



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX - **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 09/09/2008 (Per: GMM)



Appendix A ... Pt. 04A of 09

 The 2007 drafting file for LRB-0174

has been transferred to the drafting file for

2009 LRB-0150

☛ This cover sheet, the final request sheet, and the final version of the 2007 draft were copied on yellow paper, and returned to the original 2005 drafting file.

☛ The attached 2007 draft was incorporated into the new 2009 draft listed above. For research purposes, this cover sheet and the complete drafting file were transferred, as a separate appendix, to the 2009 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.



State of Wisconsin
2007 - 2008 LEGISLATURE

LRB-0174/P2

GMM:lxx(nwr)

DNSTE

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Stays

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

TODAY →

1/9

Regent

1 AN ACT *to repeal* 48.01 (2), 48.21 (5) (d) 2., 48.21 (5) (d) 3., 48.32 (1) (c) 2., 48.32

2 (1) (c) 3., 48.355 (2d) (c) 2., 48.355 (2d) (c) 3., 48.357 (2v) (c) 2., 48.357 (2v) (c) 3.,

3 48.365 (2m) (ad) 2., 48.981 (1) (cs), 938.02 (18g), 938.21 (5) (d) 2., 938.21 (5) (d)

4 3., 938.32 (1) (d) 2., 938.32 (1) (d) 3., 938.355 (2d) (c) 2., 938.355 (2d) (c) 3.,

5 938.357 (2v) (c) 2., 938.357 (2v) (c) 3. and 938.365 (2m) (ad) 2.; **to renumber**

6 48.01 (1) and 938.02 (9m); **to renumber and amend** 48.195 (1), 48.20 (8), 48.21

7 (5) (d) 1., 48.273 (1), 48.32 (1) (c) 1., 48.355 (2d) (c) 1., 48.357 (1) (am) 2., 48.357

8 (2v) (c) 1., 48.365 (2m) (ad) 1., 938.21 (5) (d) 1., 938.273 (1) (c), 938.32 (1) (d) 1.,

9 938.355 (2d) (c) 1., 938.357 (2v) (c) 1. and 938.365 (2m) (ad) 1.; **to amend** 46.515

10 (1) (d), 48.02 (2), 48.02 (13), 48.02 (15), 48.13 (intro.), 48.13 (2m), 48.14 (intro.),

11 48.15, 48.19 (2), 48.195 (2) (a), 48.195 (2) (b), 48.195 (2) (c), 48.195 (2) (d) (intro.),

12 48.195 (2) (d) 7., 48.195 (3) (a), 48.195 (4) (a), 48.195 (4) (b), 48.195 (5), 48.195

13 (6), 48.20 (2) (ag), 48.20 (2) (b), 48.20 (3), 48.20 (7) (c) (intro.), 48.20 (7) (c) 1.,

14 48.20 (7) (d), 48.21 (3) (am), 48.21 (3) (b), 48.21 (3) (d), 48.21 (3) (e), 48.23 (2),

15 48.23 (3), 48.23 (4), 48.235 (4) (a) 7., 48.235 (4m) (a) 7., 48.243 (3), 48.255 (1)

1 (cm), 48.255 (1m) (d), 48.255 (2), 48.255 (4), 48.27 (3) (a) 1., 48.27 (3) (d), 48.27
2 (4) (a) 2., 48.299 (6) (d), 48.30 (1), 48.30 (2), 48.30 (6) (a), 48.30 (7), 48.305, 48.31
3 (1), 48.31 (7) (a), 48.315 (1m), 48.315 (2), 48.345 (3) (intro.), 48.355 (2) (d), 48.355
4 (2d) (b) 5., 48.357 (1) (am) 1., 48.357 (1) (am) 3., 48.357 (1) (c) 2., 48.357 (1) (c)
5 3., 48.357 (2m) (a), 48.357 (2m) (b), 48.357 (2m) (c), 48.363 (1) (a), 48.363 (1) (b),
6 48.365 (1m), 48.365 (2), 48.365 (2m) (a) 1., 48.365 (2m) (a) 3., 48.365 (2m) (ag),
7 48.38 (5) (b), 48.38 (5) (d), 48.38 (5) (e), 48.38 (5m) (b), 48.38 (5m) (d), 48.38 (5m)
8 (e), 48.415 (1m), 48.415 (2) (a) 2. a., 48.415 (2) (a) 2. b., 48.42 (1) (d), 48.42 (2)
9 (c), 48.42 (4) (a), 48.422 (1), 48.422 (2), 48.422 (6) (a), 48.422 (8), 48.423 (1),
10 48.424 (1), 48.424 (2) (intro.), 48.424 (2) (a), 48.424 (3), 48.424 (4) (intro.), 48.424
11 (4) (a), 48.424 (4) (b), 48.424 (5), 48.425 (1) (intro.), 48.428 (2) (a), 48.428 (2) (b),
12 48.43 (5) (c), 48.43 (5m), 48.43 (6) (a), 48.43 (6) (c), 48.43 (7), 48.46 (2), 48.48
13 (8m), 48.485, 48.63 (1), 48.63 (4), 48.63 (5) (b), 48.63 (5) (c), 48.63 (5) (d) 3., 48.63
14 (5) (d) 4., 48.63 (5) (d) 5., 48.63 (5) (d) 6., 48.83 (1), 48.831 (2), 48.833, 48.837 (4)
15 (c), 48.837 (4) (d), 48.837 (6) (c), 48.85 (1), 48.88 (2) (a) (intro.), 48.88 (2) (b), 48.89
16 (1), 48.91 (3), 48.93 (1d), 48.977 (4) (a) 1., 48.977 (4) (b) 6., 48.977 (4) (c) 2., 48.977
17 (4) (d), 48.978 (2) (b) 11., 48.981 (1) (i), 48.981 (3) (bm) (intro.), 48.981 (3) (bm)
18 1., 48.981 (3) (bm) 2., 48.981 (7) (a) 10m., 48.981 (7) (a) 10r., 48.981 (7) (a) 11m.,
19 822.015, 938.02 (10m), 938.02 (12m), 938.02 (13), 938.02 (15), 938.13 (intro.),
20 938.15, 938.185 (4) (title), 938.185 (4) (intro.), 938.185 (4) (a), 938.185 (4) (b),
21 938.19 (2), 938.20 (2) (ag), 938.20 (2) (b), 938.20 (3), 938.20 (7) (c) 1., 938.20 (7)
22 (d), 938.20 (8) (a), 938.21 (2) (title), 938.21 (2) (ag), 938.21 (3) (ag), 938.21 (3)
23 (am), 938.21 (3) (b), 938.21 (3) (d), 938.21 (3) (e), 938.23 (3), 938.23 (4), 938.235
24 (4) (a) 7., 938.24 (2r) (a) (intro.), 938.24 (2r) (a) 1., 938.24 (2r) (a) 2., 938.24 (2r)
25 (b), 938.243 (1) (e), 938.243 (3), 938.255 (1) (cm), 938.255 (1) (cr) 1. a., 938.255

1 (1) (cr) 1. b., 938.255 (1) (cr) 1. c., 938.255 (1) (cr) 2., 938.255 (2), 938.255 (4),
2 938.27 (3) (a) 1., 938.27 (4) (b), 938.273 (1) (a), 938.273 (1) (b), 938.299 (6) (d),
3 938.299 (9) (a), 938.30 (1), 938.30 (2), 938.30 (6) (a), 938.30 (7), 938.305, 938.31
4 (7) (a), 938.315 (2), 938.355 (2) (d), 938.355 (6) (am) 1., 938.355 (6) (b), 938.355
5 (6m) (am) 1., 938.355 (6m) (c), 938.357 (1) (am) 1., 938.357 (1) (am) 2., 938.357
6 (1) (am) 3., 938.357 (1) (c) 2., 938.357 (1) (c) 3., 938.357 (2m) (a), 938.357 (2m)
7 (b), 938.357 (2m) (c), 938.363 (1) (a), 938.363 (1) (b), 938.365 (1m), 938.365 (2),
8 938.365 (2m) (a) 1., 938.365 (2m) (a) 3., 938.365 (2m) (ag), 938.38 (3) (intro.),
9 938.38 (5) (b), 938.38 (5) (d), 938.38 (5) (e), 938.38 (5m) (b), 938.38 (5m) (d) and
10 938.38 (5m) (e); **to repeal and recreate** 48.028, 48.833, 938.02 (15c) and
11 938.028; and **to create** 48.02 (8d), 48.02 (8g), 48.02 (8m), 48.02 (8p), 48.02 (8r),
12 48.02 (15c), 48.02 (18j), 48.14 (12), 48.195 (1) (b) 2., 48.23 (2g), 48.255 (1) (g),
13 48.255 (1m) (g), 48.273 (1) (ag), 48.273 (1) (c) 2., 48.299 (9), 48.315 (1) (j), 48.33
14 (4) (d), 48.335 (3j), 48.345 (3m), 48.355 (2) (b) 6v., 48.357 (1) (am) 1g., 48.357 (1)
15 (am) 1m., 48.357 (1) (c) 1m., 48.357 (1) (c) 2m., 48.357 (2m) (am), 48.357 (2m)
16 (bm), 48.357 (2v) (a) 4., 48.365 (2g) (b) 4., 48.38 (4) (i), 48.38 (4m), 48.38 (5) (bm),
17 48.38 (5) (c) 8., 48.38 (5m) (bm), 48.38 (6) (cm), 48.41 (2) (e), 48.417 (2) (cm),
18 48.42 (1) (e), 48.42 (2g) (ag), 48.425 (1) (cm), 48.427 (5), 48.427 (6) (b) 4., 48.43
19 (5) (bm), 48.831 (1r), 48.831 (4) (cm), 48.837 (2) (e), 48.88 (2) (am), 48.93 (1v),
20 48.977 (2) (g), 48.977 (4) (b) 7., 48.977 (4) (c) 1. j., 48.977 (4) (c) 2m., 48.977 (4)
21 (g) 4., 938.02 (8d), 938.02 (8g), 938.02 (8m), 938.02 (8p), 938.02 (8r), 938.02 (18j),
22 938.23 (2g), 938.255 (1) (g), 938.27 (3) (d), 938.273 (1) (ag), 938.273 (1) (c) 2.,
23 938.299 (10), 938.315 (1) (a) 11., 938.33 (4) (d), 938.335 (3j), 938.345 (1m),
24 938.355 (2) (b) 6v., 938.355 (6) (bm), 938.355 (6) (cr), 938.355 (6m) (bm), 938.355
25 (6m) (cr), 938.357 (1) (am) 1g., 938.357 (1) (am) 1m., 938.357 (1) (c) 1m., 938.357

- 1 (1) (c) 2m., 938.357 (2m) (am), 938.357 (2m) (bm), 938.357 (2v) (a) 4., 938.365
2 (2g) (b) 4., 938.38 (4) (i), 938.38 (4m), 938.38 (5) (bm), 938.38 (5) (c) 8., 938.38
3 (5m) (bm) and 938.38 (6) (cm) of the statutes; **relating to:** Indian child welfare.
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Analysis by the Legislative Reference Bureau

Introduction

Under current law, the federal Indian Child Welfare Act (ICWA), which governs jurisdiction over child custody proceedings involving an Indian child and provides certain minimum standards for those proceedings, supercedes the provisions of the Children's Code and the Juvenile Justice Code in any child custody proceeding governed by ICWA. For purposes of ICWA, "child custody proceeding" means any of the following:

1. Any action removing an Indian child from his or her parent or Indian custodian, that is, an Indian person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical custody of an Indian child has been transferred by the Indian child's parent, for temporary placement in a foster home or institution, in which the parent or Indian custodian cannot have the Indian child removed on demand, but not including a placement that is based on an act that would be a crime if committed by an adult (out-of-home care placement).

2. A termination of parental rights (TPR) proceeding.

3. A temporary placement of an Indian child in a foster home or institution after a TPR, but prior to or in lieu of an adoptive placement (preadoptive placement).

