

Wisconsin Indian Child Welfare Act



State Public Defender's
Criminal Defense Conference
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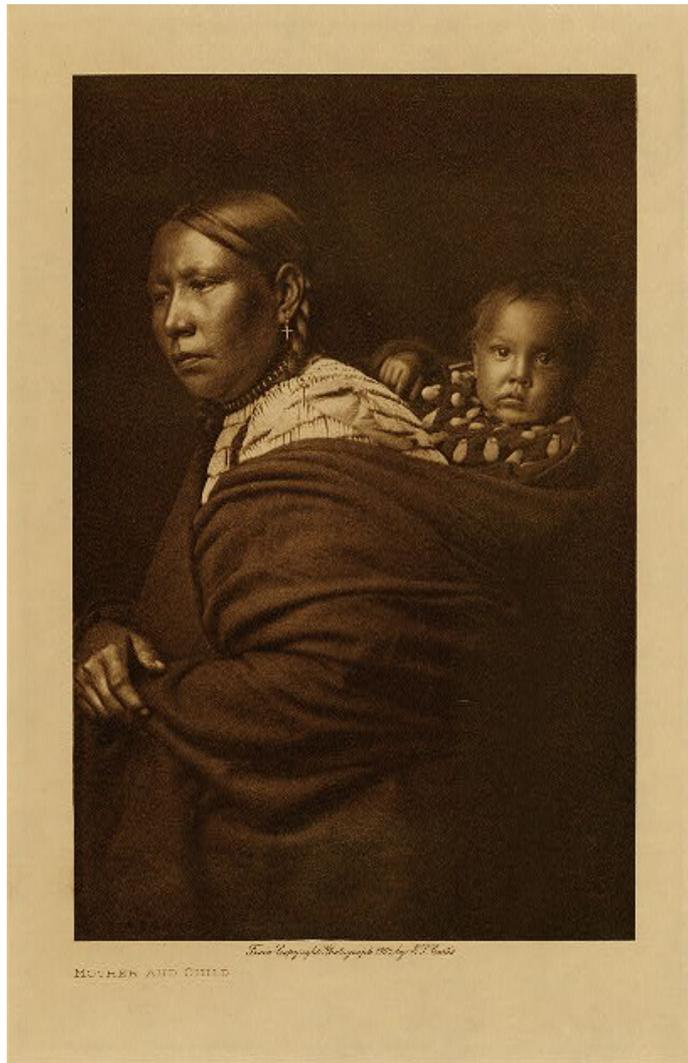
History



Tribal Sovereignty and
Jurisdiction

Background:

Periods of Federal Indian Law Policy



- ❑ Discovery, Conquest, and Treaty-making (1532 - 1828)
- ❑ Removal and Relocation (1828 – 1887)
- ❑ Allotment and Assimilation (1887-1928)
- ❑ Reorganization and Self-Government (1928 – 1945)
- ❑ Termination (1945 – 1961)
- ❑ Self-Determination (1961 – Present)

Tribal sovereignty

□ Marshall Trilogy

- *Johnson v. McIntosh* ("Doctrine of Discovery")
- *Cherokee Nation v. Georgia*
("domestic dependent nations")
- *Worcester v. Georgia*
(the laws of the state of Georgia could have no force on the Cherokee reservation)

Indian Tribes

- Tribes do not draw their powers from any source of federal law. Rather, they are the inherent powers of sovereigns that pre-exist the federal Union.
 - United States v. Wheeler, 435 U.S. 313, 323-24 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896).

Tribal sovereignty

- ▣ Tribal sovereignty traditionally only limited by Congress
- ▣ The Supreme Court has placed limitations on tribal authority consistent with what it termed implicit divestiture; defined as “that part of sovereignty which the Indian implicitly lost by virtue of their dependent status.”

Tribal sovereignty

- However, these judicial divestments of Indian sovereignty have been limited to relations between tribes and non-members and not those matters of internal tribal relations.
- The Supreme Court has made it clear that in statutory construction, the absence of an express Congressional mandate prohibits any limitation of tribal sovereignty.

U.S. Supreme Court on Tribal Courts

- ▣ We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," to the extent that sovereignty has not been withdrawn by federal statute or treaty.

-Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987)(internal citations and quotation marks omitted)

Wisconsin Tribal Courts

- ❑ All eleven Tribes in Wisconsin have some form of a judicial system.
- ❑ Formality and procedure vary, but all are based on the adversarial process.
- ❑ In addition to adversarial court, the Ho-Chunk Nation operates a Traditional Court and other Tribes have peacemaking available.

