# 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. Additional information on WICWA can be found at: www.wicciptraining.com/ELearningActivities

## APPLICABILITY

An "Indian child" is defined as 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. Court must instruct parties to inform court if they receive information indicating that there is reason to know the child is Indian child.*

- ❒ Did the court make an inquiry of all case participants, on the record, as to whether the case involves an Indian child? *If there is "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 has been 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)?

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

<u>First Hearing in the Case (excluding Temporary Physical Custody Hearings)</u>

- ❒ 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 parent or tribe is unknown, was notice sent to Bureau of Indian Affairs 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.*
- ❒ Have parents been notified of their right to intervene and to request/object to transfer to tribal court?
- ❒ Have parents been notified of potential consequences of case on parental and custodial rights (*form IW-1716*)?

<u>Subsequent Hearings</u>

- ❒ 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, orders, 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?
- ❒ If placement preferences not followed, is there good cause to depart from order of preference? *Reasons for asserting good cause must be made on the record or provided to court and parties in writing.*

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

Emergency Removal

- ❒ Is emergency removal necessary to prevent imminent physical damage or harm to the child?

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?
- ❒ Does a causal relationship exist between the conditions in the home and the likelihood 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, 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 TPR, VOLUNTARY PLACEMENT AGREEMENT, OR DELEGATION OF POWERS

- ❒ Has the Indian parent or Indian custodian consented in writing?
- ❒ Were the terms and consequences of the consent, including limitation on withdrawing 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?
- ❒ Have placement preferences been followed or is there good cause to depart from the order of preference?