4. An adoptive placement.

This bill incorporates the jurisdictional provisions of ICWA and the minimum standards for Indian child custody proceedings established by ICWA into the provisions of the Children's Code relating to child in need of protection or services (CHIPS), TPR, and adoption proceedings and the provisions of the Juvenile Justice Code relating to juvenile in need of protection or services (JIPS) proceedings, other than proceedings that are based on the commission of an act that would be a crime if committed by an adult.

Jurisdiction

Under ICWA, an Indian tribe has exclusive jurisdiction over an Indian child custody proceeding involving an Indian child who resides or is domiciled within the reservation of the tribe and over an Indian child who is a ward of a tribal court, regardless of the residence or domicile of the Indian child, except when jurisdiction is otherwise vested in the state by federal law. This grant of jurisdiction, however, does not prevent the emergency removal of an Indian child who resides or is domiciled on a reservation, but who is temporarily located off the reservation, from his or her parent or Indian custodian in order to prevent imminent physical damage or harm to the Indian child.

Also, under ICWA, a state court is required to transfer a proceeding involving an out-of-home care placement of, or TPR to, an Indian child who is not residing or

domiciled within the reservation of the Indian child's tribe to the jurisdiction of the Indian child's tribe upon the petition of the Indian child's parent, Indian custodian, or tribe, unless a parent of the Indian child objects, the tribal court declines jurisdiction, or the state court finds good cause not to transfer the proceeding. In addition, ICWA permits an Indian child's parent, Indian custodian, or tribe to intervene at any point in an Indian child custody proceeding in state court involving the out-of-home care placement of, or TPR to, the Indian child.

Finally, with respect to jurisdiction over an Indian child custody proceeding, ICWA requires a state court to decline jurisdiction and to forthwith return an Indian child to his or her parent or Indian custodian, unless returning the Indian child would subject the Indian child to a substantial and immediate danger or threat of danger, when a petitioner in an Indian child custody proceeding has improperly removed the Indian child from the custody of his or her parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody.

This bill incorporates those jurisdictional provisions of ICWA into the Children's Code and the Juvenile Justice Code. The bill also does all of the following:

1. Specifies that the provisions of ICWA and of the Children's Code and Juvenile Justice Code relating to Indian child custody proceedings apply to any Indian child custody proceeding regardless of whether the Indian child is in the custody of an Indian parent, Indian custodian, extended family member, or other person at the commencement of the proceeding and whether the Indian child resides or is domiciled on or off a reservation.

2. Prohibits a court assigned to exercise jurisdiction under the Children's Code and the Juvenile Justice Code (juvenile court) from determining whether those provisions apply to an Indian child custody proceeding based on whether the Indian child is part of an existing Indian family.

3. Permits a juvenile court to find good cause to deny transfer of a proceeding to an Indian child's tribe only if it is shown that the evidence or testimony necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or the witnesses and that the tribal court is unable to mitigate the hardship by making arrangements to receive the evidence or testimony by use of telephone or live audiovisual means, by hearing the evidence or testimony at a location that is convenient to the parties and witnesses, or by use of other means permissible under the tribal court's rules of evidence.

Out-of-home care placements and TPR proceedings

ICWA requires a party seeking an out-of-home care placement of, or TPR to, an Indian child in an involuntary proceeding in state court to notify the Indian child's parent, Indian custodian, and tribe, by registered mail with return receipt requested, of the proceeding and of their right to intervene in the proceeding. Under ICWA, if the identity or location of the parent, Indian custodian, or tribe cannot be determined, notice of the proceeding must be provided to the U.S. secretary of the interior, who then has 15 days after receipt of the notice to provide the notice to the parent, Indian custodian, and tribe. ICWA prohibits an out-of-home care placement or TPR proceeding from being heard until at least ten days after receipt of notice by

the parent, Indian custodian, or tribe or by the U.S. secretary of the interior and permits a parent, Indian custodian, or tribe to request up to 20 additional days to prepare for the proceeding.

This bill requires an Indian child's parent, Indian custodian, and tribe to be notified, in the manner specified in ICWA, of a CHIPS, JIPS, or TPR proceeding involving the Indian child, of a change in placement in a CHIPS or JIPS proceeding involving the Indian child, or of a hearing to determine or review the permanency plan for the Indian child. A permanency plan is a plan designed to ensure that a child is reunified with his or her family whenever appropriate or that the child quickly attains a placement providing long-term stability. The bill prohibits a CHIPS, JIPS, or TPR hearing, a change in placement hearing, or a permanency plan determination or review hearing from being held until at least ten days after receipt of notice of the hearing by the parent, Indian custodian, or tribe and permits a parent, Indian custodian, or tribe to request up to 20 additional days to prepare for the hearing.

Under ICWA, a parent or Indian custodian who is indigent has the right to court-appointed counsel in any proceeding involving the removal of an Indian child from his or her home, placement of an Indian child in an out-of-home care placement, or TPR to an Indian child. This bill incorporates that right into the Children's Code and the Juvenile Justice Code.

ICWA requires a party seeking to effect an out-of-home care placement of, or a TPR to, an Indian child to satisfy the state court that active efforts have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. ICWA also prohibits a state court from ordering an out-of-home care placement of, or TPR to, an Indian child in the absence of a determination, supported by clear and convincing evidence in the case of out-of-home care placement and by evidence beyond a reasonable doubt in the case of TPR, including the testimony of qualified expert witnesses, that continued custody of the Indian child by his or her parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

This bill requires a CHIPS or JIPS order or a change in placement order placing an Indian child outside the home to include a finding, supported by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that continued custody of the Indian child by his or her parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child and a finding, supported by clear and convincing evidence that the agency primarily responsible for providing services to the Indian child has made active efforts to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. The bill also requires the juvenile court or jury in a TPR proceeding to determine if it is proved beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that 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 and if it is proved beyond a reasonable doubt that active efforts have been made to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. In addition, the bill requires an order extending a CHIPS or JIPS

dispositional order for an Indian child who is placed outside the home and a summary of a permanency plan review for such a child to include a determination as to whether active efforts were made to prevent the breakup of the Indian family and as to whether those efforts have proved unsuccessful.

The bill defines a "qualified expert witness" as a person, ~~including a social worker, sociologist, physician, psychologist, or traditional tribal therapist and healer, spiritual leader, historian, or elder~~ who, in descending order of preference, is a member of the Indian child's tribe knowledgeable in the tribe's customs relating to family organization or child-rearing practices, a member of another tribe knowledgeable in those customs, a professional person having extensive knowledge of those customs, or a layperson having substantial knowledge of those customs. The bill also specifies that the evidence of active efforts to prevent the breakup of the Indian family must show that there has been a vigorous and concerted level of case work beyond the level that typically constitutes reasonable efforts to prevent the removal of the child from the home and requires the active efforts to 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 to utilize the available resources of the Indian child's tribe, tribal and other Indian ~~social services~~ agencies, extended family members, and other individual Indian caregivers. child welfare

ICWA further requires an Indian child who is accepted for an out-of-home care placement or a preadoptive placement to be placed in the least restrictive setting which most approximates a family and in which the Indian child's special needs, if any, may be met and requires an Indian child to be placed within reasonable proximity to his or her home, taking into account any special needs of the Indian child. ICWA also requires that a preference be given, in the absence of good cause to the contrary, to a placement with a member of the Indian child's extended family, a foster home licensed, approved, or specified by the Indian child's tribe, an Indian foster home licensed or approved by an authorized non-Indian licensing authority, or an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs, unless the Indian child's tribe has established a different order of preference. ICWA also specifies that the standards to be applied in meeting the placement preference requirements of ICWA are the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the parent or extended family maintains social and cultural ties.

This bill requires the juvenile court, in placing or changing the placement of an Indian child who is in need of protection or services or in placing an Indian child in a preadoptive placement following a TPR, to designate one of the following as the placement for the Indian child, in the order of preference listed, unless the Indian child's tribe has established a different order of preference or good cause is shown for departing from that order of preference:

1. The home of an extended family member of the Indian child.
2. A foster home or treatment foster home licensed, approved, or specified by the Indian child's tribe.

3. An Indian foster home or treatment foster home licensed or approved by the Department of Health and Family Services (DHFS), a county department of human services or social services (county department), or a child welfare agency.

4. A group home or residential care center for children and youth approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the needs of the Indian child.

The bill requires the juvenile court to designate a placement that is the least restrictive setting that most approximates a family, that meets the Indian child's special needs, if any, and that is within reasonable proximity to the Indian child's home, taking into account the Indian child's special needs. The bill also specifies that the standards to be applied in meeting the placement preference requirements of the bill are the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family members reside or with which the parent or extended family members maintain social and cultural ties.

Finally, with respect to involuntary out-of-home care placements and TPR proceedings, ICWA permits the Indian child or the Indian child's parent, Indian custodian, or tribe to petition any court of competent jurisdiction to invalidate an out-of-home care placement or TPR upon a showing that the placement or TPR violated any provision of ICWA relating to out-of-home care placements or TPR.

This bill permits any Indian child who is the subject of an out-of-home care placement or of a TPR proceeding, any parent or Indian custodian of that Indian child, or the Indian child's tribe to move the juvenile court to invalidate that out-of-home care placement or TPR on the grounds that the out-of-home care placement was made or the TPR was ordered in violation of any provision of the bill or of ICWA relating to out-of-home care placements or TPR. If the juvenile court finds that those grounds exist and if the Indian child has not been adopted, the juvenile court must invalidate the out-of-home care placement or TPR and order the Indian child to be returned to his or her parent or Indian custodian. If the Indian child has been adopted, the parent or Indian custodian may petition the juvenile court for return of custody of the Indian child.

Voluntary out-of-home care placements or TPR; consent; withdrawal

Under ICWA, the consent of a parent to an out-of-home care placement of, or a TPR to, an Indian child is not valid unless executed in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the judge's certification that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent. ICWA also requires the court to certify that the parent fully understood the explanation in English or that the explanation was interpreted into a language that the parent understood. Under ICWA, any consent given prior to, or within ten days after, the birth of an Indian child, is not valid. ICWA permits a parent to withdraw his or her consent to a TPR for any reason prior to the entry of a final decree of adoption, or to withdraw his or her consent to an out-of-home care placement at any time, and the Indian child must be returned to the parent. After the entry of a final decree of adoption of an Indian child, the Indian child's parent may withdraw consent to the TPR to the Indian child on the grounds of fraud or duress and may petition the court to vacate the decree.

If the court finds that the consent was obtained through fraud or duress, the court must vacate the decree and return the Indian child to his or her parent, except that no adoption that has been effective for at least two years may be invalidated by the withdrawal of consent on the grounds of fraud or duress.

This bill provides that a voluntary consent to an out-of-home care or placement of, or TPR to, an Indian child is valid only if the consent is executed in writing, recorded before a judge, and accompanied by a written certification by the judge that the terms and consequences of the consent were fully explained in detail to and were fully understood by the parent. The bill also requires the judge to certify that the parent fully understood the explanation in English or that the explanation was interpreted into a language that the parent understood. Under the bill, any consent to an out-of-home care placement or TPR given prior to or within ten days after the birth of an Indian child is not valid.

The bill permits a parent who has consented to TPR to an Indian child to withdraw the consent for any reason at any time prior to the entry of a final order granting adoption, or a parent who has consented to an out-of-home care placement of an Indian child to withdraw that consent at any time, and the Indian child must be returned to his or her parent. After the entry of a final order granting adoption, a parent who has consented to TPR to an Indian child or who did not contest a petition initiating involuntary TPR proceedings may withdraw that consent and move the juvenile court for relief from the order on the grounds that the consent was obtained through fraud, misrepresentation, or duress, if the motion is filed within two years after the entry of an order granting adoption of the Indian child. If the juvenile court finds that the consent was obtained through fraud, misrepresentation, or duress, the juvenile court must vacate the TPR order and, if applicable, the order granting adoption.

