
Wisconsin Legislative Council

INFORMATION MEMORANDUM



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THE WISCONSIN INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (ICWA) applies when an “Indian child”¹ is the subject of certain types of custody proceedings, including those involving placement of the Indian child in out-of-home care or termination of the rights of an Indian child’s parent (TPR). When applicable, ICWA requires that a proceeding comply with various requirements in addition to those required under state child welfare laws, such as requiring transfer of jurisdiction to a tribal court, preferences for specified extended family or tribal members as placement options, and additional legal findings before placing an Indian child outside the home or terminating the rights of an Indian child’s parents.

Enacted in 1978, ICWA established minimum federal standards for the removal of Indian children from their families and the placement of such children in homes reflecting the values of Indian culture.² In 2009, Wisconsin codified its own Wisconsin Indian Child Welfare Act (WICWA) by incorporating the provisions of the federal ICWA into state law. WICWA expressly includes various policy declarations, including that it is the policy of this state for courts and child welfare agencies to cooperate fully with Indian tribes in order to ensure that ICWA is enforced, and to further protect the best interests of Indian children and promote the stability and security of Indian tribes and families. [See, ss. 48.01 (2) and 48.028 (1), Stats.]

In Wisconsin, both ICWA and WICWA apply when an Indian child is removed from his or her home.³ This information memorandum describes WICWA’s provisions in s. 48.028, Stats.

JURISDICTION OVER INDIAN CHILD CUSTODY PROCEEDINGS

WICWA generally applies to any Indian child custody proceeding. As explained in this section, an Indian tribe has exclusive jurisdiction over any such proceeding, with specific provisions addressing the transfer of jurisdiction depending on whether the child is residing within the reservation.

¹ Federal and state law define an “Indian child” as any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. [25 U.S.C. s. 1903 (4); s. 48.02 (8g), Stats.]

² ICWA was intended to promote the stability and security of Indian tribes and families by establishing such minimum federal standards. The Congressional findings in ICWA note that an “alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.” [25 U.S.C. ss. 1902 and 1901 (4).]

³ The Wisconsin statutes explicitly state that ICWA, codified at 25 U.S.C. ss. 1901 to 1963, supersedes state law in any Indian child custody proceeding governed by ICWA, except that in any case in which Wisconsin statutes provide a higher standard of protection than ICWA for the rights of an Indian child’s parent or Indian custodian, the court must apply the Wisconsin statutory standard. [s. 48.028 (10), Stats.] Note, too, that the Bureau of Indian Affairs has issued federal ICWA regulations that also may apply. [See, 25 C.F.R. Part 23.]

Exclusive Tribal Jurisdiction: Child Residing Within Reservation

An Indian tribe has exclusive jurisdiction over any Indian child custody proceeding⁴ involving an Indian child who resides or is domiciled within the tribal reservation, except when that jurisdiction is otherwise vested in the state by federal law and in certain situations in which an Indian child is temporarily located off the reservation to prevent imminent physical harm or damage to the Indian child. If an Indian child is a ward of a tribal court, the Indian tribe retains exclusive jurisdiction regardless of the child's residence or domicile. [s. 48.028 (3) (b), Stats.]

Transfer of Proceedings to Tribe: Child Not Residing Within Reservation

In certain types of Indian child custody proceedings⁵ regarding an Indian child who is not residing or domiciled within the reservation of the Indian child's tribe, the court must, upon petition of the Indian child's parent, Indian custodian, or tribe, transfer the proceeding to the jurisdiction of the tribe unless any of the following applies:

- A parent of the Indian child objects to the transfer.
- The Indian child's tribe does not have a tribal court, or the tribal court of the Indian child's tribe declines jurisdiction.
- The court determines that good cause exists to deny the transfer, if the person opposing the transfer shows by clear and convincing evidence that certain circumstances apply.⁶

[s. 48.028 (3) (c), Stats.]

Declining Jurisdiction and Returning Child if Improperly Removed

If the court determines that the petitioner in an Indian child custody proceeding has improperly removed the Indian child from the custody of his or her parent or Indian custodian or has improperly retained custody of the Indian child after a visit or other temporary relinquishment of custody, the court must decline jurisdiction over the petition and immediately return the Indian child to the custody of the parent or Indian custodian. However, this requirement does not apply if the court determines that returning the Indian child to his or her parent or Indian custodian would subject the Indian child to substantial and imminent danger or a threat of that danger. [s. 48.028 (3) (d), Stats.]

