

Frequently Asked Questions Regarding the Wisconsin Indian Child Welfare Act

These questions and answers are designed to assist individuals and agencies involved in the child welfare and juvenile justice systems to better understand the requirements of the Wisconsin Indian Child Welfare Act (WICWA). WICWA was created by 2009 Wisconsin Act 94 and became effective on December 22, 2009.

If you have a question about the Act, it is quite likely that others will have the same question. It has been our experience that no question is too basic. As such, we request that you click on the contact button and submit any question you might have. We will update this page on a regular basis.

[Contact](#)

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Basics

How many tribes are there in the United States and Wisconsin?

According to the Bureau of Indian Affairs, in 2009 there were 564 federally-recognized Indian tribes in the United States. In addition, there are 245 tribes that are not federally-recognized. In Wisconsin, there are 11 federally-recognized tribes.

Do all Indians live on reservations?

No. According to the 2000 U.S. census, on a national basis, approximately 33% of Indians live on reservations or other tribal lands and approximately 66% live outside of tribal lands.

What is the proper term to use – Native American, American Indian, or Indian?

There is no “right” term and any of these is acceptable. Other terms such as First Nation and Indigenous People are also used. Preferences may vary from individual to individual, tribe to tribe, and region to region. For purposes of WICWA, we have followed the lead from ICWA and use the term “Indian.” In referring to a specific child or family when the

tribal affiliation is known, it is generally recognized as best to use that tribal name (e.g., “He is Saint Croix.” rather than “He is Indian.”)

What is ICWA?

ICWA is the federal Indian Child Welfare Act of 1978 (Public Law 95-608). The law was passed in response to the alarmingly high number of Indian children removed from their homes and placed in largely non-Indian foster and adoptive homes. The Act seeks to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. The law also requires states to establish minimum standards for child custody proceedings involving Indian children.

What is WICWA?

WICWA is the Wisconsin version of ICWA as codified into Wisconsin statutes. 2009 Wisconsin Act 94, which was the codification, was signed by Gov. Jim Doyle on December 7, 2009 and became effective on December 22, 2009. The Wisconsin law essentially mirrors the ICWA and implements the minimum standards referenced in ICWA while providing additional clarification and definitions to facilitate implementation and understanding.

Why was ICWA passed?

As noted above, large numbers of Indian children were being removed from their families by state courts and public and private social services agencies and most of these children ended up in non-Indian foster and adoptive homes and institutions. In some cases, the motivation was malevolent; in other cases – and times – the motivation was benevolent, but social services agencies did not understand, ignored, or rejected the cultural or social customs of the tribe. In Wisconsin, for example, Indian children were approximately 1600 times more likely to be removed from their home than non-Indian children. According to the Bureau of Indian Affairs, in the 1960s approximately 25% to 35% of Indian children had been removed from their homes.

Over the years, it has become a significant problem that many Indian children who were cut off from their tribal communities and cultures often develop behavioral and emotional problems. National data indicate that Indian youth have the highest rate of suicide of any population in the country (National Indian Child Welfare Association fact sheet “Case for Support) and the suicide rate can be directly linked to children having been raised outside of their own cultural system (Matheson, 1996).

Why was WICWA passed?

Prior to the codification of ICWA into Wisconsin statutes, there were only a few references in Chs. 48 and 938 to compliance with ICWA (25 USC 1901 to 1963). Through a variety of mechanisms, including findings of the 2003 federal Child and Family Services Review (federal report issued in 2004), it became clear that Wisconsin was not in substantial compliance with ICWA. It was determined that it would be of assistance to caseworkers, corporation counsel, district attorneys, judges, and other affected individuals if the ICWA

requirements were inserted clearly into Chs. 48 and 938 rather than having an expectation that these individuals would seek out and utilize a separate federal law.

An analogy would be to refer all interested individuals to the federal Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997 for information about permanency planning rather than codifying that information into ss. 48.38 and 938.38 and other sections of those statutory chapters.

What federally-recognized tribes are located in Wisconsin?

There are 11 federally-recognized tribes located within the borders of the State of Wisconsin. They are:

- Bad River Band of the Lake Superior Tribe of Chippewa Indians (Ojibwe)
<http://www.glitc.org/web-content/pages/brblsc.html>
- Forest County Potawatomi Community (Potawatomi)
<http://www.glitc.org/web-content/pages/fcp.html>
- Ho-Chunk Nation (Ho-Chunk)
<http://www.glitc.org/web-content/pages/hcn.html>
- Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (Ojibwe)
<http://www.glitc.org/web-content/pages/lcoblsc.html>
- Lac du Flambeau Band of Lake Superior Chippewa Indians (Ojibwe)
<http://www.glitc.org/web-content/pages/ldfblsc.html>
- Menominee Indian Tribe of Wisconsin (Menominee)
<http://www.glitc.org/web-content/pages/mtw.html>
- Oneida Tribe of Indians of Wisconsin (Oneida)
<http://www.glitc.org/web-content/pages/on.html>
- Red Cliff Band of Lake Superior Chippewa Indians (Ojibwe)
<http://www.glitc.org/web-content/pages/rcblsc.html>
- Sokaogon Chippewa Community (Ojibwe)
<http://www.glitc.org/web-content/pages/scml.html>
- St. Croix Chippewa Indians of Wisconsin (Ojibwe)
<http://www.glitc.org/web-content/pages/scc.html>
- Stockbridge-Munsee Community (Mohican)
<http://www.glitc.org/web-content/pages/smiw.html>

Definitions

You say that Wisconsin has “codified” the federal law. What does “codified” mean?

Codify, generally, means to analyze, to put into words, to organize into a code or system. What it means in the context of federal and state law is that we took the federal law and incorporated it into state laws according to the statutory rules of construction used in Wisconsin. The purpose is to not require that a person have a copy of both the federal law and the state law to know what is required. This is a process that we use for virtually all federal child welfare laws.

What is a “child/juvenile custody proceeding”?

A child/juvenile custody proceeding means any proceeding under Ch. 48 (i.e., CHIPS) and certain proceedings under Ch. 938 (i.e., JIPS under ss. 938.13(4), (6), (6m), and (7)) which could result in the out-of-home care or adoptive placement of an Indian child or termination of the parental rights to the Indian child. A child/juvenile custody proceeding does **not** include a family proceeding under Ch. 767 (e.g., divorce proceedings) or actions related to delinquent acts under Ch. 938 (i.e., ss. 938.12 and 938.13(12) and (14)). [Ref. s. 48.028(2)(d); s. 938.028(2)(b)]

Who is an “Indian child”?