Adoption

ICWA requires, when an Indian child is placed for adoption, that a preference be given, in the absence of good cause to the contrary, to a placement with a member of the Indian child's extended family, other members of the Indian child's tribe, or other Indian families, unless the Indian child's tribe has established a different order of preference. ICWA also specifies that the standards to be applied in meeting the placement preference requirements of ICWA are the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the parent or extended family maintains social and cultural ties.

This bill requires DHFS, a county department, or a child welfare agency, in placing an Indian child for adoption or in investigating or making a recommendation regarding the adoptive placement of an Indian child, and a juvenile court, in determining whether an adoptive placement is in the best interests of an Indian child, to give preference to a placement with one of the following, in the order of preference listed, unless the Indian child's tribe has established a different order of preference or good cause is shown for departing from that order of preference:

1. An extended family member of the Indian child.
2. Another member of the Indian child's tribe.

3. Another Indian family.

The bill also specifies that the standards to be applied in meeting the placement preference requirements of the bill are the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family members reside or with which the parent or extended family members maintain social and cultural ties.

ICWA permits a biological parent or former Indian custodian of an Indian child who has been adopted to petition for return of custody of the Indian child when a final decree of adoption of the Indian child has been vacated or set aside or when the adoptive parents of the Indian child voluntarily consent to TPR to the Indian child. Under ICWA, the state court must grant the petition unless there is a showing that return of custody is not in the best interests of the Indian child.

This bill requires a juvenile court that vacates or sets aside a final order granting adoption of an Indian child or that grants an order voluntarily terminating parental rights to an Indian child of all adoptive parents of the Indian child to notify the Indian child's former parent and former Indian custodian, and the former parent or former Indian custodian may petition for the return of custody of the Indian child. The juvenile court must grant the petition unless there is a showing of good cause that return of custody is not in the best interest of the Indian child.

Finally, ICWA requires a state court that enters a final decree of adoption of an Indian child to: 1) provide the U.S. secretary of the interior with a copy of the decree, together with such other information as may be necessary to show the name and tribal affiliation of the Indian child, the names and addresses of the Indian child's biological parents, the names and addresses of the Indian child's adoptive parents, and the identity of any agency having files or information relating to the adoptive placement of the Indian child; and 2) inform an Indian individual who has reached the age of 18 years and who was the subject of an adoptive placement, upon application, of the tribal affiliation, if any, of the individual's biological parents and with such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. ICWA also provides that, when a biological parent has filed an affidavit requesting that his or her identity remain confidential, the court must include that affidavit with the information provided to the U.S. secretary of the interior.

This bill requires a juvenile court that enters an order granting adoption of an Indian child to: 1) provide the U.S. secretary of the interior with a copy of the order, together with such other records and papers pertaining to the adoption proceeding as may be necessary to provide that secretary with the name and tribal affiliation of the Indian child, the names and addresses of the Indian child's birth parents, the names and addresses of the Indian child's adoptive parents, and the identity of any agency that has in its possession any files or information relating to the adoptive placement of the Indian child; 2) give the birth parent an opportunity to file an affidavit indicating that the birth parent wishes the U.S. secretary of the interior to maintain the confidentiality of the birth parent's identity and include that affidavit with the information provided to the U.S. secretary of the interior; and 3) provide an Indian adoptee who is 18 years of age or older, upon request, with the tribal

or arrange to provide

affiliation, if any, of the adoptee's birth parents and with such other information as may be necessary to protect any rights accruing to the adoptee as a result of that affiliation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 46.515 (1) (d) of the statutes is amended to read:

2 46.515 (1) (d) "Indian child" has the meaning given in s. ~~48.981 (1) (cs)~~ 48.02
3 (8g).

4 **SECTION 2.** 48.01 (1) of the statutes is renumbered 48.01.

5 **SECTION 3.** 48.01 (2) of the statutes is repealed.

6 **SECTION 4.** 48.02 (2) of the statutes is amended to read:

7 48.02 (2) "Child^{plain} ~~is~~ when used without further qualification, means a person
8 who is less than 18 years of age, except that for purposes of investigating or
9 prosecuting a person who is alleged to have violated a state or federal criminal law
10 or any civil law or municipal ordinance, "child" does not include a person who has
11 attained 17 years of age.

12 **SECTION 5.** 48.02 (8d) of the statutes is created to read:

13 48.02 (8d) "Indian" means any person who is a member of an Indian tribe or
14 who is an Alaska native and a member of a regional corporation, as defined in 43 USC
15 1606.

16 **SECTION 6.** 48.02 (8g) of the statutes is created to read:

17 48.02 (8g) "Indian child" means an unmarried person who is under 18 years
18 of age and who is one of the following:

19 (a) A member of an Indian tribe.

1 (b) Eligible for membership in an Indian tribe and is the biological child of a
2 member of an Indian tribe.

3 **SECTION 7.** 48.02 (8m) of the statutes is created to read:

4 48.02 (8m) "Indian child's tribe" means one of the following:

5 (a) The Indian tribe in which an Indian child is a member or eligible for
6 membership.

7 (b) In the case of an Indian child who is a member of or eligible for membership
8 in more than one tribe, the Indian tribe with which the Indian child has the more
9 significant contacts.

10 **SECTION 8.** 48.02 (8p) of the statutes is created to read:

11 48.02 (8p) "Indian custodian" means an Indian person who has legal custody
12 of an Indian child under tribal law or custom or under state law or to whom
13 temporary physical care, custody, and control has been transferred by the parent of
14 the child.

15 **SECTION 9.** 48.02 (8r) of the statutes is created to read:

16 48.02 (8r) "Indian tribe" means any Indian tribe, band, nation, or other
17 organized group or community of Indians that is recognized as eligible for the
18 services provided to Indians by the U.S. secretary of the interior because of Indian
19 status, including any Alaska native village, as defined in 43 USC 1602 (c).

20 **SECTION 10.** 48.02 (13) of the statutes is amended to read:

21 48.02 (13) "Parent" means either a biological parent, a husband who has
22 consented to the artificial insemination of his wife under s. 891.40, or a parent by
23 adoption, including, in the case of an Indian child, an adoption under tribal law or
24 custom. If the child is a nonmarital child who is not adopted or whose parents do not
25 subsequently intermarry under s. 767.803, "parent" includes a person acknowledged

1 under s. 767.805 or a substantially similar law of another state or adjudicated to be
2 the biological father. "Parent" does not include any person whose parental rights
3 have been terminated.

NOTE: ~~The DHFS draft creates s. 48.40 (1g) to define "Indian parent."~~ Actually,
ICWA applies to any parent, not just an Indian parent, of an Indian child. See 25 USC
1903 (9). Accordingly, s. 48.40 (1g) is not included in this draft.

4 **SECTION 11.** 48.02 (15) of the statutes is amended to read:

5 48.02 (15) "Relative" means a parent, stepparent, brother, sister, stepbrother,
6 stepsister, half brother, half sister, brother-in-law, sister-in-law, first cousin, 2nd
7 cousin, nephew, niece, uncle, aunt, stepuncle, stepaunt, or any person of a preceding
8 generation as denoted by the prefix of grand, great, or great-great, whether by blood,
9 marriage, or legal adoption, or the spouse of any person named in this subsection,
10 even if the marriage is terminated by death or divorce. "Relative" also includes, in
11 the case of an Indian child, an extended family member, as defined in s. 48.028 (2)
12 (am), whether by blood, marriage, or adoption, including adoption under tribal law
13 or custom.

14 **SECTION 12.** 48.02 (15c) of the statutes is created to read:

15 48.02 (15c) "Reservation" means Indian country, as defined in 18 USC 1151,
16 or any land not covered under that section to which the title is either held by the
17 United States in trust for the benefit of an Indian tribe or individual or held by an
18 Indian tribe or individual, subject to a restriction by the United States against
19 alienation.

20 **SECTION 13.** 48.02 (18j) of the statutes is created to read:

21 48.02 (18j) "Tribal court" means a court that has jurisdiction over Indian child
22 custody proceedings, and that is either a court of Indian offenses or a court
23 established and operated under the code or custom of an Indian tribe, or any other

1 administrative body of an Indian tribe that is vested with authority over Indian child
2 custody proceedings.

3 **SECTION 14.** 48.028 of the statutes is repealed and recreated to read:

4 **48.028 Indian child welfare. (1) DECLARATION OF POLICY.** In Indian child
5 custody proceedings, the best interests of the Indian child shall be determined
6 consistent with the federal Indian Child Welfare Act, 25 USC 1901 to 1963. It is the
7 policy of this state to do all of the following:

8 (a) Cooperate fully with Indian tribes in order to ensure that the federal Indian
9 Child Welfare Act is enforced in this state.

10 (b) Protect the best interests of Indian children and promote the stability and
11 security of Indian tribes and families by doing all of the following:

12 1. Establishing minimum standards for the removal of Indian children from
13 their families and placing those children in out-of-home care placements,
14 preadoptive placements, or adoptive placements that will reflect the unique value of
15 Indian culture.

16 2. Using practices, in accordance with the federal Indian Child Welfare Act, 25
17 USC 1901 to 1963, this section, and other applicable law, that are designed to prevent
18 the voluntary or involuntary out-of-home care placement of Indian children and,
19 when an out-of-home care placement, adoptive placement, or preadoptive
20 placement is necessary, placing an Indian child, to the greatest extent possible, in a
21 placement that reflects the unique values of the Indian child's tribal culture and that
22 is best able to assist the Indian child in establishing, developing, and maintaining
23 a political, cultural, and social relationship with the Indian child's tribe and tribal
24 community.

~~NOTE: Section 48.028 (1) (b) 2, incorporates the best interest of the Indian child standard found at s. 232B.3 (2), Iowa stats.~~

1 **(2) DEFINITIONS.** In this section:

2 (a) "Adoptive placement" means the permanent placement of an Indian child
3 for adoption.

4 (am) "Extended family member" means a person who is defined as a member
5 of an Indian child's extended family by the law or custom of the Indian child's tribe
6 or, in the absence of such a law or custom, a person who has attained the age of 18
7 years and who is the Indian child's grandparent, aunt, uncle, brother, sister,
8 brother-in-law, sister-in-law, niece, nephew, first cousin, 2nd cousin, or stepparent.

9 (b) "Former Indian custodian" means a person who was the Indian custodian
10 of an Indian child before termination of parental rights to and adoption of the Indian
11 child.

12 (c) "Former parent" means a person who was the parent of an Indian child
13 before termination of parental rights to and adoption of the Indian child.

14 (d) "Indian child custody proceeding" means a proceeding governed by the
15 federal Indian Child Welfare Act, 25 USC 1901 to 1963, in which any of the following
16 may occur:

17 1. An adoptive placement.

18 2. An out-of-home care placement.

19 3. A preadoptive placement.

20 4. A termination of parental rights, as defined in s. 48.40 (2) to an Indian child.

21 (e) "Out-of-home care placement" means the removal of an Indian child from
22 his or her parent or Indian custodian for temporary placement in a foster home,
23 treatment foster home, group home, residential care center for children and youth,

1 or shelter care facility or in the home of a guardian, from which placement the parent
2 or Indian custodian cannot have the child returned upon demand.

3 (f) "Preadoptive placement" means the temporary placement of an Indian child
4 in a foster home, treatment foster home, group home, or residential care center for
5 children and youth or in the home of a guardian after a termination of parental rights
6 but prior to or in lieu of an adoptive placement.

7 (g) "Qualified expert witness" means a person ~~including a social worker,~~
8 ~~sociologist, physician, psychologist, or traditional tribal therapist and healer,~~
9 ~~spiritual leader, historian, or elder,~~ who is any of the following:

10 1. A member of the Indian child's tribe recognized by the Indian child's tribal
11 community as knowledgeable regarding the tribe's customs relating to family
12 organization or child-rearing practices.

13 2. A member of another tribe formally recognized by the Indian child's tribe as
14 knowledgeable regarding the customs of the Indian child's tribe relating to family
15 organization or child-rearing practices.

