

## JUDICIAL CHECKLIST – WISCONSIN INDIAN CHILD WELFARE ACT

The Wisconsin Indian Child Welfare Act (WICWA) codifies the federal Indian Child Welfare Act into state statutes. WICWA protects the best interests of Indian children while promoting stability and security of Indian tribes and families. WICWA applies to out-of-home placements in CHIPS, status offenses in JIPS, and guardianship cases, TPR proceedings, and pre-adoptive and adoptive placements. WICWA does not apply to placements based on delinquent acts or family court proceedings when one of the parents has custody.

### APPLICABILITY

A child is an Indian child if the child is an unmarried person under the age of 18 who is either:

- 1) A member of a federally recognized Indian tribe, or
- 2) The biological child of a member of a tribe **AND** eligible for membership in a tribe.

*There is an ongoing obligation throughout the case to identify an Indian child.*

- Did the court make an inquiry as to whether the case involves an Indian child? *If the court "knows or has reason to know" that the child is an Indian child, proceed as a WICWA case.*
- Have both parents and any Indian custodian been identified? Has paternity been acknowledged or established?
- What was done to locate an absent or missing parent?
- Is the child a member of a tribe? If not, is either parent a member of or eligible for membership in a tribe? Is the child eligible for membership in a tribe? *Each tribe determines membership.*
- If the parents are unable to provide information on tribal affiliation, have family members been consulted?
- Has a Request for Confirmation of Child's Indian Status form been sent to applicable tribe(s)? Has documentation of eligibility for membership been received back from the tribe(s)?
- If tribe unknown, was Bureau of Indian Affairs (BIA) contacted to identify tribe?

### NOTICE FOR OUT-OF-HOME PLACEMENT AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

#### First Hearing in the Case (excluding Temporary Physical Custody Hearings)

- Has notice of the proceeding been sent to the tribe, parents, and Indian custodian (if any) by registered mail with return receipt requested?
  - Have at least 10 days elapsed since **receipt** of the notices? *If no, adjourn hearing.*
  - Have return receipts been received and filed with the court?
- If tribe is unknown, was notice sent to the BIA at least 15 days prior to hearing?
- Has a parent, tribe, or Indian custodian requested adjournment to prepare? *If yes, adjourn up to 20 days.*
- If the parents/Indian custodian do not have counsel, do they want to be represented? Have they contacted the Public Defender's Office? *Right to appointed counsel if indigent.*

#### Subsequent Hearings

- Has tribal contact information (names, addresses, and phone numbers) been documented in the court record for notification of future court proceedings?
- Has written notice to tribe, parents, and Indian custodian been provided by mail, personal delivery, or fax?
- Has the tribe received copies of all reports and other documents submitted to the court?

### INTERVENTION AND TRANSFER OF JURISDICTION

- Has the tribe or Indian custodian made a motion to intervene? *Right to intervene at any stage.*
- Is there a request by the tribe, Indian custodian, or parent to transfer the case to tribal court?
- If transfer requested, the case **shall be** transferred to tribal court **unless one of the following applies**:
  - Does one of the parents object to the transfer?
  - Has the tribal court declined jurisdiction or does the tribe lack a tribal court?
  - Is there good cause under ss. 48.028(3)(c)3. or 938.028(3)(c)3. to deny the transfer?

## PLACEMENT PREFERENCES

The child must be placed according to placement preferences in ss. 48.028(7) or 938.028(6) in any out-of-home, pre-adoptive, or adoptive placement, unless good cause is shown, per ss. 48.028(7)(e) or 938.028(6)(d).

- Has the tribe established its own order of placement preferences? *If yes, that order applies.*
- Is the current or proposed placement in compliance with the applicable placement preferences?
- What efforts have been made to place the child in the order of preference?
- Have both parents been asked for names of extended family members?
- Was the tribe contacted for a placement approved, licensed, or operated by the tribe?
- Is the tribe in agreement with or recommending an alternate placement?
- If placement preferences not followed, is there good cause to depart from order of preference?

### Additional Considerations for Out-of-Home and Pre-adoptive Placements:

- Is the child's placement the least restrictive, family-like setting that meets the child's special needs, if any?
- Is the child placed in reasonable proximity to the child's home, taking into account any special needs?

