

**Summary of Codification of the Federal Indian Child Welfare Act  
into Chapters 48 and 938, Stats., as  
WICWA, the Wisconsin Indian Child Welfare Act**

Except as indicated, changes to Chs. 48 and 938 are identical with the exception that “child” is used in Ch. 48 and “juvenile” is used in Ch. 938.

**I. Best Interests of an Indian Child/Juvenile**

The Congressional intent of ICWA was to ensure that the best interests of Indian children were recognized, respected, and protected. What makes the best interests of an Indian child distinct from the more familiar “best interests of a child” is the consideration of the Congressional findings that the child’s heritage be considered, especially in terms of understanding the unique values of the culture of the child’s Tribe and developing and maintaining a political, cultural, and social relationship with the child’s Tribe and community. *[Ref. ss. 48.01(2), 48.028(1), 938.01(3), and 938.028(1)]*

**II. Applicability**

**a. Indian Child**

This law applies to an Indian child involved in a child custody proceeding. An “Indian child” is defined as any unmarried person who is under the age of 18 years and is affiliated with an Indian tribe in any of the following ways: (a) As a member of the Indian tribe; or (b) As a person who is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. *[Ref. ss. 48.02(8g) and 938.02(8g), except in the latter citation the term “Indian juvenile is used.]*

**b. Child Custody Proceeding**

The law, in Ch. 48, defines “Indian child custody proceeding” as a proceeding governed by the federal Indian Child Welfare Act, 25 USC 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 (TPR), as defined in s. 48.40(2) to an Indian child.

*[Ref. s. 48.028(2)(d)]*

In Ch. 938, “Indian juvenile custody proceeding” is defined as “a proceeding under s. 938.13(4), (6), (6m), or (7) that is governed by the federal Indian Child Welfare Act, 25 USC 1901 to 1963, in which an out-of-home care placement may occur.” *[Ref. s. 938.028(2)(b)]*

The reference to ICWA results in child and juvenile custody proceedings being defined in s. 25 USC 1903(1) as any of the following:

- (i) “‘foster care placement’ which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
- (ii) ‘termination of parental rights’ which shall mean any action resulting in the termination of the parent-child relationship;

(iii) ‘preadoptive placement’ which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) ‘adoptive placement’ which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.”

As such, the four cited Juvenile in need of Protection or Services (JIPS) categories are included, but the two other JIPS categories (delinquent act under age 10 and not responsible or not competent) and delinquencies under s. 938.12 are not included. Similarly, custody disputes in divorce proceedings are also not included.

### **III. Intervention in State Court Proceedings**

In any state (circuit) court proceeding for the placement of the child in out-of-home care or the termination of the parental rights to the Indian child, the Indian custodian of the child and the Indian child’s tribe have the right to intervene at any point in the proceeding. [Ref. ss. 48.028(3)(e) and 938.028(3)(e)]

### **IV. Jurisdiction/Good Cause Not to Transfer**

Tribal courts have exclusive jurisdiction in cases involving an Indian child who resides or is domiciled within the reservation of the tribe and in cases in which an Indian child is a ward of the tribal court. Tribal courts have concurrent jurisdiction in cases involving Indian children who do not reside or who are not domiciled within the reservation. In the latter cases, the state court is required to transfer a child custody proceeding to the jurisdiction of the child’s tribe upon the petition of the child’s parent, Indian custodian, or tribe, unless:

- A parent of the child objects;
- The tribal court declines jurisdiction (or the tribe does not have a court); or
- The court finds good cause to deny the transfer of the case to the tribal court. Good cause means those circumstances where the person seeking the transfer shows by clear and convincing evidence that:
  - providing evidence or testimony in tribal court would create an undue hardship and the tribal court cannot mitigate that undue hardship;
  - the child (if aged 12 or older) objects to the transfer; or
  - the proceedings are at an advanced stage, which may be considered only if the tribe has received notice as required by law, the tribe has not indicated to the court in writing that the tribe is monitoring the proceeding and may request a transfer at a later date, and the tribe has not petitioned for a transfer within 6 months after receiving notice of a Child in need of Protection or Services (CHIPS) or JIPS proceeding or within 3 months after receiving notice of a termination of parental rights hearing.