16 3. A professional person having substantial education and experience in the
17 person's professional speciality and having extensive knowledge of the customs,
18 traditions, and values of the Indian child's tribe relating to family organization and
19 child-rearing practices.

20 4. A layperson having substantial experience in the delivery of child and family
21 services to Indians and substantial knowledge of the prevailing social and cultural
22 standards and child-rearing practices of the Indian child's tribe.

~~NOTE: Most of the definitions found in 25 USC 1903 are used throughout ch. 48.
Accordingly, those definitions are incorporated in s. 48.02.~~

1 (3) JURISDICTION OVER INDIAN CHILD CUSTODY PROCEEDINGS. (a) *Applicability.*

2 This section and the federal Indian Child Welfare Act, 25 USC 1901 to 1963, apply
3 to any Indian child custody proceeding regardless of whether the Indian child is in
4 the legal custody or physical custody of an Indian parent, Indian custodian, extended
5 family member, or other person at the commencement of the proceeding and whether
6 the Indian child resides or is domiciled on or off of a reservation. A court assigned
7 to exercise jurisdiction under this chapter may not determine whether this section
8 and the federal Indian Child Welfare Act, 25 USC 1901 to 1963, apply to an Indian
9 child custody proceeding based on whether the Indian child is part of an existing
10 Indian family.

~~****NOTE: Section 48.623 (3) (a) incorporates the existing Indian family doctrine as codified at ss. 232B.4 (1) and 232B.5 (2), Iowa state.~~

11 (b) *Exclusive tribal jurisdiction.* 1. An Indian tribe shall have exclusive
12 jurisdiction over any Indian child custody proceeding involving an Indian child who
13 resides or is domiciled within the reservation of the tribe, except when that
14 jurisdiction is otherwise vested in the state by federal law and except as provided in
15 subd. 2. If an Indian child is a ward of a tribal court, the Indian tribe shall retain
16 exclusive jurisdiction regardless of the residence or domicile of the child.

~~****NOTE: The DHFS notes inquire as to the meaning of "except when that jurisdiction is otherwise vested in the state by federal law" The *Judicare ICWA Practitioners Manual* (4th ed., March 2005) explains at pp. 39 to 45 that "federal law" is a reference to federal Public Law 280, which confers on certain states, including Wisconsin, partial criminal and civil jurisdiction over Indians in Indian Country. 70 OAG 237 (1981) further explains that in regulatory proceedings, *i.e.*, proceedings involving the government versus an individual, such as involuntary placement or TPR proceedings, the tribe has exclusive jurisdiction over an Indian child in Indian country, whereas in non-regulatory proceedings, *i.e.*, proceedings involving only private parties, such as a voluntary placement or TPR, the tribal court and the state court have concurrent jurisdiction. Accordingly, we need to retain the exception for when jurisdiction is vested in the state by federal law to account for voluntary proceedings over which state courts have concurrent jurisdiction with tribal courts.~~

~~****NOTE: The DHFS notes also question whether we need to clarify the phrase "ward of a tribal court." I would say no. That phrase is found in ICWA at 25 USC 1911~~

(a). It is also found in current Wisconsin law at ss. 48.261 (2) (a) 4. and (b) and 49.19 (10) (d) and (e).

2. Subdivision 1. does not prevent an Indian child who resides or is domiciled within a reservation, but who is temporarily located off the reservation, from being taken into and held in custody under ss. 48.19 to 48.21 in order to prevent imminent physical harm or damage to the Indian child. The person taking the Indian child into custody or the intake worker shall immediately release the Indian child from custody upon determining that holding the Indian child in custody is no longer necessary to prevent imminent physical damage or harm to the Indian child and shall expeditiously restore the Indian child to his or her parent or Indian custodian, ^{release} transfer the Indian child to ^{an} the jurisdiction of ^{officer of the Indian child's} appropriate ~~tribe~~ tribe, or initiate an Indian child custody proceeding, as may be appropriate.

(c) *Transfer of proceedings to tribe.* In any Indian child custody proceeding under this chapter involving an out-of-home placement of, or termination of parental rights to, an Indian child who is not residing or domiciled within the reservation of the Indian child's tribe, the court assigned to exercise jurisdiction under this chapter shall, upon the petition of the Indian child's parent, Indian custodian, or tribe, transfer the proceeding to the jurisdiction of the tribe unless any of the following applies:

1. A parent of the Indian child objects to the transfer.
2. The tribal court of the Indian child's tribe declines jurisdiction.
3. The court determines that good cause exists to deny the transfer. The court may determine that good cause exists to deny the transfer only if ~~it is shown~~ ^{the person opposing the transfer shows to the satisfaction of the court} that the evidence or testimony necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or the witnesses and that the tribal court is

1 unable to mitigate the hardship by making arrangements to receive the evidence or
2 testimony by use of telephone or live audiovisual means, by hearing the evidence or
3 testimony at a location that is convenient to the parties and witnesses, or by use of
4 other means permissible under the tribal court's rules of evidence.

~~****NOTE: Section 48.028 (3) (c) 3. incorporates s. 232B.5 (13) (c), Iowa stats. This section does not incorporate s. 232B.5 (13) (a) or (d), Iowa stats., because these provisions are already covered in s. 48.028 (3) (c) 1. and 2.~~

5 (d) *Declination of jurisdiction.* If the court assigned to exercise jurisdiction
6 under this chapter determines that the petitioner in an Indian child custody
7 proceeding has improperly removed the Indian child from the custody of his or her
8 parent or Indian custodian or has improperly retained custody of the Indian child
9 after a visit or other temporary relinquishment of custody, the court shall decline
10 jurisdiction over the petition and immediately return the Indian child to the custody
11 of the parent or Indian custodian, unless the court determines that returning the
12 Indian child to his or her parent or Indian custodian would subject the Indian child
13 to substantial and immediate danger or the threat of that danger.

14 (e) *Intervention.* An Indian child's Indian custodian or tribe may intervene at
15 any point in an Indian child custody proceeding under this chapter involving an
16 out-of-home care placement of, or termination of parental rights to, the Indian child.

17 (f) *Full faith and credit.* The state shall give full faith and credit to the public
18 acts, records, and judicial proceedings of any Indian tribe that are applicable to an
19 Indian child custody proceeding to the same extent that the state gives full faith and
20 credit to the public acts, records, and judicial proceedings of any other governmental
21 entity.

~~NOTE: This subsection incorporates 25 USC 1911, 1920, and 1922 relating to jurisdiction. In reviewing this subsection, please note all of the following:~~

1. ~~Because 25 USC 1922 governs emergency removal of a child domiciled on a reservation, this draft incorporates that provision into s. 48.028 (3) (c), which relates to jurisdiction over such a child.~~

2. ~~25 USC 1911 (b) and (c), relating to transfer of proceedings and intervention, only apply to out-of-home care placements and termination of parental rights (TPR) proceedings, not to adoptive placements. Accordingly, the reference in the DHFS draft to any Indian child custody proceeding is too broad.~~

3. ~~Also, with respect to transfer of jurisdiction, the language of the U.S. Department of Interior Guidelines is clearer than 25 USC 1911 (b), so this draft uses the Guidelines language.~~

4. ~~25 USC 1920 relates to declination of jurisdiction. Therefore that section is incorporated into the subsection on jurisdiction.~~

1 (4) COURT PROCEEDINGS. (a) *Notice*. In any involuntary proceeding involving
2 the out-of-home care placement of, termination of parental rights to, or return of
3 custody under sub. (8) (a) of a child whom the court knows or has reason to know is
4 an Indian child, the court or party seeking the out-of-home care placement,
5 termination of parental rights, or return of custody shall notify the Indian child's
6 parent, former parent, Indian custodian, former Indian custodian, and tribe, by
7 registered mail, return receipt requested, of the pending proceeding and of their
8 right to intervene in the proceeding. If the identity or location of the Indian child's
9 parent, former parent, Indian custodian, former Indian custodian, or tribe cannot be
10 determined, that notice shall be given to the U.S. secretary of the interior in like
11 manner. The next hearing in the proceeding may not be held until at least 10 days
12 after receipt of the notice by the parent, former parent, Indian custodian, former
13 Indian custodian, and tribe. On request of the parent, former parent, Indian
14 custodian, former Indian custodian, or tribe, the court shall grant a continuance of
15 up to 20 additional days to enable the requester to prepare for that hearing.

16 (b) *Appointment of counsel*. Whenever an Indian child is the subject of a
17 proceeding involving the removal of the Indian child from his or her home, placement
18 of the Indian child in an out-of-home care placement, termination of parental rights

1 to the Indian child, or return of custody of the Indian child under sub. (8) (a), the
2 Indian child's parent, former parent, Indian custodian, or former Indian custodian,
3 upon a determination of indigency as provided in s. 48.23 (4), shall have the right to
4 be represented by court-appointed counsel. The court may also, in its discretion,
5 appoint counsel for the Indian child under s. 48.23 (3) if the court finds that the
6 appointment is in the best interests of the Indian child.

~~NOTE: 25 USC 1912 (b) requires the U.S. secretary of the interior to pay reasonable fees and expenses when state law makes no provision for the appointment of counsel. By incorporating 25 USC 1912 (b) into state law, however, state law is making provision for the appointment of counsel. Accordingly, this draft does not require the court to certify reasonable expenses to the U.S. secretary of the interior for the purpose of repayment of these expenses.~~

7 (c) *Examination of reports and other documents.* Each party to a proceeding
8 involving the out-of-home care placement of, termination of parental rights to, or
9 return of custody under sub. (8) (a) of an Indian child shall have the right to examine
10 all reports or other documents filed with the court upon which any decision with
11 respect to the out-of-home care placement, termination of parental rights, or return
12 of custody may be based.

13 (d) *Out-of-home care placement; serious damage and active efforts.* The court
14 may not order an Indian child to be placed in an out-of-home care placement unless
15 all of the following occur:

16 1. The court finds by clear and convincing evidence, including the testimony
17 of one or more qualified expert witnesses chosen in the order of preference listed in
18 sub. (2) (g) 1. to 4., that continued custody of the Indian child by the parent or Indian
19 custodian is likely to result in serious emotional or physical damage to the child.

20 2. The court finds by clear and convincing evidence that active efforts, as
21 described in par. (f), have been made to provide remedial services and rehabilitation

The court shall make that finding notwithstanding s. 48.355
= That a circumstance specified in s. 48.355 (2)(b) to s. 50 applies

1 programs designed to prevent the breakup of the Indian family and that those efforts
 2 have proved unsuccessful.

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

6 1. The court finds beyond a reasonable doubt, including the testimony of one
 7 or more qualified expert witnesses chosen in the order of preference listed in sub. (2)
 8 (g) 1. to 4., that the continued custody of the Indian child by the parent or Indian
 9 custodian is likely to result in serious emotional or physical damage to the child.

10 2. The court finds beyond a reasonable doubt that active efforts, as described
 11 in par. (f), have been made to provide remedial services and rehabilitation programs
 12 designed to prevent the breakup of the Indian family and that those efforts have
 13 proved unsuccessful.

14 (f) *Active efforts standard.* The court may not order an Indian child to be placed
 15 in an out-of-home care placement or order termination of parental rights to an
 16 Indian child unless the evidence of active efforts under par. (d) 2. or (e) 2. shows that
 17 there has been a vigorous and concerted level of case work beyond the level that
 18 typically constitutes reasonable efforts, as described in s. 48.355 (2c), or a reasonable
 19 effort, as defined in s. 48.415 (2) (a) 2. a. The active efforts shall be made in a manner
 20 that takes into account the prevailing social and cultural values, conditions, and way
 21 of life of the Indian child's tribe and that utilizes the available resources of the Indian

22 child's tribe, tribal and other Indian ~~social services~~ ^{child welfare} agencies, extended family
 23 members of the Indian child, and other individual Indian caregivers. The court's
 24 consideration of whether active efforts were made under par. (d) 2. or (e) 2. shall
 25 include whether all of the following activities were conducted:

• §5. Contact was made with

1 1. The Indian child's tribe was requested to convene traditional and customary
2 support, actions, and services to resolve the Indian family's issues.