Tribes in Wisconsin

- Eleven federally recognized Tribes in Wisconsin
 - Bad River Band of Lake Superior Chippewa
 - Forest County Potawatomi
 - Ho-Chunk Nation
 - Lac Courte Oreilles Band of Lake Superior Chippewa
 - Lac du Flambeau Band of Lake Superior Chippewa
 - Menominee Indian Tribe
 - Mole Lake (Sokaogon) Band of Lake Superior Chippewa
 - Oneida Tribe of Indians of Wisconsin
 - Red Cliff Band of Lake Superior Chippewa
 - St. Croix Band of Lake Superior Chippewa
 - Stockbridge-Munsee Band of Mohicans

ICWA



The Need for Federal Change

History: Indian Child Welfare

Boarding Schools

- ❑ No contact with family
- ❑ Forced to cut hair
- ❑ Forced to adopt Christianity
- ❑ Forbidden to speak native language
- ❑ Forced to adopt a “white” name

“We accept the watchword – Let us by patient effort
kill the Indian in him and save the man.”

-- Director of the Carlisle School

Carlisle Indian School ca. 1900



Association on American Indian Affairs (AAIA) Studies 1969 & 1974

- ❑ 25-35% of all Indian children were separated from their families, placed in foster homes, adoptive homes or institutions
- ❑ More than 17% of school-aged Indian children from reservations were living in institutional facilities
- ❑ 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"

ICWA: Congressional Intent

- "...to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of *minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture*, and by providing for assistance to Indian tribes in the operation of child and family service programs."

WICWA

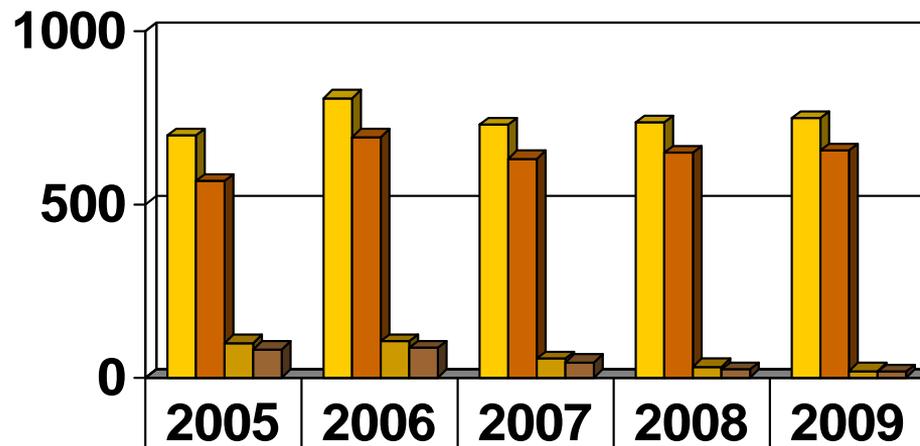
The Need for Legislation in Wisconsin



History

- ❑ When ICWA passed, the risk of parents in Wisconsin being separated from their children was 1,600 times greater for Indians than for non-Indians.
- ❑ The federal Child and Family Services Review (CFSR) in 2003 found that Wisconsin was deficient in:
 - ❑ Identification of Indian children
 - ❑ Notification to Tribes in a timely manner

eWiSACWIS Data - ICWA Implementation



OH Placement	696	806	729	734	746
Subject to ICWA	567	695	631	649	654
ICWA Notice	99	101	54	31	17
Placement	81	83	43	22	13

Children's Court Initiative Data

September 2005 – July 2009

- ❑ 11 of 71 (15.5%) CHIPS and involuntary TPR cases reviewed contained documentation that notice of the proceeding was sent to the tribe by registered or certified mail with return receipt requested
- ❑ 16 of 58 (28%) cases reviewed contained documentation that the active efforts finding was made either orally or in writing
- ❑ 26 of 58 (45%) cases reviewed contained documentation that a qualified expert witness presented testimony

Codification Initiative

- ❑ DCF and 11 tribes (ICWA Codification Workgroup) drafted the bill over a four year period (2005-2009)
- ❑ In-depth research, case law analysis
- ❑ In 2007, 4th draft of the bill sent to representatives of stakeholders for initial review (County social services, District Attorneys, Judges)
- ❑ Consensus: need for codification