## FINDINGS FOR OUT-OF-HOME PLACEMENT AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

### Active Efforts to Prevent Breakup of Indian Family\*

- Have all of the required activities under ss. 48.028(4)(g) or 938.028(4)(f) for *active* efforts been conducted?
  - Were appropriate tribal representatives requested to evaluate the family and assist in developing a case plan that uses resources of the tribe and Indian community?
  - Has a comprehensive assessment of the family been completed?
  - Have tribal representatives been identified, notified, and invited to participate in the proceeding?
  - Have extended family members been consulted for support, cultural connections, and placement?
  - Were arrangements made to provide family interaction in the most natural and unsupervised setting?
  - Were all available family preservation strategies offered or employed, while also involving the tribe?
  - Were community resources offered and the family actively assisted in accessing those resources?
  - Was monitoring of client progress and participation in services provided?
  - If services were unavailable, were alternative ways of addressing the family's needs considered?
- If any activity was not conducted, has documentation been provided to the court with an explanation?
- Why have the activities and efforts been unsuccessful in reunifying the Indian family?

*\*Under WICWA, the active efforts finding is also required at Extension and Permanency Hearings.*

### Serious Emotional or Physical Damage

- Has the petitioner provided the requisite qualified expert witness (QEW) testimony?
- Was the QEW chosen in the order of preference under ss. 48.028(4)(f) or 938.028(4)(e)? If not, what efforts were made to secure a QEW from a higher order of preference?
- Is the QEW knowledgeable in the tribe's customs and child-rearing practices? In what capacity?
- Are any of the reasons for the child's removal related to cultural child-rearing practices?
- Is continued custody of the child by the parent or Indian custodian likely to result in serious emotional or physical damage to the child, based on the QEW testimony? *Burden of proof of clear and convincing evidence for out-of-home placement and beyond a reasonable doubt for involuntary TPR.*

## VOLUNTARY PLACEMENT AGREEMENT OR VOLUNTARY TERMINATION OF PARENTAL RIGHTS

- Has the Indian parent or Indian custodian consented in writing?
- Were the terms and consequences of the consent fully explained and understood?
- Was the consent recorded before a judge and accompanied by the judge's certificate?
- Is the child at least 11 days old at the time of the consent?

# ACTIVE EFFORTS

## A Child Welfare Practitioner's Guide for Meeting the WICWA Active Efforts Requirement



**MCWIC**  
Midwest Child Welfare  
Implementation Center

www.mcwic.org

## Wisconsin Indian Child Welfare Act Active Efforts Requirement

The following Active Efforts Guideline was developed under the Wisconsin Indian Child Welfare Act State Advisory Board: Active Efforts Sub-committee.

### Members:

Esie Leoso-Corbine	Director— Social Services Bad River Lake Superior Band of Chippewa
Hazel Coppernoll	CPS Supervisor — Sauk County Department of Social Services
LeighWahlen	Juvenile Court Intake Worker — Polk County Human Services Department
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Nicole Homer-Lundgren	Attorney — Ho-Chunk Nation Child Support
Mary Sowinski	Attorney — Assistant Milwaukee County District Attorney
Bill Orth	Director – Sauk County Department of Human Services
Kristin Allen	Director - ICWA—Lac du Flambeau Lake Superior Band of Chippewa
Carolyn Grzelak	Attorney — Ho-Chunk Nation Legislature
Kris Goodwill	Lead Attorney — Lac Courte Oreilles Lake Superior Band of Chippewa
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## Best Interest of an Indian Child

In 2009 the Wisconsin State Legislature unanimously passed the Wisconsin Indian Child Welfare Act (WICWA). The bill was signed into law on December 7, 2009.

In the Wisconsin Children's Code, Chapter 48, the State of Wisconsin declares the best interest of the Indian child shall be in accordance with the federal and state Indian Child Welfare Acts (ICWA). The legislated policy for the State fur-

ther establishes that courts and agencies responsible for child welfare cooperate fully with Indian tribes to ensure that the federal and state Acts are enforced. Additionally it is the state's policy to protect the best interest of Indian children and promote the stability and security of Indian tribes and families. Among the practices utilized in preventive placement, and out of home care, as required under WICWA, it is

imperative the placement reflect the Tribes' unique values and, "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." Wis. Stat. §48.01(2)(b)(2)

## Agency Responsibility for Active Efforts

Unlike the ICWA's undefined active efforts requirement, WICWA clarifies, with specificity, when in the course of an action a court must make the finding that active efforts have been made. Prior to the enactment of the WICWA, practitioners had little guidance as to what "active efforts" were other than the efforts had to involve the particular tribe or tribes in some way, and that "active efforts" were something more than "reasonable efforts." With the advent of the WICWA, specifically Wis. Stat. § 48.028(4)(g), practitioners now have an articulated "active efforts" standard and a specific list of activities that should be conducted,

or at least attempted, in order to meet that standard in both CHIPS and TPR cases. Pursuant to Wis. Stat. § 48.028(4)(g)1, that standard is defined as:

