

The Indian Child Welfare Act



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Association on American Indian Affairs – Findings of 1969 & 1974 Studies

- By the 1960s, there was recognition that Indian families were being broken apart at an alarming rate due to state social service departments removing children and placing them in non-Indian homes.
- 25-35% of all Indian children were separated from their families, placed in foster homes, adoptive homes or institutions.
- In Wisconsin, the risk of an Indian child being separated from his or her family was **1600 times** higher than for non-Indian child.
- 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.”

- Blanchard, Evelyn L. and Unger, Steven, “Destruction of American Indian Families,” **Social Casework 58(1977)**

“Indian” Designation

The designation of “Indian” by the federal government refers to a **political** status, rather than a **racial** status.

- It recognizes that an Indian person is a member of a sovereign political entity -- of a tribe.
- An Indian person is, in effect, a person with dual citizenship.
- Child’s political status is independent of their parent’s

Tribal Sovereignty

- The U.S. government and Tribes have a government-to-government relationship that is unique in the world system of governments.
- This Relationship was created by:
 - The United States Constitution – Article I, Section 8:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; and

- 1823-1832 U. S. Supreme Court “Marshall Trilogy”
 - *Johnson v. McIntosh, 21 U.S. 543 (1823)*
 - *Cherokee Nation v. Georgia, 30 U.S. 1 (1831)*
 - *Worcester v. Georgia, 31 U.S. 515 (1832)*

Overview of the Wisconsin Indian Child Welfare Act



Wis. Stat. § 48.028

* Other sections as well

WICWA applies when:

The child is an Indian child,

- a member of an Indian tribe, or
- eligible for membership and the biological child of a member of an Indian tribe

[Wis. Stat. § 48.02(8g)]

and

The child is subject of an Indian child custody proceeding or action governed by WICWA

[Wis. Stat. § 48.028(3a)]

Important to keep in mind:

- A child may still be a member or eligible for membership in a tribe, even if adopted by a non-Indian person.
- An adult may be a member of a tribe, even if adopted by a non-Indian as a child, and his or her child could also be a member or eligible for membership.

WICWA Requirements Summary

- Notice to tribe required for OHC placement
- Tribe may intervene and/or may transfer case to tribal court
- Agency required to provide culturally sensitive active efforts to prevent child's removal and return child home
- Requires placement consistent with tribal preference, primarily with extended family or tribal approved foster home
- Special testimony and findings required
 - Qualified Expert Witness
 - Serious Damage to Child must be proven Beyond a Reasonable Doubt
- Special rules for voluntary placements and TPR's
- Invalidation is Remedy

“Indian Tribe”

Any Indian tribe, band, 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. § 48.02(8r)]

There are currently 11 federally-recognized tribes in WI and 567 in the U.S. (2017 Federal Register Notices)

WI Federally Recognized Tribes

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

-WICWA applies to ALL federally recognized tribes – not just Wisconsin federally recognized tribes.

Tribal Membership

- Membership and eligibility for membership are determined by the tribe (Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978))
- A determination by a tribe is not advisory; it is definitive
- Membership criteria differ from tribe to tribe.
- Membership is not the same as enrollment.
- Some Tribes have membership classifications for purposes of ICWA
 - Leech Lake Band of Ojibwe in MN
 - May not meet blood quantum for enrollment, but Tribe acknowledges membership for purposes of ICWA protections.
 - But See, Nielson v. Ketchum- Cherokee Nation- ICWA Membership classification from 10th Circuit (SCOTUS denied cert on 5/21/12)

Proceedings and Actions Governed by WICWA

Child Welfare proceedings or actions that result or may result in the removal of an Indian child from his or her parent or Indian custodian.