Why codify? More Reasons

- ❑ Most federal child welfare mandates are codified into state law to ensure compliance:
 - Child Abuse Prevention and Treatment Act (CAPTA)
 - Adoption and Safe Families Act (ASFA, TPR timelines)
 - Fostering Connections Act

- ❑ ICWA: No funding attached

- ❑ Some other states that have codified (whole or part)
 - Washington, Nebraska, Oklahoma
 - California, Minnesota, Montana
 - Colorado, Alaska, Oregon, Iowa

Wisconsin Indian Child Welfare Act (WICWA)

Codified into Statutes by
2009 Wisconsin Act 94



Best Interests of an Indian Child

“It is the policy of this state...to protect the best interests of Indian children and promote the stability and security of Indian tribes and families...”

Wis. Stat. § 48.02(2)(intro.) and (b)

Purpose:

- ❑ Prevent unwarranted placements
- ❑ Create placements that reflect values of child's Tribe and establish, develop, and maintain a political, cultural, and social relationship with Indian children & their Tribe and Tribal community

Wis. Stat. s. 48.02(2)(b)2.

Applicability, Jurisdiction, and Notice



Applicability to Parties

- WICWA applies in cases involving an Indian child
- Indian child: “Any unmarried person who is under the age of eighteen and is affiliated with an Indian Tribe in any of the following ways:
 - As a member of the Indian Tribe.
 - As a person who is eligible for membership in an Indian Tribe and is the biological child of a member of an Indian Tribe.”

Wis. Stat. § 48.02(8g)

Applicability to Parties

“ ‘Indian’ means any person who is a member of an Indian Tribe or who is an Alaska native and a member of a regional corporation, as defined in 43 USC 1606.”

Wis. Stat. s. 48.02(8d)

Prohibited Use of Existing Indian Family Doctrine

A court assigned to exercise jurisdiction under Ch. 48 or 938 may not determine whether WICWA and ICWA apply to an Indian child custody proceeding based on whether the Indian child is part of an existing Indian family.

Wis. Stat. s. 48.028(3)

Applicability to Parties

Indian Tribe: Any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the federal government, including any Alaska native village as defined in 43 U.S.C. 1602(c).

Wis. Stat. s. 48.02(8r)

Applicability: Type of Proceeding

- ❑ WICWA applies to all Indian child (and some juvenile) custody proceedings
- ❑ Most commonly, CHIPS actions and TPR actions
- ❑ Also applies to guardianship proceedings and certain JIPS actions
 - Applies to JIPS proceedings under Wis. Stat. § 938.13(4), (6), (6m), and (7).
 - ❑ Uncontrollable
 - ❑ Habitually truant from school
 - ❑ School dropout
 - ❑ Habitually truant from home

Applicability: Type of Proceeding

“ ‘Indian child custody proceeding’ means a proceeding governed by the federal Indian Child Welfare Act, 25 U.S.C. 1901 to 1963, in which any of the following may occur:

- An adoptive placement
- An out-of-home care placement
- A preadoptive placement
- A termination of parental rights, as defined in s. 48.40(2) to an Indian child.”

Wis. Stat. s. 48.028(2)(d)

Applicability: Type of Proceeding

Out-of-home care placement includes situations in which an Indian child is removed from the home of his or her parent or Indian custodian for temporary placement in:

- ❑ A foster home or treatment foster home
- ❑ A group home
- ❑ A residential care center for children and youth
- ❑ A shelter care facility
- ❑ The home of a relative other than a parent
- ❑ The home of a guardian.

Out-of-Home Care Placement

- ❑ The key is that the parent or Indian custodian cannot have the child returned upon demand.
- ❑ Thus, voluntary out-of-home placements where the parent or Indian custodian may have the child returned upon demand do not qualify as out-of-home care placements.

Jurisdiction & Intervention

- ▣ Tribes have exclusive jurisdiction over Indian child custody proceedings when the Indian child resides or is domiciled on the reservation or is a ward of the Tribe's court regardless of residence.

Wis. Stat. s. 48.028(3)(b)

- ▣ WICWA provides that an Indian child's Indian custodian or tribe may intervene at any point in any child custody proceeding.