An Indian child or Indian juvenile is a person under the age of 18 who is affiliated with an Indian tribe as 1) a member of the tribe or 2) a person who is eligible for membership in an Indian tribe and who is the biological child of a member of an Indian tribe. The tribe in which the child is a member or eligible for membership need not be the same tribe in which the parent is a member. [Ref. s. 48.02(8g); s. 938.02(8g)]

Does WICWA apply in cases where the Indian child or parent doesn’t really have any substantive relationship to the tribe?

Yes. WICWA applies to all child custody proceedings involving an Indian child as both are defined in the statute. In a few states, the court-created doctrine of Existing Indian Family holds that if the child is a member of a family that does not have substantial connections to a tribe, then ICWA does not apply. Under Wisconsin law, a court is prohibited from making that finding because it is clearly contradictory to the definition of an Indian child. [Ref. s. 48.028(3)(a); s. 938.028(3)(a)]

How is Indian “parent” defined?

Parent, for purposes of WICWA, is a biological parent, an Indian husband who has consented to the artificial insemination of his wife, an Indian person who has adopted an Indian child under state law or the law or custom of the tribe, or a person acknowledged or adjudicated under certain circumstances to be the parent of the Indian child. [Ref. s. 48.02(13); s. 938.02(13)]

What is an “Indian custodian”? How and by whom are they appointed?

An Indian custodian is any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of the Indian child. [Ref. s. 48.02(8p); s. 938.02(8p)]

Do ICWA and WICWA apply to any Indian child, including a member of a tribe located in Canada or Mexico?

ICWA and WICWA apply to an Indian child in a child custody proceeding when the tribe in which the Indian child is a member or is eligible for membership is recognized by the U.S.

government (i.e., a tribe that is federally-recognized). This may not always be a clear distinction since some tribes are located in both the U.S. and Canada and, in a few instances, may have a reservation that straddles the U.S./Canadian or U.S./Mexican border. In addition, a particular child may be a member of or eligible for membership in more than one tribe, including one in the U.S. and one outside of the U.S. [Ref. s. 48.02(8r); s. 938.02(8r)]

Is a non-Indian relative considered an “extended family member” for purposes of placement preferences?

Yes. The definition of “extended family member” merely identifies the relationship of the relative to the child without regard to whether that person is an Indian or non-Indian. The placement preferences also merely refer to an extended family member. In terms of placement preferences, however, it should be remembered that the purpose of WICWA is to protect the best interests of the Indian child and the stability and security of Indian tribes and families. One way to accomplish this is to place an Indian child “in a placement that reflects the unique values of the Indian child’s tribal culture and that is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child’s tribe and tribal community.” [Ref s. 48.01(2)(b); s. 48.028(2)(am) and (7)(a) and (b); s. 938.01(3)(b); s. 938.028(2)(a) and (6)(a)]

Membership in a Tribe

How is it determined whether a child is a member of or eligible for membership in a tribe?

Only the child’s tribe can determine if the child is or is not a member of or eligible for membership in the tribe. Criteria for membership vary from tribe-to-tribe and may require a certain blood quantum or may require documentation of descendancy. Agencies should make no assumptions about the membership of an Indian child – even if it is known that a half-sibling or other relative of the child is a member. In fact, in the latter case, there is more reason to presume that the child is an Indian child. In general, it is best practice to assume a child is an Indian child than to assume that he or she is not until confirmation is received.

In Wisconsin, requests to tribes must be sent to the Indian Child Welfare Director. Here is a link to those individuals: <http://dcf.wisconsin.gov/children/icw/pdf/wifedrectribes.pdf>

For other states, here is a link to the federal register which provides detailed information for contacting each tribe located in the United States:
<http://edocket.access.gpo.gov/2009/pdf/E9-9644.pdf>

It is possible that a child could be eligible for membership in more than one tribe. In such an instance, the agency needs to provide notice to all tribes which may have an interest in the case.

For those using eWiSACWIS, the form “Request for Confirmation of Child’s Indian Status” (CF-2016) should be used for this purpose.

Does WICWA apply to children who are not eligible for “full” membership in a tribe, but who could potentially become “ancillary” members?

It is presumed in this question that “ancillary” membership means that a child is affiliated with a certain tribe but does not have the blood quantum or does not meet some other requirement for membership. Therefore, the answer is “No, WICWA does not apply” because the child must be a member of the tribe or eligible for membership.

However, having said that, the requirements for membership can change. For example, a child could have a 25% blood quantum for membership in Tribe X but Tribe X requires a minimum of a 50% blood quantum. The child, then, would not be covered under WICWA. However, if Tribe X lowered its blood quantum requirement to 25% or it was later determined that the child does, in fact, have a blood quantum at 50% or more (whatever the Tribe’s requirement is), the child would be covered because he or she would then be eligible for membership. This situation occurred in Wisconsin in recent years, but it is quite rare and it is a complicated process involving the Tribe and the federal government. [Ref. ss. 48.02(8g) and 938.02(8g)]

Does WICWA apply if a parent is eligible for membership but not a member?

Possibly. WICWA applies in a child custody proceeding involving an Indian child. “Indian child” is defined as any unmarried person under the age of 18 years who is affiliated with an Indian tribe by virtue of the fact that the Indian child is a member of the Tribe OR the child is eligible for membership *and* is the child of a member of a Tribe. So if the child is a member of a Tribe, WICWA applies. If the child is eligible for membership and is the child of a member, WICWA applies. If the child is eligible for membership and the parent is eligible for membership but is not a member, then WICWA does not apply. [Ref. ss. 48.02(8g) and 938.02(8g)]

Having said that, it must be noted that the membership status of the parent can change. As a result, a case could change from being a non-WICWA case to a WICWA case just as quickly. We would therefore recommend that, to the extent possible, the case be processed as an ICWA/WICWA case and that the agency communicate with the Tribe for which the parent is eligible for membership to determine if the Tribe might be interested in taking any action to encourage the parent to become a member of his or her Tribe.

Best Interests of an Indian Child

How does one determine the best interests of an Indian child?

In creating the Indian Child Welfare Act, the Congress found that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.” [Ref. 25 USC 1901(3)]

As such, it is in the best interests of Indian children to have relationships with their tribes. Wisconsin statutes provide that the best interests of an Indian child are determined by the

two interrelated and inextricable purposes of WICWA, i.e., to protect the best interests of Indian children and to promote the stability and security of Indian tribes. In short, if it is in the best interest of the child to have a relationship with his or her tribe, then the best interest of an Indian child must, by definition, include the stability and security of that tribe. [Ref. s. 48.01(2); s. 938.01(3)]

How does the federal IV-E requirement about seeking a TPR if the child has been in care for 15 of the most recent 22 months affect WICWA?

