A	Petition to Change Placement, Review Disposition Order, Extend Disposition Order, Revoke Permanency Plan, Terminate Disposition Order - ICWA
Form 101B	Consent to Disposition of Power under 48C 579 of an Indian Child
Form 101C	Application to Disposition of Power under 48C 579 of an Indian Child
Form 101D	Disposition for Consent Decree (Out of Home Placement Only) - ICWA
Form 101E	Order for Extension of Disposition Order/Consent Decree (Out of Home Placement Only) - ICWA
Form 101F	Order for Extension of Disposition Order/Consent Decree with TFR Notice (Out of Home Placement Only) - ICWA
Form 101G	Order for Change in Placement with TFR Notice (In Home to Out of Home Placement Only) - ICWA
Form 101H	Order for Change in Placement with TFR Notice (Out of Home to Out of Home Placement Only) - ICWA
Form 101I	Permanency Hearing Order - ICWA
Form 101J	Permanency Hearing Order with TFR Notice - ICWA

## 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?**