**"an ongoing, vigorous, and concerted level of case work ...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."**

## Active Efforts Guidelines

Nine specific activities are listed in Wis. Stat. § 48.028(4)(g)1.a.-h. These activities illustrate for the practitioner what "active efforts" look like. Practitioners should also be mindful of the requirement that if any of the nine activities was not conducted, documentation of the reason or reasons the particular activity was not conducted must be submitted

to the court, (Wis. Stat. § 48.028(4)(g)2.) It is also important to acknowledge that it is not the obligation of the tribes to meet the active efforts requirement, but the petitioner's obligation to seek and request assistance from the child's tribe to assist the petitioning agency in meeting the requirements.

The following Active Efforts Table provides a guideline to implementing the Active Efforts requirements. Each component offers suggested activities that may assist the child welfare practitioner in meeting the requirement, which may provide benefits to the petitioning agency as it moves through the WICWA case.

**Active Efforts  
Wis. Stat. 48.028 (4) (g)  
And 938.028(4)(f)**

a) Representatives designated by the Indian child's Tribe with substantial knowledge of the prevailing social and cultural standards and child-rearing practice within the tribal community were requested to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the Tribe and of the Indian community, including traditional and customary support, actions, and services, to address those circumstances.

b) Representatives of the Indian child's Tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and their advice was actively solicited throughout the proceeding.

**Recommended Activities for  
Petitioning Agency**

Request tribal agency to assist in assessing and developing the case

A. Evaluate the circumstances of the Indian child's family

- ◆ Contact Tribe(s): call each Tribal social Services/Child Welfare Agency(ies)
- ◆ Ask for tribal assistance in completing all state assessment/plans requirements:

- Safety Plan
- Confirming Safe Environment Plan
- Child and Adolescent Needs and Strengths Tool

B. Develop a case plan

- ◆ Ask whether tribal child welfare agency staff is able to assist in developing a case plan in conjunction with county agency.
- ◆ Ask if there are prevailing social and cultural standards or specific resources, programs, or services, that may help in providing and developing a case plan.
- ◆ Request a list of resources Tribe(s) might have.

Invite representatives of child's Tribe(s) to participate in custody proceeding at earliest point and solicit active advice throughout proceeding

A. Ensure representatives of child's Tribe(s) are notified and invited to participate at the earliest point and throughout the proceeding

- ◆ Provide information to the Tribe(s) regarding circumstances leading to county agency involvement

B. Actively request from the Tribe(s), advice throughout the proceeding

- ◆ Keep Tribe(s) updated on circumstances and/or activities

**Potential Benefits of  
Tribal Contact**

Access to informative material on child rearing practices

Access to copy of tribal children's codes particularly sections referring to placement preference and definition of relatives (check Tribal Website)

Knowledge of familial structure

Tribal involvement in meetings

Awareness of Tribe's ability and resources to assist the agency in providing active efforts

Access to updated tribal information including : contact information, family information and additional resources

Actively updated on circumstances and progress in case

## Active Efforts

### Wis. Stat. 48.028 (4) (g) And 938.028(4)(f)

c) Extended family members of the Indian child, including extended family members who were identified by the Indian child's Tribe or parents, were notified and consulted with to identify and provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

## Recommended Activities for Petitioning Agency

Notify and consult with extended family members to provide structure and support

A. At the initial contact with the tribal child welfare agency, ask whether there may be additional extended family members that might assist in providing support to the child.

- ◆ Reference the eWISACWIS Child's Biological Family History form
- ◆ Continue to update references on the form using Tribes, and immediate extended family for accuracy and new information
- B. Consult and solicit support from family members as they are identified to improve the ability to fulfill placement preferences.
- ◆ Initiate extended family search as any other child welfare case.
- ◆ When an Indian child may have significant relations and contact with two or more Tribe(s) include that information.

d) Arrangements were made to provide natural and unsupervised family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including arrangements for transportation and other assistance to enable family members to participate in that interaction.