Wis. Stat. s. 48.028(3)(e)

Notice to Tribes

- ❑ Indian child's parent, Indian custodian, and tribe must be provided notice of child custody proceedings
 - ❑ First notice in a CHIPS/JIPS or TPR proceeding must be by registered mail, return receipt requested
 - ❑ The return receipt must be filed with the court
 - ❑ Notice for subsequent hearings must be sent in writing by:
 - Mail
 - Personal service
 - Fax
 - **NOT E-MAIL**
- Wis. Stat. s. 48.028(4)(a)

Resources for Notice

- BIA list for notice

<http://www.narf.org/icwa/contacts/biaicwa.pdf>

- BIA list of federally recognized tribes

http://www.narf.org/nill/resources/indian_entities_2009.htm

Representation: Appointment of Counsel



Appointment of Counsel

- ❑ Historically, all parents subject to CHIPS petition were appointed SPD.
- ❑ Right to counsel existed in Federal Law prior to passage of WICWA.
- ❑ WICWA made the Office of the Public Defender the primary provider of representation.

Appointment of Counsel

- “Whenever an Indian child is the subject of a proceeding [where WICWA applies]...the Indian child’s parent or Indian custodian shall have the right to be represented by [court-appointed] counsel as provided in subs. (2) and (4).”

Wis. Stat. s. 48.23 (2g)

- In any situation under sub. (2), (2g), or (2m) in which a parent 18 years of age or over or an adult expectant mother is entitled to representation by counsel... the court shall refer the parent or adult expectant mother to the authority for indecency determinations specified under s. 977.07 (1).

Appointment of Counsel: Procedure

- ❑ The Office of the Public Defender's Office does not solicit clients. Therefore, even if an individual may be eligible under WICWA, they must still request to be evaluated.
- ❑ HOWEVER. . .

Mission of the Office of State Public Defender

- To promote justice throughout Wisconsin by providing high-quality and compassionate legal services, protecting individual rights, and advocating as a criminal justice partner for effective defender services and a fair and rational criminal justice system.
- SO...

Standard of Evidence



Standard of Evidence

- For out-of-home placement, court or jury must find *by clear and convincing evidence*, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- For termination of parental rights, court or jury must find *beyond a reasonable doubt*, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Standard of Evidence



In both cases, court or jury must find *by clear and convincing evidence* that active efforts have been made to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

Wis. Stat.
§48.028(4)(d) and (e)

Active Efforts



Active Efforts

- ❑ Requires an ongoing, vigorous, and concerted level of casework

- ❑ Must take into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe
Wis. Stat. § 48.028(4)(g)

- ❑ Must be made in a manner 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
 - other culturally appropriate service providers

Qualified Expert Witness



Qualified Expert Witness

- The party seeking to place the Indian child in out-of-home care or to terminate parental rights to the Indian child **must** utilize a qualified expert witness.
- Any other party **may** utilize a qualified expert witness.

Qualified Expert Witness

- ▣ Qualified expert witnesses must have knowledge of the Indian child's tribe's family organization and child-rearing practices



Qualified Expert Witness

- ❑ In descending order of preference, qualified expert witnesses are the following, each of whom must have knowledge of the child's tribe:
 - A member of the Indian child's tribe
 - A member of another tribe
 - A professional person
 - A lay person

- ❑ The level in order of preference of QEW may not be the sole consideration in weighing their testimony

- ❑ In weighing the testimony of all witnesses, the court shall consider as paramount the best interests of the Indian child as provided in s. 48.01(2)
-Wis. Stat. §§ 48.028(2)(g) and (4)(f)

Transfer of Jurisdiction



ICWA and WICWA presume that the best interests of an Indian child are best assured in Tribal court

Transfer of Jurisdiction

Upon the petition of the Indian child's parent, Indian custodian, or Tribe, the circuit court **shall** transfer the case to the Tribal court **unless**:

- ❑ A parent objects to the transfer
- ❑ The child's Tribe does not have a court
- ❑ The court of the child's tribe declines
- ❑ The court finds good cause not to transfer
- ❑ The Indian child is 12 years of age or over and objects to the transfer

Transfer of Jurisdiction

Good Cause Not to Transfer

- ❑ Evidence/testimony cannot be presented in tribal court without undue hardship to parties or witnesses which Tribal court cannot mitigate by use of:
 - ❑ Telephone or live audiovisual means
 - ❑ Location that is convenient to the parties
 - ❑ Other means permissible under tribal court's rules of evidence

Transfer of Jurisdiction

Good Cause Not to Transfer

- ❑ Tribe received notice, and
- ❑ Tribe has not indicated to the [circuit] court in writing that it is monitoring the proceeding and may request a transfer at a later date, and
- ❑ Petition for transfer is filed by the tribe, and
- ❑ Petition is filed more than 6 months after the notice of a CHIPS/JIPS proceeding, or more than 3 months after the notice of a TPR proceeding.