- Indian child/juvenile custody proceedings (dependency actions)
- Voluntary placements

Indian Child/Juvenile Custody Proceeding

Includes:

- CHIPs Proceedings
- JIPS Proceeding based on a petition that the youth is:
 - uncontrollable
 - school drop out
 - habitually truant from school
 - habitually truant from home
- Guardianships
- Termination of Parental Rights Proceeding
- Wis. Stat. § 767.41(3)

In which any of the following may occur:

- out of home placement
- adoptive placement
- preadoptive placement
- termination of parental rights
- [Wis. Stat. § 48.028(2)(d)]

Definition of “Out-of-Home Care Placement”

- Removal of an Indian child from his or her parent or Indian custodian for temporary placement in a:
 - foster home or treatment foster home
 - group home
 - residential care center
 - shelter care
 - home of a relative other than a parent
 - home of a guardian
- From which the parent or Indian custodian cannot have the child returned upon demand

Definition of “Parent”

For purposes of WICWA, a “parent” is:

- A biological parent
- An Indian person who has adopted an Indian child, including adoption under tribal law or custom
- An Indian husband who has consented to artificial insemination of his wife

[Wis. Stat. § 48.02(13)]

Definition of “Parent”- Regulations

§ 23.2

...Parent or parents means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It **does not** include an unwed biological father where paternity has not been acknowledged or established.

- *Some* courts have said as long as you're making reasonable efforts to establish paternity, you are covered for ICWA purposes.

Notice of First Hearing

The party seeking out-of-home placement or TPR, or initiating proceedings must send Notice

- The notice of the 1st hearing in an involuntary Indian child/juvenile custody proceeding must be sent by **registered mail, return receipt requested.**
- The return receipt must be filed with the court.

Notice must be sent to:

Indian child's parent

Indian custodian

Tribe in which the Indian child is a member, or

Tribe or tribes in which the Indian child may be eligible for membership, or

If child's tribe is unknown, to the Bureau of Indian Affairs

NEW: BIA Regulations

Interestingly, the BIA Regulations have relaxed the requirements for service of the initial notice. The BIA Regulations now only require certified mail, return receipt requested.

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention.

* States are permitted to grant higher protections though. Arguably, registered is stricter/higher protection, and thus must be followed within Wisconsin.

NEW: BIA Regulations

§ 23.111 Notice.

(d) Notice must be in clear and understandable language and include the following:

- (1) The child's name, birthdate, and birthplace;
- (2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;
- (3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;
- (4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);
- (5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;
- (6) Statements setting out:
 - (i) The name of the petitioner and the name and address of petitioner's attorney;
 - (ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.
 - (iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.
 - (iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court appointed counsel.
 - (v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.
 - (vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by *25 U.S.C. 1911* and § 23.115.
 - (vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.
 - (viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.
 - (ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

Formal Notice- Subsequent Hearings

Notice must be sent in writing by:

- mail
- personal service
- fax
- NOT email

[Wis. Stat. § 48.028(4)(a)]

Tribal Intervention & Jurisdiction

- There has been confusion in WI w/ some counties who have mistakenly understood (W)ICWA to only apply if the Tribe intervenes.
- WICWA places mandate on the agency initiating the child custody proceeding. That agency is required to meet those mandates, regardless of the Tribe's involvement.

Even if Tribe does not intervene or participate, WICWA applies!

Tribal Sovereignty & WICWA

- The tribe must be notified of all Indian child/juvenile custody proceedings.
- The tribe has the right to formally intervene at any point during the proceeding and become a party to the case. [Wis. Stat. § 48.028(3)(e)]
- Failure to allow the tribe(s) to Intervene is grounds for invalidation. [Wis. Stat. § 48.028(6)]

Cases that Remain in Circuit Court

- Must be handled in accordance to WICWA
 - * Even if the Tribe does not intervene!
- The Tribe can continue to intervene at any state of the proceeding
 - They do have to provide notice that they are monitoring the proceeding in order to combat an argument of intervening in the late stage of proceedings.

Findings for a Termination of Parental Rights



WICWA & ICWA Regulations

Findings Required for TPR

The court must make certain findings / follow certain procedures before ordering a TPR:

- Active Efforts
- Standard of Evidence/Burden of Proof
- Causal Relationship
- Qualified Expert Witness

Active Efforts

Active Efforts

- Before ordering a TPR, the court must conclude that:
 - Active efforts have been made to prevent the breakup of the Indian family;
and
 - Those efforts have been unsuccessful
- Active efforts must be documented in detail in the record.
- What are active efforts?
 - Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his/her family

WICWA Active Efforts- Wis. Stat. § 48.028(4)(g)

(g) Active efforts standard.