The Adoption and Safe Families Act of 1997 (ASFA) created the requirement that a TPR be sought if a child has been in out-of-home care for 15 of the most recent 22 months. ASFA and s. 48.417(2), Wis. Stat., however provide specific exceptions to this requirement of pursuing TPR:

- (a) The child is being cared for by a fit and willing relative of the child.
- (b) The child's permanency plan indicates and provides documentation that TPR to the child is not in the best interests of the child.
- (c) The agency primarily responsible for providing services to the family has not made timely reasonable efforts to return the child safely to his or her home.
- (d) In the case of an Indian child, the agency primarily responsible for providing services to the Indian child and the family has not made timely active efforts to prevent the breakup of the Indian child's family; or
- (e) Grounds for an involuntary termination of parental rights under s. 48.415 do not exist.

ASFA applies generally to all children in out-of-home care. ASFA does not exclude its application to Indian children. In fact, of the states that have addressed how the two statutes co-exist, a disagreement exists as to whether ICWA supersedes ASFA. (See *J.S. v. State of Alaska*, 50 P3rd 388 (Alaska 2002) (finding active efforts to reunify children with sex offender parent not required as suggested by ASFA); see also *In the Interest of J.S.B.*, 691 N.W.2d 611 (S.D. 2005) (finding ASFA does not supersede the active efforts requirements of ICWA).

In most cases, however, the above-cited exceptions to the 15 of 22 months requirement will often apply to Indian children. For example, under WICWA, placement with a relative is the preferred placement option -- an exception to the TPR requirement under ASFA. Likewise, under WICWA, the legal standard for terminating parental rights to an Indian child is "beyond a reasonable doubt". The inability to meet this difficult burden of proof is considered another ASFA exception. Where reasonable efforts and active efforts have not been made, ASFA permits deviating from the permanency requirement. Finally, as the best interest of the child is a legitimate exception to the TPR requirement, when an Indian child is involved, the Indian child's best interest requires additional considerations of the child's and tribe's interrelationships. [Ref. s. 48.417(1)(a) and (2)]

Because expert testimony regarding the Tribe's child rearing practices is a critical piece of the evidentiary requirements for a TPR, child welfare agencies are strongly

encouraged to work very closely with tribal case workers in developing and executing treatment and case plans and making placement decisions.

A document entitled “Adoption and Safe Families Act of 1997: Issues for Tribes and States Serving Indian Children” can be found on the DCF website at: http://www.nicwa.org/policy/law/adoption_safe/asfa-issues.pdf

Juvenile Justice

Does WICWA apply to Ch. 938 cases?

It does apply to certain JIPS cases under s. 938.13. Specifically, WICWA applies to juvenile custody proceedings for juveniles who are:

- Uncontrollable (s. 938.13(4))
- Habitually truant (s. 938.13(6))
- School dropouts (s. 938.13(6m))
- Habitual runaways (s. 938.13(7))

[Ref. s. 938.028(2)(b)]

Does ICWA apply to delinquency cases?

No. ICWA states that it does not apply to “a placement based upon an act which, if committed by an adult, would be deemed a crime . . .” For this reason, actions under s. 938.13(12) and (14) and s. 938.12 are not covered. [Ref. 25 USC 1903(1)(iv)]

Notice

When does a notice have to be sent by registered mail?

The registered mail notice must be provided to the parents, Indian custodian, and tribe for the first hearing in a CHIPS, JIPS, Ch. 48 guardianship, or termination of parental rights action. This means that the notice will typically be sent at the time the petition is filed. If the identity or location of the Indian child’s parent, Indian custodian, or tribe cannot be determined, that notice shall be given to the U.S. Secretary of the Interior in a like manner. [Ref. s. 48.028(4)(a); s. 938.028(4)(a)] Again, if there are multiple tribes involved, each must be provided with this official notice.

If at any point in the later proceeding, the court determines or has reason to know that the child is an Indian child (e.g., the child becomes a member or eligible for membership after paternity is established or the tribe’s criteria for membership changed), notice of the proceeding shall be provided to the parents, Indian custodian, and tribe via registered mail with return receipt requested. The next hearing in the proceeding may not be held until at least 10 days after receipt of the notice by the parent, Indian custodian, and tribe or, if the identity or location of the parent, Indian custodian, expectant mother, or tribe cannot be determined, until at least 15 days after receipt of the notice by the U.S. Secretary of the Interior. [Ref. s. 48.028(4)(a); s. 48.299(9); s. 938.028(4)(a); s. 938.299(9)]

Notice is not specifically required in a voluntary proceeding although the tribe maintains its right to intervene in those proceedings. As such, it is always best practice to notify a tribe even in voluntary proceedings in order to facilitate the process.

Is the temporary physical custody (TPC) hearing subject to WICWA notice and timeframes?

The official registered mail notice would not apply for the temporary physical custody hearing even if that is when the petition is filed because that hearing must be held within 48 hours after the child is taken into custody and the notice requirement means that a hearing cannot be held for at least 10 days following receipt of the notice by the parent, Indian custodian, and tribe (or 15 days if the notice is to the Bureau of Indian Affairs). However, the tribe, if known, must be notified prior to the TPC hearing so that the tribe can be involved as early as possible in the proceeding for purposes of intervention, placement preferences, provision of services, etc.. [Ref. s. 48.028(2)(e) and (4)(a); s. 938.028(2)(c) and (4)(a)]

Who needs to be notified of a child custody proceeding involving an Indian child?

In addition to the other individuals required to receive notice under Chapters 48 and 938, official notification must be sent to the Indian child's parent, Indian custodian, and tribe. If the child's tribe is not known, the notice must be sent to the Bureau of Indian Affairs Regional Office at: One Federal Drive, Room 550, Fort Snelling, MN 55111-4007. [Ref. s. 48.028(4)(a); s. 938.028(4)(a)]

It is possible that a child could be eligible for membership in more than one tribe. In such an instance, the agency needs to provide notice to all tribes which may have an interest in the case.

How can written notice be provided? Can I e-mail the notice?

As noted above, the first notice in a CHIPS, JIPS, Ch. 48 guardianship, or termination of parental rights proceeding must be provided to the parents, Indian custodian, and tribe by registered mail, return receipt requested. All notices of subsequent hearings must be sent in writing; this means by mail, personal service, or facsimile. The notice may **not** be sent by electronic mail (e-mail). [Ref. s. 48.028(4)(a); s. 938.028(4)(a)]

What if I am meeting with the parent and just hand them the notice of the hearing? Do I still have to send it registered mail?

If it is the first notice in a CHIPS/JIPS hearing or in an involuntary termination of parental rights proceeding, you must still send the notice by registered mail, return receipt requested. This is important for purposes of documentation because the return receipt must be filed with the court and it removes any doubt about whether the notice was actually provided. You can provide written notice of subsequent hearings by personal service, so you could hand it to the parent for those later hearings.

If a parent is in court at the time the CHIPS petition is filed and is given a copy of the petition, must they still be sent the notice by registered mail?