3 2. Representatives of the Indian child's tribe were identified, notified, and
4 invited to participate in the Indian child custody proceeding at the earliest possible
5 point in the proceeding.

6 3. Extended family members of the Indian child were consulted to identify and
7 provide family structure and support for the Indian child.

8 4. Frequent visitation was made to the Indian child's home ~~and the homes of~~
9 extended family members of the Indian child

to assure appropriate cultural
connections

10 5. All family preservation alternatives appropriate to the Indian child's tribe
11 were exhausted.

12 6. Community resources offering housing, financial, and transportation
13 assistance were identified, information about those resources was provided to the
14 Indian family, and the Indian family was actively assisted in accessing those
15 resources.

****NOTE: Section 48.028 (4) (f) incorporates the active efforts standards found at
s. 232B.5 (19), Iowa stats.

NOTE: This subsection incorporates 25 USC 1912 into ch. 48. ICWA is ambiguous
as to whether both serious damage and active efforts must be proved beyond a reasonable
doubt in order to TPR. In *In Re Interest of DSP*, 166 Wis. 2d 464 (1992), the Wisconsin
Supreme Court held that both serious damage and active efforts must be proved beyond
a reasonable doubt in order to TPR.

16 (5) VOLUNTARY PROCEEDINGS; CONSENT; WITHDRAWAL. (a) *Out-of-home care*
17 *placement*. A voluntary consent by a parent or Indian custodian to an out-of-home
18 care placement of an Indian child under s. 48.63 (1) or (5) (b) is not valid unless the
19 consent is executed in writing, recorded before a judge, and accompanied by a written
20 certification by the judge that the terms and consequences of the consent were fully
21 explained in detail to and were fully understood by the parent or Indian custodian.

1 The judge shall also certify that the parent or Indian custodian fully understood the
2 explanation in English or that the explanation was interpreted into a language that
3 the parent or Indian custodian understood. Any consent given under this paragraph
4 prior to or within 10 days after the birth of the Indian child is not valid. A parent or
5 Indian custodian who has executed a consent under this paragraph may withdraw
6 the consent for any reason at any time, and the Indian child shall be returned to the
7 parent or Indian custodian. A parent or Indian custodian who has executed a consent
8 under this paragraph may also move to invalidate the out-of-home care placement
9 under sub. (6).

10 (b) *Termination of parental rights.* A voluntary consent by a parent to a
11 termination of parental rights under s. 48.41 (2) (e) is not valid unless the consent
12 is executed in writing, recorded before a judge, and accompanied by a written
13 certification by the judge that the terms and consequences of the consent were fully
14 explained in detail to and were fully understood by the parent. The judge shall also
15 certify that the parent fully understood the explanation in English or that the
16 explanation was interpreted into a language that the parent understood. Any
17 consent given under this paragraph prior to or within 10 days after the birth of the
18 Indian child is not valid. A parent who has executed a consent under this paragraph
19 may withdraw the consent for any reason at any time prior to the entry of a final
20 order granting adoption, and the Indian child shall be returned to his or her parent.
21 After the entry of a final order granting adoption, a parent who has executed a
22 consent under this paragraph may withdraw that consent as provided in par. (c),
23 move to invalidate the termination of parental rights under sub. (6), or move for relief
24 from the judgment under s. 48.46 (2).

1 (c) *Withdrawal of consent after order granting adoption.* After the entry of a
2 final order granting adoption of an Indian child, a parent who has consented to
3 termination of parental rights under s. 48.41 (2) (e) or who did not contest the petition
4 initiating the proceeding in which his or her parental rights were terminated may
5 withdraw that consent and move the court for relief from the judgment on the
6 grounds that the consent was obtained through fraud, misrepresentation, or duress.
7 Any such motion shall be filed within 2 years after the entry of an order granting
8 adoption of the Indian child. A motion under this subsection does not affect the
9 finality or suspend the operation of the judgment or order terminating parental
10 rights or granting adoption. If the court finds that the consent was obtained through
11 fraud, misrepresentation, or duress, the court shall vacate the judgement or order
12 terminating parental rights and, if applicable, the order granting adoption and
13 return the Indian child to the custody of the parent.

~~NOTE: This subsection incorporates 25 USC 1913 into ch. 48~~

14 (6) INVALIDATION OF ACTION. Any Indian child who is the subject of an
15 out-of-home care placement or of a termination of parental rights proceeding, any
16 parent or Indian custodian from whose custody that Indian child was removed, or the
17 Indian child's tribe may move the court to invalidate that out-of-home care
18 placement or termination of parental rights on the grounds that the out-of-home
19 care placement was made or the termination of parental rights was ordered in
20 violation of sub. (3), (4), or (5) or 25 USC 1911, 1912, or 1913. If the court finds that
21 those grounds exist and if the Indian child has not been adopted, the court shall
22 invalidate the out-of-home care placement or termination of parental rights and
23 order the Indian child to be returned to his or her parent or Indian custodian. If the

1 Indian child has been adopted, the parent or Indian custodian may petition the court
2 under sub. (8) (a) for return of custody of the Indian child.

~~NOTE: This subsection incorporates 25 USC 1914 into ch. 48.~~

3 (7) PLACEMENT OF INDIAN CHILD. (a) *Adoptive placement; preferences.* Subject
4 to pars. (c) and (d), in placing an Indian child for adoption, preference shall be given,
5 in the absence of good cause to the contrary, to a placement with one of the following,
6 in the order of preference listed:

- 7 1. An extended family member of the Indian child.
- 8 2. Another member of the Indian child's tribe.
- 9 3. Another Indian family.

10 (b) *Out-of-home care or preadoptive placement; preferences.* Any Indian child
11 who is accepted for an out-of-home care placement or a preadoptive placement shall
12 be placed in the least restrictive setting that most approximates a family, that meets
13 the Indian child's special needs, if any, and that is within reasonable proximity to the
14 Indian child's home, taking into account those special needs. Subject to pars. (c) to
15 (e), in placing an Indian child in an out-of-home care placement or a preadoptive
16 placement, preference shall be given, in the absence of good cause to the contrary, to
17 a placement in one of the following, in the order of preference listed:

- 18 1. The home of an extended family member of the Indian child.
- 19 2. A foster home or treatment foster home licensed, approved, or specified by
20 the Indian child's tribe.
- 21 3. An Indian foster home or treatment foster home licensed or approved by the
22 department, a county department, or a child welfare agency.

1 4. A group home or residential care center for children and youth approved by
2 an Indian tribe or operated by an Indian organization that has a program suitable
3 to meet the needs of the Indian child.

4 (c) *Tribal or personal preferences.* If the Indian child's tribe has established, by
5 resolution, an order of preference that is different from the order specified in par. (a)
6 or (b), the order of preference established by that tribe shall be followed, in the
7 absence of good cause to the contrary, so long as the placement under par. (a) is
8 appropriate for the Indian child's special needs, if any, and the placement under par.
9 (b) is the least restrictive setting appropriate for the Indian child's needs as specified
10 in par. (b). When appropriate, the preference of the Indian child or parent shall be
11 considered, and, when a parent who has consented to the placement evidences a
12 desire for anonymity, that desire shall be given weight, in determining the
13 placement.

14 (d) *Social and cultural standards.* The standards to be applied in meeting the
15 placement preference requirements of this subsection shall be the prevailing social
16 and cultural standards of the Indian community in which the Indian child's parents
17 or extended family members reside or with which the Indian child's parents or
18 extended family members maintain social and cultural ties.

19 (e) *Report of placement.* The department, a county department, or a child
20 welfare agency shall maintain a record of each adoptive placement, out-of-home
21 care placement, and preadoptive placement made of an Indian child, evidencing the
22 efforts made to comply with the placement preference requirements specified in this
23 subsection, and shall make that record available at any time on the request of the
24 U.S. secretary of the interior or the Indian child's tribe.

NOTE: This subsection incorporates 25 USC 1915 into ch. 48.

1 (8) RETURN OF CUSTODY. (a) *Adoption vacated, set aside, or terminated.* 1. If
2 a final order granting adoption of an Indian child is vacated or set aside or if the
3 parental rights to an Indian child of all adoptive parents of the Indian child are
4 voluntarily terminated, the court that vacated or set aside the final decree of
5 adoption or that ordered the termination of parental rights of the adoptive parents
6 shall notify the Indian child's former parent and former Indian custodian and the
7 former parent or former Indian custodian may petition for the return of custody of
8 the Indian child.

~~****NOTE. The DHFS note asserts that this subdivision does not make sense. Actually, it makes perfect sense because how is an Indian child's former parent going to know about the vacated adoption order unless he or she is notified? See p. 115 of the *Judicare ICWA Manual*.~~

9 2. On receipt of a petition under subd. 1., the court shall set a date for a hearing
10 on the petition that allows reasonable time for the parties to prepare. The court shall
11 provide notice of the hearing to the guardian and legal custodian of the Indian child,
12 to all other interested parties as provided in s. 48.27 (6), and to the Indian child's
13 former parent, former Indian custodian, and tribe in the manner specified in sub. (4)
14 (a). The hearing on the petition may not be held until at least 10 days after receipt
15 of the notice of the hearing by the Indian child's former parent, former Indian
16 custodian, and tribe. On request of the Indian child's former parent, former Indian
17 custodian, or tribe the court shall grant a continuance of up to 20 additional days to
18 enable the requester to prepare for the hearing.

~~****NOTE. The DHES note says that this subdivision also needs language relating to right to counsel and examination of records. These issues are already covered in s. 48.028 (4) (b) and (c) by cross reference to s. 48.028 (8) (a).~~

19 3. At the conclusion of the hearing, the court shall grant a petition for the return
20 of custody of the Indian child to the Indian child's former parent or former Indian

1 custodian unless there is a showing that return of custody is not in the best interests
2 of the Indian child.

3 (b) *Removal from out-of-home care placement.* If an Indian child is removed
4 from an out-of-home care placement for the purpose of placing the Indian child in
5 another out-of-home care placement, a preadoptive placement, or an adoptive
6 placement, the placement shall be made in accordance with this section. Removal
7 of an Indian child from an out-of-home care placement for the purpose of returning
8 the Indian child to the home of the parent or Indian custodian from whose custody
9 the Indian child was originally removed is not subject to this section.

~~NOTE: This subsection incorporates 25 USC 1916 into ch. 48.~~

10 (9) ADOPTEE INFORMATION. (a) *Provision of information to U.S. secretary of the*
11 *interior.* At the time a court enters an order granting adoption of an Indian child, the
12 court shall provide the U.S. secretary of the interior with a copy of the order, together
13 with such other records and papers pertaining to the adoption proceeding as may be
14 necessary to provide that secretary with all of the following information:

- 15 1. The name and tribal affiliation of the Indian child.
- 16 2. The names and addresses of the Indian child's birth parents.
- 17 3. The names and addresses of the Indian child's adoptive parents.
- 18 4. The identity of any agency that has in its possession any files or information
19 relating to the adoptive placement of the Indian child.

20 (b) *Confidentiality of parent's identity.* The court shall give the birth parent of
21 an Indian child the opportunity to file an affidavit indicating that the birth parent
22 wishes the U.S. secretary of the interior to maintain the confidentiality of the birth
23 parent's identity. If the birth parent files that affidavit, the court shall include the
24 affidavit with the information provided to the U.S. secretary of the interior under

or arrange to provide

1 par. (a), and that secretary shall maintain the confidentiality of the birth parent's
2 identity as required under 25 USC 1951 (a) and (b).

3 (c) *Provision of tribal affiliation to adoptee.* At the request of an Indian adoptee
4 who is 18 years of age or older, the court that entered the order granting adoption of
5 the adoptee shall provide the adoptee with the tribal affiliation, if any, of the
6 adoptee's birth parents and with such other information as may be necessary to
7 protect any rights accruing to the adoptee as a result of that affiliation.