[Ref. ss. 48.028(3)(c) and 938.028(3)(c)]

### **V. Existing Indian Family Doctrine**

The Wisconsin law borrows language from several states that have codified ICWA to clarify that ICWA and the provisions of Chs. 48 and 938 relating to Indian children apply regardless of whether the child is currently in the custody of an “existing Indian family.” A few state courts have held that ICWA applies only in situations where an Indian child is being removed from an “existing Indian family.” Other state and federal courts, however, have held that ICWA applies regardless of whether the child is being removed from an “existing Indian family.” This is a court-created doctrine in those few states and it has not been so created in Wisconsin. It is the

intent of Congress that an Indian child be given an opportunity to develop an Indian identity even if he or she does not currently live in an Indian environment. Also, the child's tribe has an interest in the child even if the child's Indian parent or parents are not currently involved in the child's life. For this reason, WICWA specifies that ICWA applies to *all* children who are considered an "Indian Child" as defined under s.48.02(8g). Several other states have also approached this issue legislatively. [Ref. ss. 48.028(3)(a) and 938.028(3)(a)]

#### **VI. Notification**

The law requires notification of an Indian child's parent, Indian custodian, and tribe of any hearing involving the Indian child. In the first hearing in a CHIPS, JIPS, or TPR proceeding, the notice must be provided in writing by registered mail, return receipt requested. Notice of subsequent hearings in those proceedings must be in writing and provided by mail, personal delivery, or FAX. They may not be provided by e-mail.

No hearing may be held until at least 10 days after receipt of the notice by the parent, Indian custodian, and tribe or until at least 15 days after receipt of the notice by the BIA regional office if the tribe is not known. The parties noticed may request an additional 20 days to prepare for the proceeding; if such a request is made, the court must grant it. [Ref. ss. 48.028(4)(a) and 938.028(4)(a)]

#### **VII. Legal Representation**

The law provides that an indigent parent or Indian custodian has the right to court-appointed counsel in a child custody proceeding covered under ICWA. The court may, in its discretion, appoint counsel for the Indian child except, of course, in cases in which the appointment of counsel is required under the statute. [Ref. s. 48.028(4)(b) and 938.028(4)(b)]

#### **VIII. Active Efforts**

The law requires the court or, in some cases, the jury to find that active efforts have been made to prevent the breakup of the Indian family and that those efforts have proved to be unsuccessful before the child is removed from the home or parental rights to the child are terminated. [Ref. ss. 48.028(4)(d)2. and (e)2. and 938.028(4)(d)2.]

The active efforts finding must be based on a showing that there has been an ongoing, vigorous, and concerted level of case work beyond the level that typically constitutes reasonable efforts. The active efforts must be 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, and other individual Indian caregivers. The consideration by the court or jury of whether active efforts were made shall include whether all of the following activities were conducted:

- 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.
- A comprehensive assessment of the situation of the Indian child's family was completed, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

- 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.
- 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 ensure cultural connections, and to serve as placement resources for the Indian child.
- 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.
- 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.
- 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 family, and the Indian family was actively assisted or offered active assistance in accessing those resources.
- Monitoring of client progress and client participation in services was provided.
- 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.

If any of these activities were not conducted, the person seeking the out-of-home care placement or involuntary termination of parental rights must submit documentation to the court explaining why the activity was not conducted.

[*Ref. ss. 48.028(4)(g) and 938.028(4)(f)*]

### **IX. Qualified Expert Witness**

Before the breakup of an Indian family may occur, the court or, in some cases, the jury must find by clear and convincing evidence that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage. The evidence for this finding must include the testimony of a qualified expert witness. [*Ref. s. 48.028(4)(d)1. and (e)1. and 938.028(4)(d)1.*]

Under the law, a qualified expert witness means a person who is any of the following (listed in order of preference):

- A member of the Indian child's tribe recognized by the Indian child's tribal community as knowledgeable regarding the tribe's customs relating to family organization or child-rearing practices.
- A member of another tribe who is knowledgeable regarding the customs of the Indian child's tribe relating to family organization or child-rearing practices.
- A professional person having substantial education and experience in the person's professional specialty and having substantial knowledge of the customs, traditions, and values of the Indian child's tribe relating to family organization and child-rearing practices.
- A layperson having substantial experience in the delivery of child and family services to Indians and substantial knowledge of the prevailing social and cultural standards and child-rearing practices of the Indian child's tribe.