Yes. There are no exceptions to the requirement that the first notice in a child custody proceeding be sent by registered mail, return receipt requested. Providing the parent with notice in person does not remove the requirement that the Indian custodian and Tribe be so notified; as such, it would be best for all parties, in terms of consistency and assurance of receipt of notice, that the same manner of notice apply to all parties. Notice of subsequent hearings in the same proceeding may be made by personal service, mail, or facsimile (FAX). [Ref. ss. 48.028(4)(a) and 938.028(4)(a)]

What if the agency is seeking to place an Indian child in out-of-home care via a CHIPS petition, but the child is still in the home. When is the notice required?

The notice should be provided of the pending proceeding, so it doesn't matter whether the Indian child has or has not already been removed from his or her home. At the time the petition is filed, no one knows the outcome so out-of-home care placement should be regarded as a possibility. If the tribe is not notified and the judge determines that the child should be placed outside the home, then a violation of ICWA and WICWA would have occurred. [Ref. s. 48.028(4)(a); s. 938.028(4)(a)]

Do you have to notify the tribe even if the parents do not want the tribe notified?

Yes. The tribe has a right to be notified of and to intervene in the case whether or not the parent wants the tribe to be involved, except that the parent can object to a request by the tribe to transfer jurisdiction to the tribal court. [Ref. s. 48.028(3)(c)1. and (e) and (4)(a); s. 938.028(3)(c)1. and (e) and (4)(a)]

If we have sent notice to a tribe or the BIA and are awaiting confirmation on the status as to whether the child is a member or eligible for membership, do we use the Court ICWA forms while the request is pending or do we use the Court ICWA forms ONLY when status is confirmed? There is no place on the petition or other forms to indicate the confirmation status is pending. We just received notice from a tribe that a child is not eligible for membership and we have already completed disposition. It can be confusing to use the ICWA forms if the status is not confirmed.

You do not need to use the ICWA forms while you are waiting for confirmation of tribal affiliation. However, we would also recommend that in such situations you may want to wait to go to disposition until you receive confirmation from the BIA or tribe -- one way or the other -- unless it would be an inordinate amount of time. This would avoid any necessity to have to go back to court to "re-do" hearings or orders or have to worry that an action might be invalidated if it is determined that the child is an Indian child. The court would just have to make a good cause finding for the delay based on the fact that the court is waiting for confirmation of the child's Indian status.

What if we request confirmation of a child's membership or eligibility for membership but the tribe never responds? Can we proceed with the case?

Your responsibility is to seek confirmation of a child's membership or eligibility for membership in a Tribe – directly or through the BIA. If you do not hear from the specific Tribe within 10 days or from the BIA within 15 days, you may proceed with the case unless the Tribe, the child's parent, or the Indian custodian requests a delay of 20 days to prepare for the case. It should be kept in mind that these are tight timeframes given different procedures that individual Tribes might have to determine membership or eligibility for membership. [Ref. ss. 48.028(4)(a) and 938.028(4)(a)]

If you have a strong reason to believe that the child is an Indian child, it is recommended that, to the extent possible, the case proceed as an ICWA case in the event that a Tribe does later provide information about the child's membership. Obviously, without knowing with what Tribe the child may be affiliated, you will not be able to fulfill all of the requirements under WICWA.

Given the definition of “out-of-home care,” does WICWA apply to the placement of an Indian child in secure detention?

No. The types of living situations included in “out-of-home” care are statutorily defined and do not include secure detention. [Ref. s. 938.028(2)(e)]

If a youth is living at home but there is a JIPS order and the youth is sanctioned, is placement in a secure detention facility considered to be out-of-home care? If so, does WICWA then apply in terms of notice, intervention, etc.

No, secure detention is not considered to be an out-of-home placement, so WICWA would not apply. However, if for some reason the child/juvenile was placed into out-of-home care rather than returned home after the secure detention placement, then WICWA would obviously apply. [Ref. s. 938.028(2)(e)]

If I notify the BIA that I have a Cherokee child or an Ojibwe child and the BIA just sends me a list of all the Cherokee or Ojibwe tribes or bands, do I have to then send a registered mail notice to each of those tribes or bands?

Yes. However, we are working with the BIA to see if this process can be changed. In prior years, the BIA would provide notice to the individual bands or Tribes in such circumstances. In the meantime, you must provide notice as required in response to information provided by the BIA. [Ref. ss. 48.028(4)(a) and 938.028(4)(a)]

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WICWA seems to be silent about notifying the tribe in voluntary proceedings, but the tribes have the right to intervene in such proceedings (especially in termination of parental rights and adoption proceedings). Does the Tribe need to be notified of voluntary proceedings?

This is an interesting question. Neither ICWA nor WICWA require notice to the tribe in voluntary proceedings, even though, as you note, the tribe may intervene and may even be able to request a transfer of jurisdiction. So it would be wise to notify the tribe because by not doing so, the whole action could be invalidated at a later date. There is some case law on this as well -- some courts have ruled that tribes have rights which can't be exercised without knowing that a case exists, so therefore notice is required in voluntary cases as well. Other courts have ruled to the contrary, too, based on the lack of a requirement in ICWA. There is no specifically applicable case law in Wisconsin. [Ref. ss. 48.028(4)(a) and 938.028(4)(a)]

Jurisdiction

What is the difference between exclusive jurisdiction and concurrent jurisdiction?

A tribal court has exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled on the reservation or an Indian child who is a ward of the tribal court. If an Indian child does not reside or is not domiciled on the reservation or if the Indian child is not a ward of the tribal court, then the tribal court and the circuit court have concurrent jurisdiction. [Ref. s. 48.028(3)(b); s. 938.028(3)(b)]

If a child is domiciled on a reservation, can a voluntary placement or voluntary termination of parental rights only be heard in tribal court?

Not necessarily. Wisconsin is a P.L. 280 state, so unless the case involves one of the three tribes that have reassumed exclusive jurisdiction under ICWA (i.e., Forest County Potawatomi, Lac Courte Oreilles, and Red Cliff) or the Menominee Tribe, which is not covered by P.L. 280, then the parent can choose whether to go through tribal or state court. If it is one of the three or Menominee, then it must go through tribal court. Having said that, tribal laws may also be relevant, so communication with the Tribe is critical.

In addition, the Native American Rights Fund, in its guide to ICWA, has stated: “However, arguments have been made that grants of jurisdiction to states under Public Law 280 do not extend to involuntary public child welfare proceedings initiated by state agencies, as states did not receive civil/regulatory jurisdiction under Public Law 280.”

In short, there is some confusion around this issue. As is usually the case, contact with the tribe is the best approach. [Ref. s. 48.028(3)(b) and (c); 938.028(3)(b) and (c)]

When one parent is an Indian and the other parent is not, does the fact that the child was removed from the non-Indian parent and did not live with the Indian parent prior to his or her removal have any impact on whether WICWA applies?