~~Note: Section 48.028 (9) (a) and (b) codifies 25 USC 1951 (a) and s. 48.028 (9) (c),
codifies 25 USC 1917.~~

~~***NOTE: The DHFS note questions whether the court should be given the option
of allowing or arranging for the provision of tribal affiliation information to an Indian
adoptee. 25 USC 1917, however, quite clearly requires the court to provide an Indian
adoptee with that information.~~

8 (10) HIGHER STATE OR FEDERAL STANDARD APPLICABLE. The federal Indian Child
9 Welfare Act, 25 USC 1911 to 1963, supersedes this chapter in any Indian child
10 custody proceeding governed by that act, except that in any case in which this
11 chapter provides a higher standard of protection for the rights of an Indian child's
12 parent, Indian custodian, or tribe than the rights provided under that act, the court
13 shall apply the standard under this chapter.

~~***NOTE: This subsection incorporates 25 USC 1921 into ch. 48~~

14 SECTION 15. 48.13 (intro.) of the statutes is amended to read:

15 48.13 **Jurisdiction over children alleged to be in need of protection or**
16 **services.** (intro.) The Except as provided in s. 48.028 (3), the court has exclusive
17 original jurisdiction over a child alleged to be in need of protection or services which
18 can be ordered by the court, and:

19 SECTION 16. 48.13 (2m) of the statutes is amended to read:

20 48.13 (2m) Whose parent has relinquished custody of the child under s. 48.195

21 (1) (a);

(b) (ii)

RULES

The department shall promulgate rules to
implement and administer this section and the federal Indian
Child Welfare Act, 25 USC 1901 to 1963

1 **SECTION 17.** 48.14 (intro.) of the statutes is amended to read:

2 **48.14 Jurisdiction over other matters relating to children.** (intro.) The
3 Except as provided in s. 48.028 (3), the court has exclusive jurisdiction over:

4 **SECTION 18.** 48.14 (12) of the statutes is created to read:

5 48.14 (12) Proceedings under s. 48.028 (8) for the return of custody of an Indian
6 child to his or her former parent, as defined in s. 48.028 (2) (c), or former Indian
7 custodian, as defined in s. 48.028 (2) (b), following a vacation or setting aside of an
8 order granting adoption of the Indian child or following an order voluntarily
9 terminating parental rights to an Indian child of all adoptive parents of the Indian
10 child.

11 **SECTION 19.** 48.15 of the statutes is amended to read:

12 **48.15 Jurisdiction of other courts to determine legal custody.** ~~Nothing~~
13 ~~contained in ss. 48.13, 48.133 and 48.14~~ Except as provided in s. 48.028 (3), nothing
14 in this chapter deprives ~~other courts~~ another court of the right to determine the legal
15 custody of ~~children~~ a child by habeas corpus or to determine the legal custody or
16 guardianship of ~~children~~ a child if the legal custody or guardianship is incidental to
17 the determination of causes an action pending in ~~the other courts.~~ But that court.
18 Except as provided in s. 48.028 (3), the jurisdiction of the court assigned to exercise
19 jurisdiction under this chapter and ch. 938 is paramount in all cases involving
20 children alleged to come within the provisions of ss. 48.13 and 48.14 and unborn
21 children and their expectant mothers alleged to come within the provisions of ss.
22 48.133 and 48.14 (5).

23 **SECTION 20.** 48.19 (2) of the statutes is amended to read:

24 48.19 (2) When a child is taken into physical custody ~~as provided in~~ under this
25 section, the person taking the child into custody shall immediately attempt to notify

1 the parent, guardian ~~and~~, legal custodian, and Indian custodian of the child by the
2 most practical means. The person taking the child into custody shall continue such
3 attempt until the parent, guardian ~~and~~, legal custodian, and Indian custodian of the
4 child are notified, or the child is delivered to an intake worker under s. 48.20 (3),
5 whichever occurs first. If the child is delivered to the intake worker before the
6 parent, guardian ~~and~~, legal custodian, and Indian custodian are notified, the intake
7 worker, or another person at his or her direction, shall continue the attempt to notify
8 until the parent, guardian ~~and~~, legal custodian, and Indian custodian of the child are
9 notified.

10 **SECTION 21.** 48.195 (1) of the statutes is renumbered 48.195 (1) (a) and
11 amended to read:

12 48.195 (1) (a) In addition to being taken into custody under s. 48.19, a child
13 whom a law enforcement officer, emergency medical technician, or hospital staff
14 member reasonably believes to be 72 hours old or younger may be taken into custody
15 under circumstances in which a parent of the child relinquishes custody of the child
16 to the law enforcement officer, emergency medical technician, or hospital staff
17 member and does not express an intent to return for the child. If a parent who wishes
18 to relinquish custody of his or her child under this ~~subsection~~ paragraph is unable
19 to travel to a sheriff's office, police station, fire station, hospital, or other place where
20 a law enforcement officer, emergency medical technician, or hospital staff member
21 is located, the parent may dial the telephone number "911" or, in an area in which
22 the telephone number "911" is not available, the number for an emergency medical
23 service provider, and the person receiving the call shall dispatch a law enforcement
24 officer or emergency medical technician to meet the parent and take the child into
25 custody.

(b) A law enforcement officer, emergency medical technician, or hospital staff member who takes a child into custody under this subsection shall take do all of the following:

1. Take any action necessary to protect the health and safety of the child, shall, within, the Federal Indian Child Welfare Act

3. Within 24 hours after taking the child into custody, deliver the child under s. 48.20 to the intake worker under s. 48.20, and shall, within, who shall make reasonable efforts to determine whether the child is an Indian child and, if so, shall notify the Indian child's tribe that the Indian child has been relinquished under par.

(10) (a) Section 48.028 and 25 USC 1901 to 1963, apply to a child who is relinquished under par. (a) only if it is determined that the child

4. Within 5 days after taking the child into custody, file a birth certificate for is an the child under s. 69.14 (3). the Federal Indian Child Welfare Act Indian child

SECTION 22. 48.195 (1) (b) 2. of the statutes is created to read:
48.195 (1) (b) 2. Ask the parent who is relinquishing custody of the child and any person assisting the parent in that relinquishment whether the child has a parent who is either a member of an Indian tribe or is eligible for membership in an Indian tribe. A parent or person assisting the parent is not required to provide that information.

(18) Section 48.028 and 25 USC 1901 to 1963, apply to a child who is relinquished under par. (a) only if it is determined that the child
***Note: The previous two sections incorporate s. 24-22.1.1, New Mexico stats. is an Indian child

SECTION 23. 48.195 (2) (a) of the statutes is amended to read:
48.195 (2) (a) Except as provided in this paragraph, a parent who relinquishes custody of a child under sub. (1) (a) and any person who assists the parent in that relinquishment have the right to remain anonymous. The exercise of that right shall not affect the manner in which a law enforcement officer, emergency medical technician, or hospital staff member performs his or her duties under this section.

1 No person may induce or coerce or attempt to induce or coerce a parent or person
2 assisting a parent who wishes to remain anonymous into revealing his or her
3 identity, unless the person has reasonable cause to suspect that the child has been
4 the victim of abuse or neglect, as defined in s. 48.981 (1) (d), or that the person
5 assisting the parent is coercing the parent into relinquishing custody of the child.

6 **SECTION 24.** 48.195 (2) (b) of the statutes is amended to read:

7 48.195 (2) (b) A parent who relinquishes custody of a child under sub. (1) (a)
8 and any person who assists the parent in that relinquishment may leave the
9 presence of the law enforcement officer, emergency medical technician, or hospital
10 staff member who took custody of the child at any time, and no person may follow or
11 pursue the parent or person assisting the parent, unless the person has reasonable
12 cause to suspect that the child has been the victim of abuse or neglect, as defined in
13 s. 48.981 (1) (d), or that the person assisting the parent has coerced the parent into
14 relinquishing custody of the child.

15 **SECTION 25.** 48.195 (2) (c) of the statutes is amended to read:

16 48.195 (2) (c) No officer, employee, or agent of this state or of a political
17 subdivision of this state may attempt to locate or ascertain the identity of a parent
18 who relinquishes custody of a child under sub. (1) (a) or any person who assists the
19 parent in that relinquishment, unless the officer, employee, or agent has reasonable
20 cause to suspect that the child has been the victim of abuse or neglect, as defined in
21 s. 48.981 (1) (d), or that the person assisting the parent has coerced the parent into
22 relinquishing custody of the child.

23 **SECTION 26.** 48.195 (2) (d) (intro.) of the statutes is amended to read:

1 48.195 (2) (d) (intro.) Any person who obtains any information relating to the
2 relinquishment of a child under sub. (1) (a) shall keep that information confidential
3 and may not disclose that information, except to the following persons:

4 **SECTION 27.** 48.195 (2) (d) 7. of the statutes is amended to read:

5 48.195 (2) (d) 7. ~~A~~ If the child is an Indian child, the Indian child's tribe, a tribal
6 court, or other adjudicative body authorized by an ~~American~~ Indian tribe ~~or band~~ to
7 perform child welfare functions, that is exercising jurisdiction over proceedings
8 relating to the Indian child, an attorney representing the interests of the ~~American~~
9 Indian tribe ~~or band~~ in those proceedings, or an attorney representing the interests
10 of the Indian child in those proceedings.

11 **SECTION 28.** 48.195 (3) (a) of the statutes is amended to read:

12 48.195 (3) (a) Subject to par. (b), a law enforcement officer, emergency medical
13 technician, or hospital staff member who takes a child into custody under sub. (1) (a)
14 shall make available to the parent who relinquishes custody of the child the maternal
15 and child health toll-free telephone number maintained by the department under
16 42 USC 705 (a) (5) (E).

17 **SECTION 29.** 48.195 (4) (a) of the statutes is amended to read:

18 48.195 (4) (a) Any parent who relinquishes custody of his or her child under
19 sub. (1) (a) and any person who assists the parent in that relinquishment are immune
20 from any civil or criminal liability for any good faith act or omission in connection
21 with that relinquishment. The immunity granted under this paragraph includes
22 immunity for exercising the right to remain anonymous under sub. (2) (a), the right
23 to leave at any time under sub. (2) (b), and the right not to accept any information
24 under sub. (3) (b) and immunity from prosecution under s. 948.20 for abandonment
25 of a child or under s. 948.21 for neglecting a child.

1 **SECTION 30.** 48.195 (4) (b) of the statutes is amended to read:

2 48.195 (4) (b) Any law enforcement officer, emergency medical technician, or
3 hospital staff member who takes a child into custody under sub. (1) (a) is immune
4 from any civil liability to the child's parents, or any criminal liability for any good
5 faith act or omission occurring solely in connection with the act of receiving custody
6 of the child from the child's parents, but is not immune from any civil or criminal
7 liability for any act or omission occurring in subsequently providing care for the
8 child.

9 **SECTION 31.** 48.195 (5) of the statutes is amended to read:

10 48.195 (5) **MEDICAL ASSISTANCE ELIGIBILITY.** A child who is taken into custody
11 under sub. (1) (a) is presumed to be eligible for medical assistance under s. 49.46 or
12 49.47.

13 **SECTION 32.** 48.195 (6) of the statutes is amended to read:

14 48.195 (6) **RULES.** The department shall promulgate rules to implement this
15 section. In promulgating those rules, the department shall consider the different
16 circumstances under which a parent might relinquish custody of a child under sub.
17 (1) (a). The rules shall include rules prescribing a means by which a parent who
18 relinquishes custody of his or her child under sub. (1) (a) may, until the granting of
19 an order terminating parental rights, choose to be identified as the child's parent.

20 **SECTION 33.** 48.20 (2) (ag) of the statutes is amended to read:

21 48.20 (2) (ag) Except as provided in pars. (b) to (d), a person taking a child into
22 custody shall make every effort to release the child immediately to the child's parent,
23 guardian ~~or~~, legal custodian, or Indian custodian.