1. The court may not order an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in an out-of-home care placement unless the evidence of active efforts under par. (d) 2. or (e) 2. shows that there has been 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. The consideration by the court or jury of whether active efforts were made under par. (d) 2. or (e) 2. shall include whether all

Were all of these Active Efforts Provided?

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? Because documentation has to be provided per statute.

Why have the activities and efforts been unsuccessful in reunifying the Indian family?

Active Efforts- CFR § 23.2

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts **must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan**. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

- (2) Identifying appropriate services and helping the parents to overcome barriers, **including actively assisting the parents in obtaining such services;**
- (6) **Taking steps to keep siblings together whenever possible;**
- (7) Supporting regular visits with parents or Indian custodians in the most natural setting **possible as well as trial home visits of the Indian child during any period of removal**, consistent with the need to ensure the health, safety, and welfare of the child;
- (11) **Providing post-reunification services and monitoring.**

Burden of Proof

Standard of Evidence

Burden of Proof -TPR- Wis. Stat. § 48.028(4)(e)

(e) *Involuntary termination of parental rights; serious damage and active efforts.* The court may not order an involuntary termination of parental rights to an Indian child unless all of the following occur:

1. The **court or jury finds beyond a reasonable doubt**, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), **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.**
2. The **court or jury finds by clear and convincing evidence** that active efforts, as described in par. (g) 1., **have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.**

Burden of Proof -TPR - CFR § 23.121

- (1) Evidence beyond a reasonable doubt,
- (2) Including the testimony of qualified expert witness(es),
- (3) That the child's *continued custody* by the child's parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child.

Causal Relationship

Causal Relationship Must be Proven- CFR § 23.121

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

Qualified Expert
Witness
(QEW) Testimony

QEW -TPR- WICWA, § 48.028(4)(f)

(f) Qualified expert witness; order of preference.

1. Any party to a proceeding involving the out-of-home placement of, or involuntary termination of parental rights to, an Indian child may call a qualified expert witness. Subject to subd. 2., a qualified expert witness shall be chosen in the following order of preference:

- a. A member of the Indian child's tribe described in sub. (2) (g) 1.
- b. A member of another tribe described in sub. (2) (g) 2.
- c. A professional person described in sub. (2) (g) 3.
- d. A layperson described in sub. (2) (g) 4.

2. A qualified expert witness from a lower order of preference may be chosen only if the party calling the qualified expert witness shows that it has made a diligent effort to secure the attendance of a qualified expert witness from a higher order of preference. A qualified expert witness from a lower order of preference may not be chosen solely because a qualified expert witness from a higher order of preference is able to participate in the Indian child custody proceeding only by telephone or live audiovisual means as prescribed in s. 807.13 (2). The fact that a qualified expert witness called by one party is from a lower order of preference under subd. 1. than a qualified expert witness called by another party may not be the sole consideration in weighing the testimony and opinions of the qualified expert witnesses. 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). The court shall determine the qualifications of a qualified expert witness as provided in ch. 907.

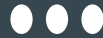
QEW- CFR § 23.122

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and **should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe**. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

WISCONSIN
Court of Appeals



In re Avery G.

In re the interest of Avery G. (Jackson County, WI)

<https://www.wicourts.gov/ca/opinion/DisplayDocument.html?content=html&seqNo=85106>

In re Avery G.

No. 2011AP2783.

Court of Appeals of Wisconsin, July 17, 2012

*Synopsis: (from the opinion) "Robert H. appeals from the order terminating his parental rights to his son, Avery G., and the order denying his motion for postdisposition relief. Robert contends he is entitled to a new trial on three grounds: (1) the requirement of the Wisconsin Indian Child Welfare Act (WICWA) with respect to testimony by qualified expert witnesses was not satisfied during the fact-finding hearing; (2) he was denied effective assistance of counsel; and (3) we should exercise our discretionary power of reversal because the real controversy has not been fully tried and it is probable that justice has miscarried. We conclude that the requisite testimony of an expert witness qualified under WICWA was presented at the disposition hearing and the error in not presenting it at the fact-finding hearing was harmless based on the specific circumstances in this case and given the arguments made by Robert. We also conclude that Robert did not receive ineffective assistance of counsel and there are not grounds for the exercise of our discretionary power of reversal. Accordingly, we affirm the order terminating Robert's parental rights to Avery and the order denying his postdisposition motion for a new trial."