No. WICWA applies to out-of-home care placements regardless of which parent the child was living with prior to removal. If it is a child custody proceeding and the child is an Indian child, WICWA applies. [Ref. ss. 48.02(8g); 48.028(3)(b) and (c); 938.02(8g); 938.028(3)(b) and (c)]

Does WICWA apply if a parent is eligible for membership but not a member?

Possibly. WICWA applies in a child custody proceeding involving an Indian child. “Indian child” is defined as any unmarried person under the age of 18 years who is affiliated with an Indian tribe by virtue of the fact that the Indian child is a member of the Tribe OR the child is eligible for membership *and* is the child of a member of a Tribe. So if the child is a member of a Tribe, WICWA applies. If the child is eligible for membership and is the child of a member, WICWA applies. If the child is eligible for membership and the parent is eligible for membership but is not a member, then WICWA does not apply. [Ref. ss. 48.02(8g) and 938.02(8g)]

Having said that, it must be noted that the membership status of the parent can change very quickly. As a result, a case could change from being a non-WICWA case to a WICWA case just as quickly. We would therefore recommend that, to the extent possible, the case be processed as an ICWA case and that the agency communicate with the Tribe for which the parent is eligible for membership to determine if the Tribe might be interested in taking any action to encourage the parent to become a member of his or her Tribe.

Given the definition of “out-of-home care,” does WICWA apply to the placement of an Indian child in secure detention?

No. The types of living situations included in “out-of-home” care are statutorily defined and do not include secure detention. [Ref. s. 938.028(2)(e)]

Transfer of Jurisdiction

Under what conditions can the circuit court refuse to transfer a case to a tribal court?

Congress and the U.S. Supreme Court recognize the “sovereignty and primacy” of tribal courts and that tribal court decision-making is in the best interests of an Indian child. As a result, the premise should be that the case is transferred to tribal court upon a petition to accomplish that. However, there are some situations under which the case may not be transferred to the tribal court. These are:

- The parent of the Indian child objects to the transfer
- The Indian child’s tribe does not have a tribal court
- The tribal court of the Indian child’s tribe declines jurisdiction
- The circuit court determines that good cause exists to deny the transfer

[Ref. s. 48.028(3)(c); s. 938.028(3)(c)]

What constitutes good cause to not transfer a case to the tribal court?

The circuit court may determine that good cause exists to deny the transfer if the person opposing the transfer shows by clear and convincing evidence that any one or more of the following applies:

- The Indian child is 12 years of age or older and objects to the transfer
- Evidence or testimony cannot be presented in tribal court without undue hardship to witnesses and parties and the tribal court cannot mitigate that hardship
- The tribe received notice of the proceeding, the tribe has not indicated to the court that the tribe is monitoring the proceeding and may request a transfer at a later date, the petition for transfer is filed by the tribe and the petition is filed more than 6 months after the tribe received notice of the CHIPS or JIPS proceeding or more than 3 months after the tribe received notice of the termination of parental rights proceeding. [Ref. s. 48.028(3)(c); s. 938.028(3)(c)]

If a case starts in circuit court and jurisdiction is then transferred to the tribal court, does the circuit court continue to have some role in the proceeding?

No. After transfer to the tribal court, that court has exclusive jurisdiction and there is no role for the circuit court to play.

Why do some tribes not seek to transfer jurisdiction as soon as they receive notice of the case?

There may be many reasons. In many cases, the tribe may simply monitor the case to assure that the interests of the tribe, the child, and the child's family are being met. At some point later in the case (e.g., when the child is placed in certain types of facilities, when a petition to terminate parental rights is filed), the tribe may determine that it would be in the Indian child's best interests to seek transfer of jurisdiction to the tribe. Some tribes, for example, do not accept the concept of terminating parental rights, so they may seek transfer when a case is moving in that direction. In other situations, the case may be being heard in a distant county where the child and his or her family reside; to transfer jurisdiction would create hardships for all of the parties.

Some tribes are able to provide a more comprehensive level of services than others due to funding or staffing constraints. In some of those cases, the tribe will assist the county in providing services but can't afford, for example, the out-of-home care costs. If the tribe transfers jurisdiction and the tribal court places the child in out-of-home care, the county may or may not be willing to pay for those costs. If the circuit court makes that same placement, the county must provide the funding for the placement. As such, in some situations the tribe may allow the case to proceed in circuit court so that the child receives the services he or she needs.

What happens if the tribe requests jurisdiction of a case after a TPR has been ordered?

This would depend upon the specific situation. If the Tribe received appropriate notice of the child custody proceeding and good cause not to transfer jurisdiction to the Tribe exists, then the TPR will most likely stand. However, if the good cause requirements are not met, and other factors are not involved (e.g., the parent objects), then the Tribe can argue that the order be vacated and that jurisdiction should be transferred. It is, therefore, critical that all required notices be provided so that such situations can be avoided. [Ref. s. 48.028(3)(c)]

Intervention

What does “intervention” mean?

Intervention is a process that allows a person or entity who has a legal interest in a proceeding to protect that interest. ICWA grants an Indian custodian and the Indian child’s tribe the right to intervene in a child custody proceeding at any point in that proceeding, including any temporary physical custody hearing. [Ref. s. 48.028(3)(e); s. 938.028(3)(e)]

It is important to note that regardless of whether the tribe formally intervenes, notice must still be provided to the tribe and all of the other requirements of ICWA and WICWA still apply.

How are intervention and transferring of a case different?

A tribe may intervene while the case is in circuit court or in another tribal court and the proceeding remains in that other court. If the tribe transfers jurisdiction, that means that the case is heard in the tribal court. [Ref. s. 48.028(3)(c) and (e); s. 938.028(3)(c) and (e)]

Who may intervene in the circuit court on behalf of the Indian child’s tribe?

This is a determination to be made by the specific tribe. The tribal representative does not have to be an attorney under state and federal law. An individual tribe may have its own requirements on that particular issue. [*In re Shuey*, 850 P.2d 378 (Or. Ct. App. 1993)]

Does it matter if the parent or another party objects to the tribe’s motion to intervene?

No. The tribe can intervene at any point in the proceeding regardless of objection on the part of any party. [Ref ss. 48.028(3)(e) and 938.028(3)(e)]

Appointment of Counsel

Are parents in WICWA cases entitled to court-appointed attorneys?

Yes, if the parent is indigent. [Ref. s. 48.028(4)(b); s. 48.23(2g); s. 938.028(4)(b); s. 938.23(2g)]

Isn't it unconstitutional to provide court-appointed attorneys for indigent Indian parents but not for indigent non-Indian parents?

No. The following provides the rationale for this allowance:

“The obligations of the United States toward Indian tribes are primarily borne out of treaties entered into by the parties as well as federal laws enacted for the benefit of Indian tribes.