24 **SECTION 34.** 48.20 (2) (b) of the statutes is amended to read:

1 48.20 (2) (b) If the child's parent, guardian ~~or~~, legal custodian, or Indian
2 custodian is unavailable, unwilling, or unable to provide supervision for the child,
3 the person who took the child into custody may release the child to a responsible
4 adult after counseling or warning the child as may be appropriate.

5 **SECTION 35.** 48.20 (3) of the statutes is amended to read:

6 48.20 (3) If the child is released under sub. (2) (b) to (d), the person who took
7 the child into custody shall immediately notify the child's parent, guardian ~~and~~, legal
8 custodian, and Indian custodian of the time and circumstances of the release and the
9 person, if any, to whom the child was released. If the child is not released under sub.
10 (2), the person who took the child into custody shall arrange in a manner determined
11 by the court and law enforcement agencies for the child to be interviewed by the
12 intake worker under s. 48.067 (2), ~~and. The person who took the child into custody~~
13 ~~shall make a statement in writing with supporting facts of the reasons why the child~~
14 ~~was taken into physical custody and shall give any child 12 years of age or older a~~
15 ~~copy of the statement in addition to giving a copy to the intake worker. When and~~
16 ~~to any child 12 years of age or older. If the intake interview is not done in person, the~~
17 ~~report may be read to the intake worker.~~

18 **SECTION 36.** 48.20 (7) (c) (intro.) of the statutes is amended to read:

19 48.20 (7) (c) (intro.) The intake worker may release the child as follows:

20 **SECTION 37.** 48.20 (7) (c) 1. of the statutes is amended to read:

21 48.20 (7) (c) 1. To a parent, guardian ~~or~~, legal custodian, or Indian custodian,
22 or, to a responsible adult if the parent, guardian ~~or~~, legal custodian, or Indian
23 custodian is unavailable, unwilling, or unable to provide supervision for the child,
24 ~~release the child to a responsible adult,~~ counseling or warning the child as may be
25 appropriate; or, if a the child is 15 years of age or older, ~~release the child~~ without

1 immediate adult supervision, counseling or warning the child as may be appropriate;
2 or.

3 SECTION 38. 48.20 (7) (d) of the statutes is amended to read:

4 48.20 (7) (d) If the child is released from custody, the intake worker shall
5 immediately notify the child's parent, guardian and, legal custodian, and Indian
6 custodian of the time and circumstances of the release and the person, if any, to whom
7 the child was released.

8 SECTION 39. 48.20 (8) of the statutes is renumbered 48.20 (8) (a) and amended
9 to read:

10 48.20 (8) (a) If a child is held in custody, the intake worker shall notify the
11 child's parent, guardian and, legal custodian, and Indian custodian of the reasons for
12 holding the child in custody and of the child's whereabouts unless there is reason to
13 believe that notice would present imminent danger to the child. The parent,
14 guardian and, legal custodian, and Indian custodian shall also be notified of the time
15 and place of the detention hearing required under s. 48.21, the nature and possible
16 consequences of that hearing, and the right to present and cross-examine witnesses
17 at the hearing, and, in the case of a parent or Indian custodian of an Indian child, the
18 right to counsel under s. 48.028 (4) (b) regardless of ability to pay. If the parent,
19 guardian or, legal custodian, or Indian custodian is not immediately available, the
20 intake worker or another person designated by the court shall provide notice as soon
21 as possible. When the child is 12 years of age or older, the child shall receive the same
22 notice about the detention hearing as the parent, guardian or, legal custodian, or
23 Indian custodian. The intake worker shall notify both the child and the child's
24 parent, guardian or, legal custodian—~~When~~ , or Indian custodian.

1 **(b)** If the child is an expectant mother who has been taken into custody under
2 s. 48.19 (1) (cm) or (d) 8., the unborn child, through the unborn child's guardian ad
3 litem, shall receive the same notice about the whereabouts of the child expectant
4 mother, about the reasons for holding the child expectant mother in custody and
5 about the detention hearing as the child expectant mother and her parent, guardian
6 ~~or~~, legal custodian, or Indian custodian. The intake worker shall notify the child
7 expectant mother, her parent, guardian ~~or~~, legal custodian, or Indian custodian and
8 the unborn child, by the unborn child's guardian ad litem.

9 **SECTION 40.** 48.21 (3) (am) of the statutes is amended to read:

10 48.21 (3) (am) The parent, guardian, ~~or~~ legal custodian, or Indian custodian
11 may waive his or her right to participate in the hearing under this section. After any
12 waiver, a rehearing shall be granted at the request of the parent, guardian, legal
13 custodian, Indian custodian, or any other interested party for good cause shown.

14 **SECTION 41.** 48.21 (3) (b) of the statutes is amended to read:

15 48.21 (3) (b) If present at the hearing, a copy of the petition or request shall be
16 given to the parent, guardian ~~or~~, legal custodian, or Indian custodian, and to the child
17 if he or she is 12 years of age or older, before the hearing begins. If the child is an
18 expectant mother who has been taken into custody under s. 48.19 (1) (cm) or (d) 8.,
19 a copy of the petition shall also be given to the unborn child, through the unborn
20 child's guardian ad litem, before the hearing begins. Prior notice of the hearing shall
21 be given to the child's parent, guardian ~~and~~, legal custodian, and Indian custodian,
22 to the child if he or she is 12 years of age or older and, if the child is an expectant
23 mother who has been taken into custody under s. 48.19 (1) (cm) or (d) 8., to the unborn
24 child, through the unborn child's guardian ad litem, ~~in accordance with~~ under s.
25 48.20 (8).

1 **SECTION 42.** 48.21 (3) (d) of the statutes is amended to read:

2 48.21 (3) (d) Prior to the commencement of the hearing, the court shall inform
3 the parent, guardian ~~or~~, legal custodian ~~shall be informed by the court, or Indian~~
4 custodian of the allegations that have been made or may be made, the nature and
5 possible consequences of this hearing as compared to possible future hearings, the
6 right to present, confront, and cross-examine witnesses ~~and the right to present~~
7 witnesses, and, in the case of a parent or Indian custodian of an Indian child, the
8 right to counsel under s. 48.028 (4) (b) regardless of ability to pay.

9 **SECTION 43.** 48.21 (3) (e) of the statutes is amended to read:

10 48.21 (3) (e) If the parent, guardian ~~or~~, legal custodian, Indian custodian, or the
11 child is not represented by counsel at the hearing and the child is continued in
12 custody as a result of the hearing, the parent, guardian, legal custodian, Indian
13 custodian, or child may request through counsel subsequently appointed or retained
14 or through a guardian ad litem that the order to hold the child in custody be reheard.
15 If the request is made, a rehearing shall take place as soon as possible. ~~Any~~ An order
16 to hold the child in custody shall be ~~subject to rehearing~~ reheard for good cause,
17 whether or not counsel was present.

18 **SECTION 44.** 48.21 (5) (d) 1. of the statutes is renumbered 48.21 (5) (d) and
19 amended to read:

20 48.21 (5) (d) If the judge or circuit court commissioner finds that any of the
21 circumstances specified in s. 48.355 (2d) (b) 1. to 5. applies with respect to a parent,
22 the judge or circuit court commissioner shall hold a hearing under s. 48.38 (4m)
23 within 30 days after the date of that finding to determine the permanency plan for
24 the child. ~~If a hearing is held under this subdivision, the agency responsible for~~

1 preparing the permanency plan shall file the permanency plan with the court not less
2 than 5 days before the date of the hearing.

NOTE: Rather than add even more repetitious language to chs. 48 and 938 relating to permanency plan hearings when the court finds aggravated circumstances, this draft consolidates the language of ss. 48.21 (5) (d), 48.32 (1) (c), 48.355 (2d) (c), 48.357 (2v) (e), and 48.365 (2m) (ad) into a newly created provision, s. 48.38 (4m).

3 SECTION 45. 48.21 (5) (d) 2. of the statutes is repealed.

4 SECTION 46. 48.21 (5) (d) 3. of the statutes is repealed.

5 SECTION 47. 48.23 (2) of the statutes is amended to read:

6 48.23 (2) Whenever a child is the subject of a proceeding involving a contested
7 adoption or the involuntary termination of parental rights, any parent under 18
8 years of age who appears before the court shall be represented by counsel; but no such
9 parent may waive counsel. ~~A~~ Except as provided in sub. (2g), a minor parent
10 petitioning for the voluntary termination of parental rights shall be represented by
11 a guardian ad litem. If a proceeding involves a contested adoption or the involuntary
12 termination of parental rights, any parent 18 years old or older who appears before
13 the court shall be represented by counsel; but the parent may waive counsel provided
14 the court is satisfied such waiver is knowingly and voluntarily made.

15 SECTION 48. 48.23 (2g) of the statutes is created to read:

16 48.23 (2g) RIGHT OF INDIAN CHILD'S PARENT OR INDIAN CUSTODIAN TO COUNSEL.
17 Whenever an Indian child is the subject of a proceeding involving the removal of the
18 Indian child from his or her home, placement of the Indian child in an out-of-home
19 care placement, termination of parental rights to the Indian child, or return of
20 custody of the Indian child under s. 48.028 (8) (a), the Indian child's parent, former
21 parent, as defined in s. 48.028 (2) (c), Indian custodian, or former Indian custodian,
22 as defined in s. 48.028 (2) (b), upon a determination of indigency as provided in sub.
23 (4), shall have the right to be represented by court-appointed counsel.

1 **SECTION 49.** 48.23 (3) of the statutes is amended to read:

2 48.23 (3) POWER OF THE COURT TO APPOINT COUNSEL. ~~Except in proceedings under~~
3 ~~s. 48.13, at~~ At any time, upon request or on its own motion, the court may appoint
4 counsel for the child or any party, unless the child or the party has or wishes to retain
5 counsel of his or her own choosing. ~~The court may not appoint counsel for any party~~
6 ~~other than the child in a proceeding under s. 48.13.~~

~~NOTE. In *Joni B. v. State*, 202 Wis. 2d 1 (1996), the Supreme Court held that the legislature's prohibition against appointing counsel for any party other than the child in a child in need of protection or services (CHIPS) proceeding is unconstitutional. Accordingly, this draft amends s. 48.23 (3) and other related provisions to conform the Children's Code to *Joni B.*~~

7 **SECTION 50.** 48.23 (4) of the statutes is amended to read:

8 48.23 (4) PROVIDING COUNSEL. ~~In any situation under this section in which If~~
9 a child has a right to be represented by counsel or is provided counsel at the discretion
10 of the court under this section and counsel is not knowingly and voluntarily waived,
11 the court shall refer the child to the state public defender and counsel shall be
12 appointed by the state public defender under s. 977.08 without a determination of
13 indigency. If the referral is of a child who has filed a petition under s. 48.375 (7), the
14 state public defender shall appoint counsel within 24 hours after that referral. Any
15 counsel appointed in a petition filed under s. 48.375 (7) shall continue to represent
16 the child in any appeal brought under s. 809.105 unless the child requests
17 substitution of counsel or extenuating circumstances make it impossible for counsel
18 to continue to represent the child. In any situation under sub. (2), (2g), or (2m) in
19 which a parent 18 years of age or over or an adult expectant mother is entitled to
20 representation by counsel; counsel is not knowingly and voluntarily waived; and it
21 appears that the parent or adult expectant mother is unable to afford counsel in full,
22 or the parent or adult expectant mother so indicates; the court shall refer the parent

1 or adult expectant mother to the authority for indigency determinations specified
2 under s. 977.07 (1). In any other situation under this section in which a person has
3 a right to be represented by counsel or is provided counsel at the discretion of the
4 court, competent and independent counsel shall be provided and reimbursed in any
5 manner suitable to the court regardless of the person's ability to pay, except that the
6 court may not order a person who files a petition under s. 813.122 or 813.125 to
7 reimburse counsel for the child who is named as the respondent in that petition.

8 **SECTION 51.** 48.235 (4) (a) 7. of the statutes is amended to read:

9 48.235 (4) (a) 7. Petition for relief from a judgment terminating parental rights
10 under s. 48.028 or 48.46.