Wis. Stat. s. 48.028(3)(c)

Placement Preferences



Placement Preferences

- ❑ Indian children placed in out-of-home care or for adoption must be placed pursuant to identified preferences unless good cause exists to depart from those preferences.
- ❑ The standard to be applied in meeting placement preference requirements shall be the prevailing social and cultural standards of the child's Tribe.

Placement Preferences

(Unless otherwise indicated by the child's Tribe)

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

For adoptive placements:

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

Placement Preferences: Good Cause to Depart

- ❑ Request of parent or child (if of sufficient age and developmental level) unless request is to avoid application of WICWA
- ❑ Extraordinary physical, mental, or emotional health needs; established by expert witness; length of time in placement does not in itself constitute an extraordinary mental health need
- ❑ Unavailability of suitable placement after diligent efforts have been made to comply

The burden of establishing good cause is on the person seeking departure from the placement preferences

Voluntary Consent and Withdrawal of Consent



Voluntary Placements and TPRs

Any such consents must be:

- ❑ Executed in writing
- ❑ Recorded before a judge
- ❑ Certified by judge that terms and consequences were fully explained in detail to and were fully understood by parent or Indian custodian

Any such consent given prior to or within 10 days after the birth of the Indian child is not valid.

Withdrawal of Consent

Voluntary Placements and TPRs

- For voluntary placement, parent may withdraw consent for any reason at any time and child must be returned
- For voluntary TPR, parent may withdraw consent for any reason at any time prior to entry of final TPR order and child must be returned unless an agreement under § 48.368(1) or 938.368(1) provides for a different placement

Wis. Stat. § 48.028(5)(a) and (b)

Withdrawal of Consent

After Order Granting Adoption

- ❑ If parent consented to TPR, parent may withdraw consent and move the court for relief from the judgment on the grounds that the consent was obtained through fraud or duress.
- ❑ Motion must be filed within 2 years after the order granting the adoption.
- ❑ If court finds there was fraud or duress, court must vacate the TPR order and the adoption order and return the Indian child to the parent unless an agreement under § 48.368(1) or 938.368(1) provides for a different placement.

Wis. Stat. s. 48.028(5)(c)

Invalidation of Action and Return of Custody



Invalidation of Action

- ▣ Indian child, parent, Indian custodian, or Tribe may move 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.

1911: Exclusive jurisdiction, transfer of jurisdiction, intervention, full faith and credit

1912: Notice, time, counsel, active efforts, evidentiary standard, qualified expert witness, damage to child

1913: Voluntary consent and withdrawal

Invalidation of Action & Return of Custody

- ❑ If court finds violation did occur, court shall invalidate order for out-of-home care placement or termination of parental rights
- ❑ If order granting adoption of an Indian child is vacated or set aside or parental rights of all adoptive parents of Indian child are voluntarily terminated, Indian child's former parent or former Indian custodian may petition for return of custody of the Indian child, and hearing must be held
- ❑ At conclusion of hearing, court shall grant petition for return of custody unless there is a showing that return of custody is not in best interests of the Indian child

Wis. Stat. § 48.028 (6) and (8)

Implications for Noncompliance

- ❑ Invalidation of proceedings
- ❑ Possible return of custody to Indian parent
- ❑ Nullification of adoption orders
- ❑ Instability of placements of children
- ❑ Delay in permanence for a child
- ❑ Malpractice actions

References & Resources

Ch. 48, Wis. Stats., (Children's Code)

<http://www.legis.state.wi.us/statutes/Stat0048.pdf>

Ch. 938, Wis. Stats., (Juvenile Justice Code)

<http://www.legis.state.wi.us/statutes/Stat0938.pdf>

WI Dept. of Children & Families Tribal Relations

http://dcf.wisconsin.gov/tribal_relations/default.htm

Tribal Child Welfare Priorities

<http://dcf.wi.gov/children/icw/pdf/priorities.pdf>

Wisconsin Indian Child Welfare Act (Act 94)

<http://www.legis.state.wi.us/2009/data/acts/09Act94.pdf>

Frequently Asked Questions

<http://dcf.wi.gov/children/icw/statsadmin/pdf/faq.pdf>

Tribal Court information

www.judicare.org – has links to all tribal courts with contact information

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