

# WICWA WEBINAR SERIES: HISTORY & JURISDICTION

Outagamie County  
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## Introductions

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Question: What is your profession?

- A. Judge or Court Commissioner
- B. Court Clerk
- C. Attorney
- D. Child Welfare Caseworker or Supervisor
- E. Other

Question: Have you had experience handling a WICWA case?

- A. Yes
- B. No

# Background

## ICWA and WICWA

<b>Indian Child Welfare Act (ICWA)</b>	<b>Wisconsin Indian Child Welfare Act (WICWA)</b>	<b>ICWA Regulations</b>
<b>Federal Law</b>	<b>Codified into State Statutes</b>	<b>Legally-binding guidance</b>
<b>Enacted in 1978</b>	<b>Enacted 2009</b>	<b>Effective December 12, 2016</b>

## Purpose of ICWA & WICWA

- Intended to protect the best interests of Indian children and promote the stability and security of Indian tribes and families
- “There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” - Congress



## Need for WICWA

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- Incorporated federal ICWA into Wisconsin statutes (Ch. 48 and 938)
- Effort to provide greater clarification and compliance with ICWA
  - Federal reviews in 2003 and 2010 showed noncompliance and inconsistencies in applying ICWA throughout the state
  - Common for state legislature to codify federal law
  - Statutes first place people go to look up law
- Joint effort by tribes, DCF, CCIP, and other partners

## Best Interests of an Indian Child

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“In Indian child custody proceedings, the best interests of the Indian child shall be determined in accordance with the federal Indian Child Welfare Act, 25 USC 1901 to 1963, and the policy specified in this subsection.”

[Wis. Stat. § 48.01(2)]

# History

Start the Kahoot!



# Winnebago Indian School (1921-1957) Neillsville, WI



## Impact of Removal

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- **Historical Trauma** - The collective emotional and psychological injury both over the life span and across generations, resulting from a cataclysmic history of genocide.
- **Disenfranchised Grief** - The sense that you cannot grieve; that no one hears or is listening to your grief; the dominant culture acts as if you do not have grief, or do not need to grieve.
  - Mary Yellow Horse Brave Heart / University of Idaho

## Effects on Indian Children



- Cross-racial adoptions have a high likelihood creating a severe identity crisis in Indian children as they become adolescents (Matheson, 1996 - NRCFCPP)
- Indian youth have the highest rate of suicide of any population in the nation (NICWA fact sheet)
- Suicide rate can be directly linked to children having been raised outside of their own cultural system (Matheson, 1996 – NRCFCPP)

## Present Day - Wisconsin

Disproportionate Foster Care of AI/AN Children: 15 States with the Highest Rates <sup>3</sup>			
State	Disproportionality rate (2017)	% of children who are AI/AN	% of children in foster care who are AI/AN
Minnesota	16	1.7	27.2
Wisconsin	5.4	1.3	7
North Dakota	4.6	8.6	39
South Dakota	4.1	13.8	57
Nebraska	3.88	1.3	4.9
Oregon	3.53	1.6	5.6
Hawaii	3.5	0.2	0.6
Washington	3.2	1.8	5.7
Montana	3.2	10.7	34.2
Utah	3.1	1.1	3.3
Alaska	2.5	21.2	53
Iowa	2.1	0.4	0.9
North Carolina	1.8	1.3	2.4
California	1.8	0.5	0.9
Idaho	1.6	1.4	2.2

# Membership

Question: WICWA would apply if the child is eligible for membership in Tribe A, the mother is not a member of any tribe, and the father is a member of Tribe B.

- A. True
- B. False

## Applicability

- WICWA applies in cases involving an Indian child. (Will discuss more in future webinar.)
  - 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 an Indian Tribe, OR
    - ▣ 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)]

Question: Who determines whether the child is an Indian child?

- A. County agency
- B. Tribe
- C. Circuit court
- D. Bureau of Indian Affairs
- E. Other

## Tribal Membership

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- Indian tribes have the inherent authority to determine their membership.  
-See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
- Tribal membership is a political status NOT a racial or ethnic designation.
- Membership criteria differ from tribe-to-tribe.
- Enrollment is not the same as membership.

# Jurisdiction

## Jurisdiction in Indian Child Custody Proceedings

### Exclusive Tribal Jurisdiction

- Child/juvenile resides or is domiciled within the reservation; or
- Child/juvenile is a ward of the tribal court.