11 **SECTION 52.** 48.235 (4m) (a) 7. of the statutes is amended to read:

12 48.235 (4m) (a) 7. Petition for relief from a judgment terminating parental
13 rights under s. 48.028 or 48.46 after the child is born.

14 **SECTION 53.** 48.243 (3) of the statutes is amended to read:

15 48.243 (3) If the child or expectant mother has not had a hearing under s. 48.21
16 or 48.213 and was not present at an intake conference under s. 48.24, the intake
17 worker shall ~~inform~~ notify the child, parent, guardian and, legal custodian, and
18 Indian custodian, or expectant mother, as appropriate, of the basic rights provided
19 under this section. The notice shall be given verbally, either in person or by
20 telephone, and in writing. ~~This~~ The notice shall be given ~~so as in sufficient time~~ to
21 allow the child, parent, guardian, legal custodian, Indian custodian, or adult
22 expectant mother ~~sufficient time~~ to prepare for the plea hearing. This subsection
23 does not apply to cases of informal disposition under s. 48.245.

24 **SECTION 54.** 48.255 (1) (cm) of the statutes is amended to read:

1 48.255 (1) (cm) Whether the child may be subject to the federal Indian child
2 ~~welfare act~~ Child Welfare Act, 25 USC 1911 to 1963, and, if the child may be subject
3 to that act, the names and addresses of the child's Indian custodian, if any, and
4 Indian tribe, if known.

5 **SECTION 55.** 48.255 (1) (g) of the statutes is created to read:

6 48.255 (1) (g) If the child is or may be an Indian child, reliable and credible
7 information showing that continued custody of the child by the child's parent or
8 Indian custodian is likely to result in serious emotional or physical damage to the
9 child under s. 48.028 (4) (d) 1. and reliable and credible information showing that the
10 person who took the child into custody and the intake worker have made active
11 efforts under s. 48.028 (4) (d) 2. to prevent the breakup of the Indian family and that
12 those efforts have proved unsuccessful. If the child is or may be an Indian child and
13 is being held in custody outside of his or her home, the petition shall set forth with
14 specificity both the information required under this paragraph and the information
15 required under par. (f).

~~Note: The DHFS draft uses language borrowed from the Adoption and Safe
Families Act (ASFA), i.e., "continued placement in the home" and "efforts to prevent
removal from the home." ICWA, however, refers to "continued custody by the parent or
Indian custodian" and "efforts to prevent the breakup of the Indian family." This draft
uses the ICWA language.~~

16 **SECTION 56.** 48.255 (1m) (d) of the statutes is amended to read:

17 48.255 (1m) (d) Whether the unborn child, when born, may be subject to the
18 federal Indian Child Welfare Act, 25 USC 1911 to 1963, and, if the unborn child may
19 be subject to that act, the name and address of the Indian tribe in which the unborn
20 child may be eligible for membership when born, if known.

21 **SECTION 57.** 48.255 (1m) (g) of the statutes is created to read:

1 48.255 (1m) (g) If the expectant mother is or may be an Indian child, reliable
2 and credible information showing that continued custody of the child expectant
3 mother by her parent or Indian custodian is likely to result in serious emotional or
4 physical damage to the child expectant mother under s. 48.028 (4) (d) 1. and reliable
5 and credible information showing that the person who took the child expectant
6 mother into custody and the intake worker have made active efforts under s. 48.028
7 (4) (d) 2. to prevent the breakup of the Indian family and that those efforts have
8 proved unsuccessful. If the child expectant mother is or may be an Indian child and
9 is being held in custody outside of her home, the petition shall set forth with
10 specificity both the information required under this paragraph and the information
11 required under par. (f).

12 **SECTION 58.** 48.255 (2) of the statutes is amended to read:

13 48.255 (2) If any of the facts required under sub. (1) (a) to (cm) ~~and, (f), and (g)~~
14 or (1m) (a) to (d) ~~and, (f), and (g)~~ are not known or cannot be ascertained by the
15 petitioner, the petition shall so state.

16 **SECTION 59.** 48.255 (4) of the statutes is amended to read:

17 48.255 (4) A copy of a petition under sub. (1) shall be given to the child if the
18 child is 12 years of age or over and to the parents, guardian, legal custodian and
19 physical custodian. A copy of a petition under sub. (1m) shall be given to the child
20 expectant mother, if 12 years of age or over, her parents, guardian, legal custodian
21 and physical custodian and the unborn child by the unborn child's guardian ad litem
22 or to the adult expectant mother, the unborn child through the unborn child's
23 guardian ad litem and the physical custodian of the expectant mother, if any. ~~A~~ If
24 the child is an Indian child or the unborn child may be an Indian child when born,
25 a copy of a petition under sub. (1) or (1m) shall also be given to the tribe or band with

1 ~~which the child is affiliated or~~ Indian child's Indian custodian and tribe or the Indian
2 tribe with which the unborn child may be eligible for ~~affiliation~~ membership when
3 born, ~~if the child is an Indian child or the unborn child may be an Indian child when~~
4 born.

5 **SECTION 60.** 48.27 (3) (a) 1. of the statutes is amended to read:

6 48.27 (3) (a) 1. If the petition that was filed relates to facts concerning a
7 situation under s. 48.13 or a situation under s. 48.133 involving an expectant mother
8 who is a child, the court shall ~~also~~ notify, under s. 48.273, the child, any parent,
9 guardian, and legal custodian of the child, any foster parent, treatment foster parent,
10 or other physical custodian described in s. 48.62 (2) of the child, the unborn child by
11 the unborn child's guardian ad litem, if applicable, and any person specified in par.
12 (b), (d), or (e), if applicable, of all hearings involving the child except hearings on
13 motions for which notice ~~need only~~ must be provided only to the child and his or her
14 counsel. ~~When~~ If parents who are entitled to notice have the same place of residence,
15 notice to one ~~shall constitute~~ constitutes notice to the other. The first notice to any
16 interested party, foster parent, treatment foster parent, or other physical custodian
17 described in s. 48.62 (2) shall be ~~written in writing~~ and may have a copy of the petition
18 attached to it. ~~Thereafter, notice of~~ Notices of subsequent hearings may be given by
19 telephone at least 72 hours before the time of the hearing. The person giving
20 telephone notice shall place in the case file a signed statement of the time notice was
21 given and the person to whom he or she spoke.

22 **SECTION 61.** 48.27 (3) (d) of the statutes is amended to read:

23 48.27 (3) (d) If the petition that was filed relates to facts concerning a situation
24 under s. 48.13 involving an Indian child or a situation under s. 48.133 ~~concerning~~
25 involving an unborn child who, when born, will be an Indian child, the court shall

1 notify, under s. 48.273, the Indian child's Indian custodian and tribe or the Indian
2 tribe or band with which the unborn child ~~will be affiliated~~ may be eligible for
3 membership when born and that Indian custodian or tribe or band may, ~~at the court's~~
4 ~~discretion,~~ intervene at any point in the proceeding before the unborn child is born.

5 **SECTION 62.** 48.27 (4) (a) 2. of the statutes is amended to read:

6 48.27 (4) (a) 2. Advise the child and any party, if applicable, of his or her right
7 to legal counsel regardless of ability to pay.

8 **SECTION 63.** 48.273 (1) of the statutes is renumbered 48.273 (1) (a) and
9 amended to read:

10 48.273 (1) (a) Service of summons or notice required by s. 48.27 may be made
11 by mailing a copy ~~thereof~~ of the summons and notice to the ~~persons~~ person
12 summoned or notified. If

13 (ar) Except as provided in par. (b), if the persons fail person fails to appear at
14 the hearing or otherwise to acknowledge service, a continuance shall be granted,
15 ~~except where the court determines otherwise because the child is in secure custody,~~
16 and service shall be made personally by delivering to the ~~persons~~ person a copy of the
17 summons or notice; except that if the court ~~is satisfied~~ determines that it is
18 impracticable to serve the summons or notice personally, ~~it~~ the court may ~~make an~~
19 order ~~providing for the service of the summons or notice~~ by certified mail addressed
20 to the last-known ~~addresses~~ address of the ~~persons.~~ person.

21 (b) The court may refuse to grant a continuance when the child is being held
22 in secure custody, but ~~in such a case the court~~ if the court so refuses, the court shall
23 order that service of notice of the next hearing be made personally or by certified mail
24 to the last-known address of the person who failed to appear at the hearing.

1 (c) Personal service shall be made at least 72 hours before ~~the time of the~~
2 hearing. Mail shall be sent at least 7 days before ~~the time of the hearing~~, except
3 where as follows:

4 1. When the petition is filed under s. 48.13 and the person to be notified lives
5 outside the state, ~~in which case~~ the mail shall be sent at least 14 days before ~~the time~~
6 of the hearing.

7 **SECTION 64.** 48.273 (1) (ag) of the statutes is created to read:

8 48.273 (1) (ag) Service of summons or notice required by s. 48.27 to an Indian
9 child's parent, Indian custodian, or tribe, or to the Indian tribe in which an unborn
10 child who may be an Indian child when born may be eligible for membership when
11 born, shall be made as provided in s. 48.028 (4) (a).

12 **SECTION 65.** 48.273 (1) (c) 2. of the statutes is created to read:

13 48.273 (1) (c) 2. When a petition under s. 48.13 involves an Indian child and
14 the person to be notified is the Indian child's parent, Indian custodian, or tribe or
15 when a petition under s. 48.133 involves an unborn child who, when born, may be an
16 Indian child and the person to be notified is the child's expectant mother or the
17 Indian tribe with which the unborn child may be eligible for membership when born,
18 the mail shall be sent so that it is received by the person to be notified, or by the U.S.
19 secretary of interior, at least 10 days before the time of the hearing.

20 **SECTION 66.** 48.299 (6) (d) of the statutes is amended to read:

21 48.299 (6) (d) The court may stay the proceedings under this chapter pending
22 the outcome of the paternity proceedings under subch. IX of ch. 767 if the court
23 determines that the paternity proceedings will not unduly delay the proceedings
24 under this chapter and the determination of paternity is necessary to the court's
25 disposition of the child if the child is found to be in need of protection or services or

1 if the court determines that the paternity proceedings may result in a finding that
2 the child is an Indian child and in a petition by the child's parent, Indian custodian,
3 or tribe for transfer of the proceeding to the jurisdiction of the tribe.

4 **SECTION 67.** 48.299 (9) of the statutes is created to read:

5 48.299 (9) If at any point in the proceeding the court determines that the child
6 is or may be an Indian child or that the unborn child, when born, may be an Indian
7 child, the court shall provide notice of the proceeding to the child's parent, Indian
8 custodian, and tribe, or to the expectant mother and the Indian tribe in which the
9 unborn child may be eligible for membership when born, in the manner specified in
10 s. 48.028 (4) (a). The next hearing in the proceeding may not be held until at least
11 10 days after receipt of the notice by the parent, Indian custodian, and tribe or by the
12 expectant mother and tribe. On request of the parent, Indian custodian, expectant
13 mother, or tribe, the court shall grant a continuance of up to 20 additional days to
14 enable the requester to prepare for that hearing.

~~NOTE: At numerous places throughout ss. 48.30 to 48.31 the DHFS draft repeats essentially the same language requiring notice under 25 USC 1912 (a) to be provided to an Indian child's parent, Indian custodian, and tribe. Rather than unduly lengthen an already lengthy chapter by repeating essentially the same language over and over again, this draft consolidates that language into one section applicable throughout.~~

15 **SECTION 68.** 48.30 (1) of the statutes is amended to read:

16 48.30 (1) Except as provided in ~~this subsection~~ s. 48.299 (9), the hearing to
17 determine whether any party wishes to contest an allegation that the child or unborn
18 child is in need of protection or services shall take place on a date which allows
19 reasonable time for the parties to prepare but is within 30 days after the filing of a
20 petition for a child or an expectant mother who is not being held in secure custody
21 or within 10 days after the filing of a petition for a child who is being held in secure
22 custody.