* Holding: QEW should have been heard by Jury. Harmless Error. Upheld the TPR.

INVALIDATION

Remedy for Violations of the WICWA- Invalidation

Failure to comply with the ICWA:

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

§1912: Notice, time, counsel, active efforts, evidentiary standard, QEW, damage to child

§1913: Voluntary consent and withdrawal

SHALL result in the invalidation of the out-of-home placement or termination of parental rights.

[Wis. Stat. § 48.028(6)]

Implications of Noncompliance

- Invalidation of proceedings
- Possible return of custody to Indian parent before ready
- Nullification of adoption orders
- Instability of placements of children
- Delay in permanence for a child
- Malpractice actions
- State could be required to pay back Federal IV-E foster care payments
- Tribe/Family/Child is damaged for life
- Tribe experiences loss of child- history

Potential Legal Pitfalls

Notice is not being sent to the Tribes

- Counties report difficulty in identifying the correct Tribe
- Counties are not asking the correct questions to identify if the child is an Indian Child and who are the potential tribes are
- Notice needs to be sent to all eligible tribes at day one
- Late notice prevents the Tribe from participating in case at beginning
- Frequently, if Tribe does not respond quickly to Notice, the County moves forward as if non-ICWA case

Tribes do not respond quickly to Notice, even when sent in a timely and appropriate manner

Pitfalls = More Adversarial

- A history exists between the state, county, and tribal agencies that has not always been positive and this further complicates communication.
- Counties believe WICWA is an obligation placed on Tribes and expect the Tribe to provide AE and QEW
- Communication between the county and tribe does not occur early on in the proceeding, or it is not maintained throughout the case. Then, if the county wants to proceed on a permanency option that is not supported by the tribe, the proceedings become exceedingly adversarial.

DIGGING DEEPER

Notice to Tribe

The legal responsibility of notice is on the party seeking the out-of-home placement/termination of parental rights.

However, your client receives extra protections if the case is an ICWA case. As such, it is in your client's best interests to have the case treated as an ICWA case if the child is Indian.

This means, getting in contact with the Tribe or taking quick steps to become a member if the child would be eligible too.

→ You can take the extra step to reach out to the Tribe on your own.

→ You can sit down and go through the family genogram with the parent to see if there is a possibility of Indian heritage.

Fact Pattern

When the case started as a CHIPs, it was stated that it was undetermined if it was ICWA case- Mom might be eligible w/ Oneida of WI. However, it appears the name was spelt wrong on the ICWA notice that was sent to the Tribe, thus the Tribe sent back stating the child was not a member or eligible.

-Practice Tip: Ask to see a copy of the ICWA Notice to ensure it was filled out correctly. Spelling errors are costly! Think: *Baby Veronica* case. Dusten vs. Dustin.

-Practice Tip: Ask to see if notice was sent to “sister” tribes, if any. Think: Oneida, WI v. Oneida, NY.

As soon as the Court knows or has reason to know there is an Indian child, the Court should be treating it as an ICWA case.

-Practice Tip: A case can become an ICWA case at ANY point in the proceedings.

Does the petitioner need to send notice again at TPR if the parent says “hey, I am Indian” again? YES! Petitioner must send notice with a new TPR Petition and cannot rely on the letter received from the Tribe in the CHIPs action. Why? First, because the law requires it. However, why does it require it? Let’s say parent and/or child becomes a member after Disposition in the CHIPs case, but before TPR Petition filed. Hello, ICWA, nice to see you.

Parent's Attorney Misunderstands ICWA; Arkansas COA Goes Along With It

King v. Arkansas Dept. of Human Services (Ark. Ct. App.)