⁴ Wisconsin law defines an "Indian child custody proceeding" as a proceeding governed by ICWA in which any of the following may occur concerning an Indian child: (a) an adoptive placement; (b) an out-of-home care placement; (c) a pre-adoptive placement; (d) TPR; or (e) a delegation of powers by a parent regarding the care and custody of an Indian child for longer than one year under s. 48.979, Stats. WICWA applies to such proceedings regardless of whether the Indian child is in the legal or physical custody of an Indian parent, Indian custodian, extended family member, or other person at the commencement of the proceeding and whether the Indian child resides or is domiciled on or off of a reservation. [s. 48.028(2) (d) and (3) (a), Stats.]

⁵ Specifically, the requirement to transfer proceedings applies to the following types of Indian child custody proceedings: (a) an out-of-home placement, as recently expanded under 2023 Wisconsin Act 119; (b) TPR; and (c) a delegation of parental powers under s. 48.979, Stats. [s. 48.028 (3) (c), Stats.] In those same types of proceedings, WICWA specifies that an Indian child's Indian custodian or tribe may intervene at any point in an Indian child custody proceeding. [s. 48.028 (3) (e), Stats.]

⁶ WICWA specifies the grounds on which a court may determine that good cause exists to deny the transfer. [s. 48.028 (3) (c) 3. a. to c., Stats.] Also, in determining if good cause exists, a court may not consider perceived inadequacy of the tribal social services department or the tribal court. [s. 48.028 (3) (c) 3., Stats.]

COURT PROCEEDINGS

In specified types of Indian child custody proceedings, various procedural requirements apply, such as notice to specified persons, appointment of counsel, and a hierarchy governing the preference of qualified expert witnesses. Beyond procedure, WICWA contains certain substantive requirements for additional court findings that apply in addition to those generally required under the Children's Code.

Procedural Requirements

Notice to Parent, Custodian, and Tribe

In any involuntary proceeding involving the out-of-home placement of, TPR to, or delegation of parental powers regarding a child whom the court knows or has reason to know is an Indian child, the party seeking the placement, TPR, or delegation must comply with certain notice requirements. Specifically, that party must, by registered mail, notify the Indian child's parent, custodian, and tribe of the pending proceeding and the right to intervene in the proceeding. The proceeding's first court hearing may not be held until at least 10 days after receipt of the notice by the parent, Indian custodian, and tribe.⁷ [s. 48.028 (4) (a), Stats.]

Appointment of Counsel for Parent, Custodian, or Child

An Indian child's parent or custodian has the right to be represented by court-appointed counsel whenever the parent or custodian's Indian child is the subject of a proceeding involving removal from the home, placement in out-of-home care, or TPR. In addition, the court may appoint counsel for the Indian child if the court finds that the appointment is in the Indian child's best interests. [s. 48.028 (4) (b), Stats.]

Order of Preference of Qualified Expert Witnesses

Any party to a proceeding involving an out-of-home care placement of, or involuntary TPR to, an Indian child may call a qualified expert witness,⁸ and WICWA requires certain additional court findings to be based on such expert testimony, as explained in more detail below.

In general, a qualified expert witness must be chosen in the following order of preference: (1) a member of the Indian child's tribe recognized as knowledgeable on certain tribal customs; (2) a member of another tribe who is knowledgeable regarding the tribal customs of the Indian child's tribe; (3) a professional person with certain education and experience; and (4) a layperson with substantial experience and knowledge on specific topics. However, WICWA specifies situations in which a qualified expert witness from a lower order of preference may be chosen, and requires that the court consider as paramount the Indian child's best interest when weighing the testimony of all witnesses. [s. 48.028 (4) (f), Stats.]

⁷ If the identity or location of the Indian child's parent, Indian custodian, or tribe cannot be determined, the required notice must be given to the U.S. Secretary of the Interior in the same manner and, in that circumstance, the first hearing of the proceeding may not be held until at least 15 days after receipt of notice.

⁸ WICWA's definition of "qualified expert witness" specifies four categories of expert witnesses that may qualify. A court must determine a witness's qualifications in accordance with the rules of evidence that are generally applicable in Wisconsin civil proceedings. [See, s. 48.028 (2) (g) and (4) (f) 2., and ch. 907, Stats.]

Substantive Requirements

Additional Findings Required for Out-of-Home Care Placement

In addition to the legal findings applicable to all child removals and placements under the Children's Code, WICWA requires further findings if such actions involve an Indian child. Specifically, the court may not order removal of an Indian child from the home of the child's parent or Indian custodian and placement in out-of-home care unless all of the following occur:

- The court or jury finds by clear and convincing evidence, including the testimony of one or more qualified expert witnesses chosen in the order of preference described above, 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.
- The court or jury finds by clear and convincing evidence that active efforts, described below, were made to provide programming and services designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful, even if certain circumstances exist under which a child welfare agency is otherwise not required to make reasonable efforts in child welfare proceedings.⁹

[s. 48.048 (4) (d), Stats.]