Providing natural and unsupervised family interaction

- ◆ Initiate Family Interaction Plan (See On-going Standards), in consultation with the Tribe(s)
- ◆ Identify natural setting within the family and/or Tribe(s) that will ensure the child's safety for the interactive plan. Initiate efforts to provide transportation for family, extended family participation
- ◆ Include child's participation in tribal activities such as social gatherings, customary spiritual related activities that include the child's family members or extended family

## Potential Benefits of Tribal Contact

Access to additional information for family tree and placement preferences

Ability to assure cultural connections are made and that family support was incorporated

Improve ability to fulfill placement preferences

Access to information on tribal resources and activities

Tribe(s) may have alternative interaction plan, may have extra/other information regarding family/relative, visitation and transportation

Ability to ensure cultural connection and support family relationships

## Active Efforts

Wis. Stat. 48.028 (4) (g)  
And 938.028 (4)(f)

e) All available family preservation strategies were offered or employed and the involvement of the Indian child's Tribe was requested to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's Tribe.

f) Community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs were identified, information about those resources was provided to the Indian child's family, and the Indian child's family was actively assisted or offered active assistance in accessing those resources.

## Recommended Activities for Petitioning Agency

Available culturally appropriate family preservation strategies were employed

- ◆ Continue to collaborate with the child's Tribe(s) or designated tribal agency (ies) to provide cultural strategies suggested by the child's Tribe(s)
- ◆ Consult with the child's Tribe(s) regarding cultural activities that might assist in supporting family preservation
- ◆ Become familiar with Tribe(s) web-site, community conferences, or other cultural activities
- ◆ Consult with Tribes to incorporate identified preservation strategies in the case plan and family engagement
- ◆ Actively assist the family to engage in identifying preservation strategies

## Potential Benefits of Tribal Contact

Access to information on Tribal resources and activities to ensure provisions of culturally appropriate family preservation strategies

Gain knowledge of available tribal resources or federal programs associated with Tribe(s) such as Indian Health Services, Tribal AODA, Tribal Youth Programs, Tribal Education Programs

Access to information on Tribal Resources

Knowledge of available community and federal programs that are available to Tribes and Tribal members

**Active Efforts  
Wis. Stat. 48.028 (4) (g)  
And 938.028 (4)(f)**

g) Monitoring of client progress and client participation in services was provided.

h) A consideration of alternative ways of addressing the needs of the Indian child's family was provided, if services did not exist or if existing services were not available to the family.

**Recommended Activities for  
Petitioning Agency**

Regularly identify barriers to client progress and participation and actively assist to overcome barriers

- ◆ Initiate frequent contact with the client and service providers
- ◆ Consult with the family and Tribe on potential barriers and identify culturally appropriate methods to overcome or address the issues.
- ◆ Encourage and support family participation in meeting case goals

Employ creative means to address needs of the family and child.

- ◆ Discuss barriers to service implementation and service provision
- ◆ Explore alternatives to service deficits. For example, use elder to conduct parenting and education.
- ◆ Collaborate with family and Tribes to develop creative solutions.

**Potential Benefits of  
Tribal Contact**

Gain tribal insight to assist with client progress and overcome barriers

Gain tribal involvement in creative problem solving



# Meeting Active Efforts

The agency responsible for providing services to the family has a continuing obligation to make active efforts to provide remedial services and rehabilitative programs to the family through the duration of the action. To ensure that remedial and rehabilitative programs can be instituted in a culturally appropriate and timely manner, active efforts should commence when an Indian child comes to the attention of the state system. Because of the ongoing obligation to make active efforts, the WICWA requires the court to make this finding at multiple stages of the proceeding de-

pending upon the type of proceeding.

- \* Fact Finding Hearing
- \* Dispositional Hearing
- \* Dispositional Order
- \* Permanency Hearing
- \* Extension Hearing

The Active Efforts table is designed to assist the petitioning agency in meeting that effort, and should not be considered inclusive, but should be regarded as a guideline to help understand the breath of meeting active efforts.

For further discussion or questions pertaining to Active Efforts please contact:

## Bureau of Regional Offices:

Northeastern Region  
Northern Region  
Southeastern Region  
Southern Region  
Western Region

## Department of Children and Families:

ICWA Consultant  
DCF Tribal Liaison

**Wisconsin Indian Child Welfare Act Resources  
and further information can be found at:  
<http://dcf.wisconsin.gov/>**

- \* *WICWA Desk Aid*
- \* *eWiSACWIS Desk Aid*
- \* *QEW Policy*
- \* *Wisconsin Tribal Contact Information*
- \* *National ICWA Contact information*
- \* *Professional Development Training*

### Judicare WICWA Information Link:

<http://www.judicare.org/content.cfm?PageID=162>

- \* *WICWA Legal Curriculum*
- \* *WICWA Legal Practitioners Manual*
- \* *Tribal and State Resources Manual*

**WICWA Judicial Checklist** <http://www.wicourts.gov/courts/programs/ccip.htm#4>



"For all my children, grandchildren and great-grandchildren"