### Concurrent Jurisdiction (Tribal Court & Circuit Court)

- Child/juvenile does not reside or is not domiciled within the reservation, and is not a ward of the tribal court.

## Exclusive Jurisdiction – Public Law 280

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- Transferred criminal and limited civil jurisdiction from tribes to state government in certain states.
- Provides concurrent jurisdiction over Indian child custody proceedings except for Menominee Tribe and tribes that have re-assumed exclusive jurisdiction:
  - Lac Courte Oreilles Tribe (certain child welfare matters)
  - Forest County Potawatomi
  - Red Cliff Band of Lake Superior Chippewa

## Exclusive Jurisdiction – Temporary Physical Custody

- Even if tribe has exclusive jurisdiction, child may be taken into temporary physical custody under ss. 48.19-48.21 to prevent imminent physical harm or damage to child.
- Person taking child into custody shall then either: release the child to a parent, release the child to an appropriate official of the child's tribe, or initiate a CHIPS/JIPS proceeding, as may be appropriate.

Question: Which of the following is not a reason for the circuit court to deny transfer to tribal court under WICWA?

- A. Either parent objects to the transfer
-  B. Transfer could result in a placement change for the child
- C. Tribe declines transfer
- D. There is good cause to deny transfer

## Transfer to Tribal Court

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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

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

## Transfer to Tribal Court

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- WICWA presumes that the best interests of an Indian child are best assured in Tribal court.
  
- Circuit Court Forms:
  - ▣ Motion for Transfer to Tribal Court (IW-1740)
  - ▣ Order on Motion for Transfer to Tribal Court (IW-1741)
  
- Different than Discretionary Transfer of Civil Cases to Tribal Court under s. 801.54
  - ▣ e.g., divorce, paternity, child support, small claims

## Motion to Transfer to Tribal Court: ICWA Regulations

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- A copy of the motion to transfer the case to Tribal Court must be provided to the Tribal Court.
- Reasons for believing/asserting good cause must be stated orally on the record or provided in writing to the parties.

Language added to the Motion for Transfer to Tribal Court (IW-1740) and Order on Motion to Transfer to Tribal Court (IW-1741). (Pending approval by the Records Management Committee.)

## Good Cause to Deny Transfer to Tribal Court

The court may find good cause only if person opposing transfer proves one of the following:

1. Child (12 years+) objects to the transfer.
  2. Providing evidence or testimony in tribal court would result in undue hardship to parties or witnesses that cannot be mitigated.
  3. Tribe received notice as required by WICWA, the tribe has not indicated in writing that it is monitoring the case and may request transfer at a later date, and the tribe's petition to transfer is filed more than 6 months for CHIPS/JIPS cases or 3 months for TPR cases after receiving notice.
- Court may not consider any perceived inadequacy of the tribal social services or the tribal court

## Good Cause to Deny Transfer to Tribal Court: ICWA Regulations

In determining good cause, court may not consider:

- Whether case is at advanced stage if parent, Indian custodian, or tribe did not receive notice until an advanced stage.
- Whether there were prior proceedings for the child where no petition to transfer was filed.
- Whether transfer could affect the child's placement.
- Child's cultural connections with the tribe/reservation.
- Socioeconomic conditions or any negative perception of the tribal social services or court system.

## Tribal Intervention

- WICWA provides that an Indian child's Indian custodian or tribe may intervene at any point in any child custody proceeding. [Wis. Stat. § 48.028(3)(e)]
- The tribe does not have to be represented by an attorney to intervene or participate in the proceeding. [Supreme Court Rule 23.02(2)(n)]
- The tribe has a right to examine all documents filed with the court and the records maintained by the county agency. [Wis. Stat. §§ 48.028(4)(c) & 48.981(7)(a)2., 10m., 10r., 11m. ]

# Resources

- Judicial Checklist - WICWA:  
[www.wicourts.gov/courts/programs/docs/ccipwicwa.pdf](http://www.wicourts.gov/courts/programs/docs/ccipwicwa.pdf)
- ICWA circuit court forms:  
<https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=21>
- CCIP E-Learning Project: [www.wicciptraining.com](http://www.wicciptraining.com)
- DCF Resources (e.g., Active Efforts Guide, forms):  
<https://dcf.wisconsin.gov/wicwa>
- Missing Threads video:  
<https://www.youtube.com/watch?v=ZCLUbS4FxWo>

Questions?