Additional Findings Required for Involuntary TPR

Similarly, the court may not order an involuntary TPR to an Indian child unless all of the following occur:

- The court or jury finds evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witness chosen in the order of preference described above, that the 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.
- The court or jury finds by clear and convincing evidence that active efforts, described below, have been made to provide programming and services designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

[s. 48.028 (4) (e), Stats.¹⁰]

These findings are required in addition to the other requirements that apply to all involuntary TPR proceedings, such as proof of grounds for termination.¹¹ The TPR petition must include information supporting these additional findings, in addition to the other required information.

[s. 48.42 (1) (e), Stats.]

⁹ In cases in which WICWA does not apply, a court is not required to determine that a child welfare agency has made reasonable efforts to prevent a child's removal from the home if the court finds the parent has committed certain criminal acts, had parental rights to another child involuntarily terminated, or relinquished custody of the child within 72 hours of birth. [ss. 48.028 (4) (d) 2. and 48.355 (2d) (b) 1. to 5., Stats.]

¹⁰ These additional findings regarding "continued custody" and "active efforts" do not apply in cases in which the Indian parent never had custody of the Indian child. [See, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) and *Kewaunee Cnty. Dep't of Human Serv. v. R.I.*, 2018 WI App 7.]

¹¹ State law requires proof of one of the following grounds for involuntary TPR: abandonment; relinquishment; continuing need of protection or services; continuing parental disability; continuing denial of periods of physical placement or visitation; child abuse; failure to assume parental responsibility; incestuous parenthood; homicide or solicitation to commit homicide of parent; parenthood as a result of sexual assault; commission of a serious felony against a child; or prior involuntary TPR to another child. [s. 48.415, Stats.]

Active Efforts to Prevent the Breakup of the Indian Family

As noted above, the court must find that active efforts have been made to provide certain programming and services, and such efforts have proved unsuccessful, before placing an Indian child in out-of-home care or ordering TPR. The standard for “active efforts” requires showing:

“ . . . an ongoing, vigorous, and concerted level of case work and that the active efforts were made in a manner that takes 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.”

[s. 48.048 (4) (g), Stats.]

WICWA further specifies nine types of activities that a court or jury must analyze when determining whether active efforts were made. Very briefly, examples include evaluations of the family, case planning, assessments, outreach to tribal community, and use of family preservation strategies. [See, s. 48.028 (4) (g) a. to h., Stats.]

PREFERENCES FOR AN INDIAN CHILD’S PLACEMENT

If an Indian child is removed from the home of the child’s parent or Indian custodian, the child must be placed according to certain placement preferences specified in WICWA, unless good cause to deviate from these preferences is shown. [s. 48.028 (7), Stats.] When analyzing the placement preference requirements for any type of placement, WICWA requires application of “the prevailing social and cultural standards of the Indian community in which the Indian child’s parents or extended family members reside or with which the Indian child’s parents or extended family members maintain social and cultural ties.” [s. 48.028 (7) (d), Stats.]

Importantly, if the Indian child’s tribe has established, by resolution, an order of preference that is different from the preferences set forth in WICWA, described below, then the tribe’s established order of preference must be followed.¹² In addition, when appropriate, the preference of the Indian child or parent must be considered and, when a parent who has consented to the placement evidences a desire for anonymity, that desire must be given weight in determining the preference. [s. 48.028 (7) (c), Stats.]

Placement Preferences: Adoptive Placement or Parental Delegation

In the absence of good cause to the contrary, as described below, preference must be given in the following order when placing for adoption, or delegating parental powers regarding, an Indian child: (1) an extended family member of the Indian child; (2) another member of the Indian child’s tribe; and (3) another Indian family.

Placement Preferences: Out-of-Home Care or Pre-Adoptive Placement

Any Indian child who is accepted for an out-of-home care placement or a pre-adoptive placement must be placed in the least restrictive setting that most approximates a family, that

¹² This requirement applies unless good cause is shown to the contrary, and so long as the placement or delegation is appropriate for the child’s needs, as specified by statute in more detail. Also, when appropriate, the court must consider an Indian child’s or parent’s preference and further must give weight to a consenting parent’s desire for anonymity. [See, s. 48.028 (7) (c), Stats.]

meets the Indian child's special needs, if any, and that is within reasonable proximity to the Indian child's home, taking into account those special needs. In the absence of good cause to the contrary, as described below, preference must be given in the following order: (1) the Indian child's extended family member; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by the Department of Children and Families (DCF), by a county department of human or social services, or by a child welfare agency; and (4) a group home or residential care center for children and youth approved by an Indian tribe or operated by an Indian organization with a program suitable to meet the Indian child's needs. [s. 48.028 (7) (b), Stats.]