“This relationship between Indian tribes and the federal government is a ‘political’ relationship between two nations, not a relationship based on the racial classification of Native Americans. The Supreme Court has recognized* that Congress can treat Native Americans differently from other racially distinct groups and not run afoul of traditional equal protection notions because of the unique relationship between the tribes and the government.” (* Morton v. Mancari, 417 U.S. 535 (1974))

B.J. Jones, “The Indian Child Welfare Act and Its Foundations,” The Indian Child Welfare Act Handbook, American Bar Association, 1995

How does the circuit court determine indigency for purposes of appointing an attorney for a parent or Indian custodian under WICWA?

The court would use its discretion in determining whether the parent or Indian custodian is indigent. The court will frequently use the same procedure that it uses for appointing counsel in other cases, such as the Petition for Appointment of Counsel, Affidavit of Indigency and Order (GF-152), etc. [Ref. s. 48.028(4)(b); s. 938.028(4)(b)]

If a child is provided with a Guardian ad Litem under Ch. 48, must the court also appoint counsel under WICWA?

No. The appointment of legal counsel or a guardian ad litem for a child, whether an Indian child or not, is governed by statutes – and may be mandatory or subject to judicial discretion, depending upon the situation. In child custody proceedings and under certain situations, the parent or Indian custodian may be entitled to legal counsel under WICWA, but these special provisions do not apply to the Indian child. [Ref. ss. 48.23 and 938.23]

Standard for Removing an Indian Child

What is the standard for removing a child from an Indian family?

In order to remove an Indian child from his or her home, the court or jury must find, by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

In order to involuntarily terminate the parental rights to an Indian child, the court or jury must find, beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

In addition, in both situations, the court or jury must find, by clear and convincing evidence, that active efforts were made to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. [Ref. s. 48.028(4)(d) and (e); s. 938.028(4)(d) and (e)]

How does that standard relate to the “safety” standard to remove a child that we use in all other cases?

In general, it can be assumed that if a child is not safe in his or her home then the child is likely to suffer serious emotional or physical harm. As a result, the standards should be similar. It is important to keep in mind that one of the Congressional findings underpinning the Indian Child Welfare Act is that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them . . .” [Ref. 25 USC 1901(4)] Certainly, Indian children, like all children, should be removed from their homes for reasons that are warranted by the circumstances.

In providing for a check on cultural bias in removing Indian children from their homes, Congress – and now Wisconsin statutes – require the testimony of one or more qualified expert witnesses before a child may be removed in order to assure that there are no cultural considerations in the case that should be factored into the decision to remove an Indian child from his or her home. [Ref. s. 48.028(4)(d) and (e); s. 938.028(4)(d) and (e)]

Active Efforts

What constitutes “active” efforts?

Active efforts means that there has been an ongoing, vigorous, and concerted level of case work. It also requires that the efforts take into account the prevailing social and cultural values, conditions, and way of life of the Indian child’s tribe and that utilizes the available resources of the Indian child’s tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers. [Ref. s. 48.028(4)(g); s. 938.028(4)(f)]

In addition, specific activities that must be undertaken are spelled out in the statutes. [Ref. s. 48.028(4)(g)1.a. to h.; s. 938.028(4)(g)1.a. to h.]

How are “reasonable” and “active” efforts different?

The term “active efforts” was created in the federal Indian Child Welfare Act of 1978. The term “reasonable efforts” was created in the federal Adoption Assistance and Child Welfare Act of 1980, so the concept of active efforts is older than reasonable efforts. When a legislative body uses different terms, it is assumed that different things are meant. It is

generally agreed that “active” efforts is a higher standard than “reasonable” effort. [*In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007)]

The terms were not defined in either piece of federal legislation, so both were defined in state statutes when the federal laws were codified. To a certain extent, the requirements of “reasonable” efforts were included in “active” efforts. In Wisconsin, “active efforts” requires a cultural emphasis on the assessment, services, and other aspects of the case work.

Are active efforts required even if the tribe is in agreement with the out-of-home care placement or involuntary termination of parental rights?

Yes. The Indian child and his or her parents are also entitled to the provision of active efforts. [Ref. s. 48.028(4)(g)1.a. to h.; s. 48.355(2c); s. 938.028(4)(g)1.a. to h.; s. 938.355(2c)]

Are active efforts and the testimony of a qualified expert witness still required when the parent is found in default for failing to appear in a TPR case?

Yes. This is an involuntary termination of parental rights case and it is subject to the WICWA requirements. [Ref. ss. 48.028(4)(d) and (g); 938.028(4)(d) and (f)]

Is the issue of whether the agency has made active efforts a question for the jury or for the judge?

Whether or not the agency has made active efforts is, in most cases, a question for the finder of fact (i.e., the decision-maker at the fact-finding hearing). In some cases, that is the judge; in other cases, it is the jury. If the prosecutor obtains a summary partial judgment so there is nothing to determine at the fact-finding hearing, then the active efforts question moves to the dispositional stage of the case, which, of course, is always before the judge. [Ref. ss. 48.31(1) to (5); 938.31(2), (4), and (5)]

Qualified Expert Witness

What is a qualified expert witness?

A qualified witness is a person who can provide testimony in a child custody proceeding regarding the family organization and child-rearing practices of the Indian child’s tribe. The testimony of a qualified expert witness is required before an Indian child can be removed from his or her home or the parental rights to an Indian child can be involuntarily terminated. [Ref. s. 48.028(2)(g) and (4)(f); s. 938.028(2)(d) and (4)(e)]

Who can be a qualified expert witness?

Anyone who can provide the testimony required of a qualified expert witness can be a qualified expert witness. The statutes describe, in a preferential order, who may be considered to be a qualified expert witness. As with all expert witnesses, the judge ultimately

makes the decision as to whether a person is a qualified expert witness and at what level of preference. [Ref. s. 48.028(4)(f)2.; s. 938.028(4)(e)2.]

How do I find a qualified expert witness?

In order to obtain a qualified expert witness at the first level of preference, the person calling the qualified expert witness should contact the Indian Child Welfare Director for the Indian child's tribe. That person will assist by providing the names of potential qualified expert witnesses and may be able to assist in obtaining the testimony of that person. The following link will provide you with contacts for the eleven tribes in Wisconsin: <http://dcf.wisconsin.gov/children/icw/pdf/wifedrectribes.pdf>

Qualified expert witnesses at other levels may be found through the tribe, universities, county social/human services departments, community service providers, etc.

Can a county social worker who works with a tribe a lot be a qualified expert witness?