Posted on September 1, 2016 by Matthew L.M. Fletcher

<https://turtletalk.wordpress.com/2016/09/01/parents-attorney-misunderstands-icwa-arkansas-coa-goes-along-with-it/>

Here is the opinion in *Maybe it's a little thing, maybe not, but the court allowed an attorney to withdraw from representation, in part, on this representation:*

“The remaining adverse ruling was the denial of Hailey’s motion for a continuance, which was based on her assertion D.K. is an Indian child within the meaning of the Indian Child Welfare Act, entitling the Kiowa Tribe to notice of the proceedings. As explained in counsel’s brief, an Indian child is defined as “any unmarried person who is under age eighteen [8] and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]” (Emphasis added.) 25 U.S.C. section 1903(4). Counsel further explains D.K.’s paternal grandmother, who was an enrolled member of the Kiowa tribe, testified that D.K.’s father, her son, was not eligible for membership in the Kiowa tribe because she was the last generation to satisfy the tribal requirement of at least one-quarter blood. Thus, her son could not be a member of the tribe. She further explained that her son was not enrolled in the Cherokee tribe either, even though he was allowed to receive medical treatment through the Cherokee Nation because she is a registered Indian and is his mother. As noted by counsel, “even if the father were eligible to be enrolled as a Cherokee, that fact is not relevant because the statute requires that he actually be enrolled in order for D.K. to be considered an Indian child.” We agree. D.K. is not an Indian child under the Act; consequently, it did not apply. Therefore, the trial court did not err in denying the motion for continuance because notice to an Indian tribe was not required.”

Unfortunate, because the first step for parents’ counsel (and the child’s attorney most especially) should be to figure out whether an unenrolled parent is eligible for membership, get that parent enrolled, and get the tribe involved. Perhaps parent’s counsel is overworked and didn’t have the time or resources to make the effort, but did take the effort to file a notice of appeal. Deeply unfortunate, and likely endemic to the state system. The court of appeals could have done good work here and remanded to require counsel to perform diligently.

Another (unpublished) Arkansas ICWA Case Lacking Strong Parent Representation

Davis & Brown v. Arkansas Dept. of Human Services (Ark. Ct. App.)

Posted on May 8, 2017 by Kate Fort

<https://turtletalk.wordpress.com/2017/05/08/another-unpublished-arkansas-icwa-case-lacking-strong-parent-representation/>

Another reason for more parent attorney partnerships and training. Matthew noted this happened last September in Arkansas too. From the opinion, it's not remotely clear the agency notified the Cherokee tribes of dad's claim here.

In addition to the termination of Daniel's parental rights, the trial court found ICWA did not apply. His counsel explains that this finding does not provide a meritorious basis for reversal, and we agree. Daniel attempted to establish the applicability of ICWA at the outset of the termination hearing—despite the fact the trial court had earlier determined that ICWA did not apply in the probable-cause order dated July 8, 2015. The only documentation he submitted in support of his assertion was a form application for membership in the Cherokee Nation he filed only a couple of days prior to the hearing. In order to establish the applicability of ICWA, a child who is the subject of a dependency neglect action must be an "Indian child," which is defined as any unmarried person who is under eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4). Here, there was no evidence A.B. and D.B. satisfied these requirements. It is undisputed the children are not members of an Indian tribe, and the only evidence submitted was the form application prepared by Daniel two days before the hearing—there was no evidence the application had been accepted or that the children were in any other way eligible for membership, and there was not even any evidence Daniel was their biological father, although he did not dispute that fact. This issue provides no meritorious basis for reversal.

In more than one state, this would provide a meritorious basis for remand at minimum, and maybe reversal. It's fair that it might not yet be a basis for reversal in Arkansas, but it's clearly time for someone to bring the argument.

Federal ICWA Litigation Update

Oglala Sioux v. Fleming (Van Hunnik)- On Appeal to 8th Circuit

3/31/15- Dist. of SD –The order grants summary judgment on the ICWA AND Due Process violations. Injunction & Declaratory Judgment was forthcoming, after submissions addressing appropriate remedies filed on or before 5/1/15.