An Indian child being held in temporary physical custody must be placed in compliance with this same order of preference unless the person responsible for determining the placement finds good cause, as described below, for departing from the order or finds that emergency conditions necessitate departing from that order. [s. 48.028 (7) (bm), Stats.]

Good Cause to Depart From Placement Preferences

WICWA allows for departure from the preferences described above based on a finding of good cause. The party seeking to depart from the placement preferences must establish good cause based on one or more of the following considerations: (1) when appropriate, the request of the Indian child's parent or the Indian child, if of sufficient age and developmental level to make an informed decision; (2) any extraordinary physical, mental, or emotional health needs of the Indian child requiring highly specialized treatment services based on expert testimony; and (3) the unavailability of a suitable option, after diligent efforts to place the Indian child or delegate powers in the applicable order of preference. [s. 48.028 (7) (e), Stats.]

VOLUNTARY PROCEEDING: CONSENT AND WITHDRAWING CONSENT

WICWA allows a parent or Indian custodian to consent, and also withdraw consent, to certain types of orders in Indian child custody proceedings, but requires that specific procedures be followed for such consent or withdrawal to be valid.

Procedural Requirements for Voluntary Consent

A parent may voluntarily consent to TPR of an Indian child, but only if the consent is executed in writing, recorded before a judge, and accompanied by the judge's written certification that the terms and consequences of the consent were fully explained in detail to, and fully understood by, the parent. A parent or Indian custodian may also consent to an out-of-home care placement of an Indian child or a delegation of parental powers, subject to those same requirements.¹³ Also, any consent or delegation of powers given prior to or within 10 days after the birth of the Indian child is not valid. [s. 48.028 (5) (a) and (b), Stats.]

Consent Withdrawal: Out-of-Home Placement or Parental Delegation

A parent or Indian custodian who has executed a consent to an out-of-home placement or delegation may withdraw the consent or delegation for any reason at any time, and the Indian child must be returned to the parent or Indian custodian. A parent or Indian custodian who has executed a consent or delegation of powers may also move to invalidate the out-of-home care

¹³ For all voluntary consents, the judge must also certify that the parent or Indian custodian fully understood the explanation in English or that the explanation was interpreted into any language that the parent or Indian custodian understood. [s. 48.028 (5) (a) and (b), Stats.]

placement or delegation of powers by moving the court to invalidate the action, as described below. [s. 48.028 (5) (a), Stats.]

Consent Withdrawal: Voluntary TPR

A parent who has executed a consent to TPR may withdraw the consent for any reason at any time prior to the entry of a final TPR order, and the Indian child must be returned to his or her parent unless an order or agreement provides for a different placement. After the entry of a final TPR order, a parent who has executed a consent may do any of the following: (1) withdraw that consent, as described below; (2) move to invalidate the TPR, as described below; or (3) move for relief from the judgment on the bases authorized for such relief in all voluntary TPR proceedings. [s. 48.028 (5) (b), Stats.]

INVALIDATION OF OUT-OF-HOME CARE PLACEMENT OR TPR

WICWA provides a remedy that may be pursued if certain proceedings occurred in violation of ICWA. Specifically, any of the following persons may file a motion with the court to invalidate an out-of-home care placement, delegation of parental powers, or TPR on the grounds that it was made in violation of ICWA: (1) an Indian child who is the subject of an Indian child custody proceeding; (2) any parent or Indian custodian from whose custody that Indian child was removed; or (3) the Indian child's tribe. If the court finds that those grounds exist, the court must invalidate the placement, delegation, or TPR. [s. 48.028 (6), Stats.]

PROVISIONS APPLICABLE AFTER ADOPTION

Withdrawing Consent to TPR After Adoption Ordered

After the entry of an order granting adoption of an Indian child, a parent who consented to the TPR may withdraw that consent and file a motion with the court on the basis that the consent was obtained through fraud or duress. Any such motion must be filed within two years after the entry of the adoption order. If the court finds that the consent was obtained through fraud or duress, the court must vacate the TPR order and, if applicable, the adoption order, and return the Indian child to the parent's custody, unless a dispositional order or agreement that was in effect prior to the TPR provided for a different placement. [s. 48.028 (5) (c), Stats.]

Return of Custody if Adoption is Vacated, Set Aside, or Terminated

If a final order granting adoption of an Indian child is vacated or set aside, or if the parental rights to an Indian child of all adoptive parents of the Indian child are voluntarily terminated, the Indian child's former parent or former Indian custodian may petition for the return of custody of the Indian child. After a required hearing, the court must grant the petition for the return of custody of the Indian child to the former parent or Indian custodian unless there is a showing that return of custody is not in the Indian child's best interest. [s. 48.028 (8) (a), Stats.]

This information memorandum was prepared by Amber Otis, Senior Staff Attorney, on October 29, 2024.