A qualified expert witness, according to case law, is a person who has cultural specific knowledge relating to the family organization and child-rearing practices of the child's tribe, beyond that of the typical social worker. However, a social worker from a public or private agency that has worked with the Indian child's tribe over time could potentially be considered a qualified expert witness as long as it can be documented that he or she has the knowledge required. In addition, any potential conflict of interest should be considered if the social worker is employed by the county seeking to remove the Indian child from his or her home or terminate the rights of the Indian child's parent. [Ref. s. 48.028(2)(g)3.; s. 938.028(2)(d)3.]

Does the testimony of a qualified expert witness from a higher level trump the testimony of a qualified expert witness from a lower level?

No. While there is a level of preference based on the likelihood that a person would have the knowledge required of a qualified expert witness, the judge or jury cannot use the person's level of preference as the sole consideration in assessing the weight or probative value of the testimony. [Ref. s. 48.028(4)(f)2.; s. 938.028(4)(e)2.]

Who must call a qualified expert witness? Who can call one?

A person or party seeking to remove the Indian child from his or her home or seeking to terminate the parental rights to the Indian child must provide the testimony of a qualified expert witness. Any other party may call a qualified expert witness. [Ref. s. 48.028(4)(e)1. and 2.; s. 48.028(4)(f)1.; s. 938.028(4)(d)1. and 2.; s. 938.028(4)(e)1.]

Is the testimony of a qualified expert witness required even if the tribe is in agreement with the out-of-home care placement or involuntary termination of parental rights?

Yes. The Indian child and his or her parents are also entitled to the testimony of a qualified expert witness. [Ref. s. 48.028(2)(g) and (4)(f); s. 938.028(2)(d) and (4)(e)]

Is the issue of whether the agency has made active efforts a question for the jury or for the judge?

Whether or not the agency has made active efforts is, in most cases, a question for the finder of fact (i.e., the decision-maker at the fact-finding hearing). In some cases, that is the judge; in other cases, it is the jury. If the prosecutor obtains a summary partial judgment so there is nothing to determine at the fact-finding hearing, then the active efforts question moves to the dispositional stage of the case, which, of course, is always before the judge. [Ref. ss. 48.31(1) to (5); 938.31(2), (4), and (5)]

If a qualified expert witness testified in a CHIPS case when a child was placed into out-of-home care, must the county present qualified expert witness testimony again if a Ch. 48 guardianship is going to be ordered?

No. There are two “types” of child custody proceedings under WICWA: CHIPS/JIPS and termination of parental rights (TPR). If the child was placed into out-of-home care based, at least in part, on the testimony of the QEW, a QEW would not have to testify in any further part of that proceeding. However, if the county decided to terminate parental rights, then the testimony of a QEW would again be required. [Ref. ss. 48.028(4)(f) and 938.028(4)(e)]

Do you have to provide evidence of efforts to obtain qualified expert witness testimony from a higher level before you can introduce testimony from a witness from a lower level or hierarchy?

Yes. The person seeking to remove the child from the custody of the parent or Indian custodian or to terminate parental rights to an Indian child must show to the court that it has made a diligent effort to secure the attendance of a qualified expert witness from a higher order of preference. [Ref. ss. 48.028(4)(f)2. and 938.028(4)(e)2.]

Placement Preferences

Do the placement preferences have to be followed in emergency placement situations?

Yes. However, if the person placing the child finds good cause to depart from the order of preference or if emergency conditions necessitate departing from the order of preference, then the placement preferences need not be followed. This exemption is very limited and should rarely be used. It applies only until the reason for departing from the order of preference is resolved, then the child must be placed in accordance with the placement

preferences. For example, if an Indian child is removed in the middle of the night, emergency conditions may dictate that the child be placed in an available placement, e.g., receiving home. Once the emergency situation is resolved, however, the child must then be placed in accordance with the preferences. If, at the time of emergency removal, the agency is familiar with the family and knows that the child is an Indian child, then to the extent possible the emergency placement should follow the preferences in order to minimize the number of placements for the child. [Ref. s. 48.028(7)(bm); s. 938.028(6)(am)]

What are placement preferences? Are they different for foster care and adoption?

There are some differences in placement preferences for out-of-home care and for adoption. The placement preferences for out-of-home care, in declining order of preference, are:

- The home of an extended family member of the Indian child
- A foster home or treatment foster home licensed, approved, or specified by the Indian child's tribe
- An Indian foster home or treatment foster home licensed or approved by the Department, a county department, or a child welfare agency
- A group home or residential care center for children or youth approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the needs of the Indian child (Note: At the present time, there are no such facilities in Wisconsin)

The placement preferences for adoption, in declining order of preference, are:

- An extended family member of the Indian child
- Another member of the Indian child's tribe
- Another Indian family

[Ref. s. 48.028(7)(a) and (b); s. 938.028(6)(a)]

Are there exceptions to application of these placement preferences?

Yes. If the child's tribe has established, by resolution, different placement preferences, then those preferences must be followed as long as the placement is appropriate to the child's special needs or accommodates any need for a level of restrictiveness.

In addition, good cause may exist to justify a departure from the placement preferences. Good cause may be determined based on any of the following:

- The request of the parent or, if the child is of sufficient age and developmental capacity, the child as long as the request is not made for the purpose of avoiding the application of ICWA and WICWA
- Any extraordinary physical, mental, or emotional health needs of the Indian child. The length of time that the Indian child has been in a placement does not, in itself, constitute an extraordinary emotional health need
- The unavailability of a suitable placement after diligent efforts have been made to place the child according to the preferences

In any good cause situation, the burden of establishing good cause is on the person seeking to depart from the placement preferences. [Ref. s. 48.028(7)(c) and (e); s. 938.028(6)(b) and (d)]

If a child is placed in out-of-home care prior to an Indian father being adjudicated (and at the time of placement it was not known that the child was an Indian child), do you need to change the placement to comply with placement preferences upon that adjudication and discovery that WICWA applies?

Once that information is learned, WICWA applies; therefore, the child would need to be placed pursuant to the placement preferences. If the child's current placement was not in compliance with the placement preferences, then the child's placement would have to change unless one of the exceptions to the placement preferences existed. [Ref. ss. 48.028(7)(b), (c), (d), and (e); 938.028(6)(b), (c), and (d)]

Does WICWA, including placement preferences, apply when a court places a child in foster care under Ch. 767?

Yes. This is an area of some confusion because ICWA states that a child custody proceeding does not include “. . . an award, in a divorce proceeding, of custody to one of the parents.” [Ref. 25 USC 1903(1)] However, if a child is placed in a foster home pursuant to s. 767.41(3), Stats., such placement is the result of the court finding that “neither parent is able to care for the child adequately or that neither parent is fit and proper to have the care and custody of the child . . .” [Ref. s. 767.41(3)(a)] Therefore, this does not fit the exception to ICWA in that custody is not awarded to one of the parents.