“Judge Davis and the other defendants failed to protect Indian parents’ fundamental rights to a fair hearing by not allowing them to present evidence to contradict the State’s removal documents. The defendants failed by not allowing the parents to confront and cross-examine DSS witnesses. The defendants failed by using documents as a basis for the court’s decisions which were not provided to the parents and which were not received in evidence at the 48-hour hearings.”

12/15/16- Dist. of SD- Injunction & Declaratory Judgment granted.

1/13/17- Dist. of SD- Defendants file Motion to Stay and Notice of Appeal to 8th Circuit

2/9/17- Dist. SD- Stay denied

June-July, 2017- 8th Circuit- Briefs & Reply Briefs filed- appeal pending

A.D. v. Washburn (Goldwater)- On Appeal to 9th Circuit

3/16/17- Dist. of AZ – Federal/State/Gila River Indian Community/Navajo Nation’s Motions to Dismiss were all granted. The Civil Rights Class Action Complaint was dismissed for lack of standing. Case dismissed for lack of jurisdiction and standing.

4/24/17- Dist. of AZ- Plaintiffs file Notice of Appeal to 9th Circuit

4/26/17- 9th Cir. Scheduling Order (last date listed was for Appellee’s Answer Brief(s) due Sept. 1, 2017)

9/1/17- Appellants’ Brief Filed – Request for Oral Arguments Made

S.S. & S.S. v. Colorado River Indian Tribes (Goldwater)- Cert Pending at SCOTUS

3/1/16- La Paz Cty Superior Ct- Granted Respondent and Tribes Motion to Dismiss TPR Petition for failure of Petitioner to meet burden of proving active efforts & those active efforts unsuccessful

1/12/17- AZ Court of Appeals- Affirmed Superior Court’s Dismissal of Father’s Petition for failure to show proof of unsuccessful active efforts to prevent breakup of Indian family.

4/19/17- AZ Sup. Ct.- Petition for Review of Opinion of Court of Appeals Denied

7/17/17 – SCOTUS- Cert Petition Filed

9/18/17- SCOTUS- Respondents Colorado River Indian Tribes file Opposition Brief

9/27/17- SCOTUS- Reply Brief

10/4/17- SCOTUS- Distributed for Conference of 10/27/17

List of Resources for ICWA/WICWA

<p>BIA's Webpage on the Indian Child Welfare Act https://www.bia.gov/bia/ois/dhs/icwa</p>	<p>Wisconsin's Department of Children and Families' WICWA Page https://dcf.wisconsin.gov/wicwa</p>
<p>Indian Child Welfare Act Proceedings- 2016 Regulations https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf</p>	<p>WICWA Active Efforts Guide https://dcf.wisconsin.gov/files/publications/pdf/464.pdf</p>
<p>Guidelines for Implementing the Indian Child Welfare Act- 2016 Guidelines https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf</p>	<p>Judicial Checklist - Wisconsin Indian Child Welfare Act https://www.wicourts.gov/courts/programs/docs/ccipwicwa.pdf</p>
<p>BIA ICWA Rule Training Module https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/webteam/pdf/idc2-041802.pdf</p>	<p>Wisconsin's Children's Court Improvement Program's WICWA E-Learning Activity http://www.wicciptraining.com/Content/wicwa_latest/player.html</p>
<p>National Indian Child Welfare Association http://www.nicwa.org/</p>	<p>WICWA Circuit Court Forms https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=21</p>
<p>BIA Indian Child Welfare Act; Designated Tribal Agents for Service of Notice https://www.gpo.gov/fdsys/pkg/FR-2017-03-08/pdf/2017-04546.pdf</p>	
<p>BIA Quick Resource on Active Efforts https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041405.pdf</p>	
<p>Native American Rights Fund's "A Practical Guide to the Indian Child Welfare Act" http://www.narf.org/nill/documents/icwa/</p>	<p>"Missing Threads: The Story of the Wisconsin Indian Child Welfare Act" https://www.youtube.com/watch?v=ZCLUbS4FxWo (film on youtube) http://missingthreadswicwa.blogspot.com/2015/11/why-we-produced-this-documentary_20.html</p>