[Ref. ss. 48.028(2)(g) and (4)(f) and 938.028(2)(d) and (4)(e)]

A person calling a qualified expert witness may choose a qualified expert witness from a lower order of preference if the person shows to the court that that party has made a diligent effort to secure the attendance of a qualified expert witness from a higher order of preference. [Ref. ss. 48.028(4)(f)2. and 938.028(4)(e)2.]

**X. Placement Preferences**

The law identifies placement preferences that must be followed in placing a child in out-of-home care and for adoption.

Out-of-Home and Pre-Adoptive Placements*	Adoptive Placements*
Home of an extended family member	Extended family member of the child
Foster home licensed by the child's tribe	Another member of the child's tribe
Indian foster home licensed by another licensing agency	Another Indian family
Group home or residential care center approved by an Indian tribe or operated by an Indian organization	

*\*The order of preference identified above may be altered if established by the child's tribe by resolution.*

Good cause not to follow the placement preferences may be based on one or more of the following:

- The request of the Indian child's parent or the request of the Indian child when of a sufficient age and developmental level to make an informed decision, unless the request is made for the purpose of avoiding the application of the Indian Child Welfare Act.
- Any extraordinary physical, mental, or emotional health needs of the Indian child requiring highly specialized treatment services (the length of time that an Indian child has been in placement does not, in itself, constitute an extraordinary emotional health need).
- The unavailability of a suitable placement after diligent efforts have been made.

[Ref. ss. 48.028(7) and 938.028(6)]

**XI. Invalidation of Involuntary Out-of-Home Care Placements and TPR Proceedings**

The law allows an Indian child, an Indian child's parent or Indian custodian, or the tribe to petition the court to invalidate certain orders upon a showing that the placement or TPR violated provisions of ICWA. [Ref. ss. 48.028(6) and 938.028(5)]

**XII. Voluntary Placements and TPRs**

Under the law, a parent of an Indian child may voluntarily consent to placement or TPR only if it is executed in writing, recorded before a judge, and certified by the judge that terms and consequences of the placement or TPR were fully explained in detail to and were fully understood by the parent. Such consent may not be given prior to or within 10 days after the birth of the Indian child. [Ref. s. 48.028(5)(a) and (b)]

**XIII. Withdrawal of Consent; Placement and Pre-Adoption Finalization**

The law allows a parent who has consented to a TPR to withdraw that consent for any reason at any time prior to the entry of a final TPR order and a parent who has consented to a voluntary placement to withdraw that consent at any time. [Ref. s. 48.028(5)(a) and (b)]

**XIV. Withdrawal of Consent; Post-Adoption Finalization**

Under ICWA and this bill, a parent who consented to a TPR to an Indian child may withdraw that consent and move the court for relief on the grounds that the consent was obtained through fraud or duress. No adoption that has been effective for two years or more may be so invalidated. [Ref. s. 48.028(5)(c)]

**XV. Vacation of Adoption or Voluntary TPR by Adoptive Parent**

Under the law, if an order of adoption of an Indian child is vacated or the adoptive parent voluntarily TPRs, the Indian child's parent (former parent) or Indian custodian (former Indian custodian) may petition for return of the child. The court must grant the petition unless there is a showing that it would not be in the best interests of the child. [Ref. s. 48.028(8)]

**XVI. Definition of Relative**

The law amends the definition of "relative" to include an extended family member of an Indian child. Based on the language in the law, unless a tribe has identified specific persons by law or custom of the tribe as being extended family members, the list of relatives for all CHIPS cases under Ch. 48 and JIPS cases under Ch. 938, including ICWA cases, is the same. [Ref. ss. 48.02(15), 48.028(2)(am), 938.02(15), and 938.028(2)(a)]

**XVII. Adoptive Home Studies**

Under previous law, the court may order the Department, a county department, or a child welfare agency to conduct an adoptive home study. The revised law also allows the court to request the child welfare department of the child's tribe (if that department consents) to conduct that home study. [Ref. s. 48.831(2)]