On the other hand, WICWA applies to foster care placements, which are defined as “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.” This would certainly describe the situation noted above under the Ch. 767 proceeding. [Ref. s. 48.028(2)(d); s. 25 USC 1903(1)(i)]

If the tribe chooses not to intervene, does the court still have to follow the placement preferences?

Yes. Placement preference and all other requirements of WICWA apply whether or not the Tribe intervenes.

The placement preferences must be followed in a voluntary adoptive situation, but do they need to be followed in a voluntary placement in a foster home?

No. WICWA applies to child custody proceedings. A voluntary placement in foster care is not a child custody proceeding because the parent can have the child returned upon demand. However, voluntary placements sometimes result in court-ordered placements, which do require compliance with placement preferences. To avoid unnecessary changes in placement, it would make sense, to the extent possible, to follow the placement preferences even in voluntary placement situations. [Ref. ss. 48.028(2)(e) and 48.028(7)(b)]

In a voluntary TPR situation, it may be that the adoptive placement hasn't been settled yet. In such cases, it may no longer be the parent voluntarily consenting to the adoptive placement because his or her parental rights have been terminated. Regardless of how an Indian child gets to the point of being placed in a preadoptive or adoptive home, is it still required that the placement preferences be followed?

In terms of a voluntary adoption (which we really don't have in Wisconsin because once parental rights are terminated, the parent isn't the parent and thus can't make decisions for the child), it is a child custody proceeding because once it is final the parent cannot have the child back on demand (ergo, it's not voluntary). So the tribe may seek to transfer jurisdiction but the parent can veto that (prior to TPR). The reality is that it is in those situations where the tribe may intervene and the court then considers the wishes of the parent (if prior to TPR or if they are essentially happening at the same time) and the tribe and then makes a decision. The court must give weight to the parent's wishes but the parent cannot veto the placement preferences like he or she can veto a transfer of jurisdiction. [Ref. ss. 48.028(2)(d) and (7)(a)]

Invalidation of a Court Action

What does it mean that a court action can be invalidated?

The Indian child, the Indian child's parent, or Indian custodian from whom the child was removed, or the child's tribe may move the circuit court to invalidate an out-of-home care or termination of parental rights action on the basis that certain violations of ICWA occurred (e.g., failure to transfer the case to tribal court without appropriate rationale, failure to notify the tribe, failure to appoint counsel, failure to make active efforts, not allowing a parent to withdraw consent to a voluntary placement). If the court determines that any of those violations occurred, the court must invalidate the action (i.e., placement in out-of-home care or termination of parental rights).

This is a significant result of a failure to comply with WICWA requirements. In order to avoid rehearings and disruptions to the child, potential foster and adoptive parents, and other individuals and agencies, and tribes, it is critical that compliance with WICWA be assured. [Ref. s. 48.028(6); s. 938.028(5)]

What are the time limits for invalidating an action if there has been a violation of ICWA?

Unlike the limitation of two years following the entry of an adoption order to withdraw consent when fraud or duress are proved, there is no limit on how long after an order is entered that the child, Indian custodian, or Tribe may move to invalidate that order when specified violations of ICWA occur. Most courts have indicated that the most analogous state statute of limitations should apply.

Since state laws vary, there is some likelihood that this resolution could be found contrary to the intent of Congress to provide a uniform federal standard for the applicability of ICWA.

That has also not been determined. [Ref. s. 48.028(6), Stats.; Native American Rights Fund, FAQ #20.3]

Voluntary Placement Agreement and Termination of Parental Rights

Can an Indian child be placed using a voluntary placement agreement?

Yes, but the procedure is different than a voluntary placement agreement under s. 48.63(1). If the child is an Indian child, the consent must be executed in writing, recorded before a judge, and accompanied by a written certification by the judge that the terms and consequences of the consent were fully explained to and were understood by the parent or Indian custodian.

In addition, a parent or Indian custodian may not consent to a voluntary placement or voluntary termination of parental rights prior to or within 10 days after the birth of the child. Any such consent is not valid. [Ref. s. 48.028(5)(a) and (b)]

Can a parent in a WICWA case withdraw consent to a voluntary termination of parental rights? What if the consent was given as the result of the filing of a petition for an involuntary termination of parental rights?

Yes. A parent who has consented to a voluntary termination of parental rights may withdraw that consent for any reason at any time prior to the entry of a final order terminating parental rights. It does not matter whether the consent was given subsequent to the filing of a petition to involuntarily terminate the parent's rights. [Ref. s. 48.028(5)(b)]

When does WICWA apply to voluntary placements?

WICWA applies, at least in part, to all voluntary child custody proceedings which result in the parent not being able to have the child returned upon demand. So, for example, ICWA does not apply to voluntary placements in foster care [with the exception of the process under which that must occur (Ref. s. 48.028(5)(a); 25 USC 1913(a) and (b)].

As another example, if a parent places an Indian child for adoption on a private basis, the Tribe is not required to receive notice but the Tribe does have the right to intervene (and perhaps argue for the application of the placement preferences). There are several court decisions related to this with two primary outcomes: some courts have held that notice to the Tribe is required because it may not be possible for a Tribe to exercise its right to intervene without knowing about the case; other courts have held that ICWA does not require notice to the Tribe in voluntary cases.

We recommend that notice be provided to the Tribe in all child welfare proceedings involving an Indian child. This will reduce the number of problems and conflicts that may occur later when the Tribe does hear about the case and seeks to intervene at that point.

Adoptive Home Studies

Can the court order a tribe to conduct an adoptive home investigation involving an Indian child?

Previously, the court could order the Department, a county department, or a licensed child placing agency to conduct adoptive investigations/studies in all cases, including those involving Indian children. Now the court can also request the child welfare department of the child's tribe to conduct the investigation/study. If the tribal child welfare agency agrees, the court must accept the study prepared by that agency. [Ref. s. 48.425(1)(intro.)]

Non-Compliance

What happens if the agency or court doesn't follow the requirements of WICWA?

In most cases, the result of non-compliance is that the tribe may move the court to invalidate any action that may have occurred and either go back to the court proceeding at which point the non-compliance occurred or to the beginning of the case – case law supports both potential results. For example, if the non-compliance was that notice wasn't provided to the tribe, the court could potentially require the case to begin all over again. If the non-compliance was that a qualified expert witness' testimony was not provided, then the court could require the case to go back to the fact-finding hearing or to the beginning of the case.

In the most dramatic and publicized cases, if certain aspects of WICWA are violated, it may result in a termination of parental rights being overturned and even an adoption order being overturned – for as long as two years after the adoption if the consent was obtained through fraud or duress. Depending upon the nature of the non-compliance, any failure of an attorney may result in a finding of malpractice. [*In re Baby Girl B.*, 2003 OK CIV APP 24, 67 P.3d 359, 374; *Doe v. Hughes*, 838 P.2d 804 (Alaska 1992)]