

2003 ASSEMBLY BILL 402

AN ACT *to amend* 938.185 (1) (intro.) and 938.255 (2); and *to create* 938.02 (12m), 938.02 (15c), 938.02 (18g), 938.185 (4), 938.24 (2r), 938.25 (2g), 938.255 (1) (cr), 938.299 (9) and 938.315 (1) (i) of the statutes; **relating to:** proceedings involving an American Indian juvenile who is alleged to have committed a delinquent act while physically outside the boundaries of a reservation and off-reservation trust land because of certain tribal court orders.

Analysis by the Legislative Reference Bureau

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

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill was prepared for the Joint Legislative Council's Special Committee on State-Tribal Relations. The bill relates to proceedings involving an American Indian juvenile (age 16 or under for violations of criminal laws) who is alleged to have committed a delinquent act while physically outside the boundaries of the reservation of a federally recognized American Indian tribe or band in this state (tribe) and any off-reservation trust land of either a tribe or tribal member because of an order issued by a court of that tribe, other than a tribal court order relating to adoption, physical placement or visitation with the juvenile's parent, or permanent guardianship.

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The Menominee Indian Tribe of Wisconsin originally proposed that the 2000–02 Special Committee on State-Tribal Relations address the issue following the Wisconsin Court of Appeals decision in *In the Interest of Elmer J.K. III*, 224 Wis. 2d 372, 591 N.W.2d 176 (Wis. Ct. App. 1999). That case involved a Menominee juvenile who had been adjudicated delinquent by the Menominee Tribal Court and placed by the tribal court in a residential facility outside the boundaries of the Menominee Reservation and who then engaged in disorderly conduct and battery to staff members at the residential facility in violation of several Wisconsin criminal statutes. The *Elmer J.K.* court held that the state court had jurisdiction and stated that the Menominee Tribal Court did not have jurisdiction.

The jurisdiction of a tribal court is determined by federal law and tribal law, rather than state law. This bill does not alter, diminish, or expand the jurisdiction of either the state courts or tribal courts. Rather, the bill provides a process for consultation to determine which government should exercise its existing jurisdiction based on the best interests of the juvenile and of the public.

The bill includes the following provisions relating to an American Indian juvenile who allegedly commits a delinquent act and, at the time of the alleged delinquent act was both: (a) under an order of a tribal court, other than an order relating to adoption, physical placement or visitation with the juvenile's parent, or permanent guardianship; and (b) physically outside the boundaries of that tribe's reservation and any off-reservation trust land of either that tribe or a member of that tribe because of the tribal court order (specified circumstances):

1. Duties of Juvenile Court Intake Worker

If the intake worker of the court assigned to exercise jurisdiction under the Children's Code and the Juvenile Justice Code (juvenile court) determines in the intake inquiry that the specified circumstances exist, the juvenile court intake worker (intake worker) must promptly notify the clerk of the tribal court, a person who serves as the tribal juvenile intake worker, or a tribal prosecuting attorney that the juvenile has allegedly committed a delinquent act under the specified circumstances. If the intake worker is notified by a tribal official that a petition related to the delinquent act has been or may be filed in tribal court, the intake worker must consult with tribal officials.

After the consultation, the intake worker must determine whether the best interests of the juvenile and of the public would be served by having the matter proceed solely in tribal court. If the intake worker determines that the best interests of the juvenile and of the public would be served by having the matter proceed solely in tribal court, the intake worker must close the case. If the intake worker determines that the best interests of the juvenile and of the public would not be served by having the matter proceed solely in tribal court, the intake worker must, as under current law, do one of the following: (a) enter into a deferred prosecution agreement; (b) request that the district attorney file a delinquency petition or, if the juvenile is under 10 years of age, request that the district attorney or corporation counsel file a juvenile in need of protection or services (JIPS) delinquency petition; or (c) close the case. (The county board determines whether the district attorney or corporation counsel handles JIPS cases in the county.) The bill specifies that the intake worker may close a case without consultation with tribal officials.

2. Duties of District Attorney or Corporation Counsel

Under current law, a district attorney may file a delinquency petition in the juvenile court, and either the district attorney or corporation counsel (as determined by the county board) may file a JIPS delinquency petition in the juvenile court, based on the request of the intake worker or after the intake worker has closed the case. The bill provides that, if the specified circumstances apply, before filing such a petition the district attorney or corporation counsel must determine whether the intake worker has received notification from a tribal official that a petition relating to the alleged delinquent act has

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been or may be filed in tribal court. If the intake worker has received that notification or if a tribal official has provided that notification directly to the district attorney or corporation counsel, the district attorney or corporation counsel must attempt to consult with appropriate tribal officials before filing the delinquency or JIPS delinquency petition in juvenile court.

3. Delinquency or JIPS Delinquency Petition

If a decision is made to file a delinquency petition or JIPS delinquency petition in juvenile court, the petition must include a statement that the specified circumstances exist. In addition, the petition also must include a statement that a petition has been or may be filed in tribal court relating to the same delinquent act if a tribal official has informed the intake worker, district attorney, or corporation counsel that that is the case.

4. Juvenile Court Procedure

If the juvenile court is informed during a delinquency proceeding or JIPS delinquency proceeding that a petition relating to the same delinquent act has been or may be filed in tribal court, the juvenile court must stay (suspend) the proceeding and communicate with the tribal court to discuss whether the tribal court or juvenile court may be the more appropriate forum. If the juvenile court and tribal court either mutually agree or agree under the terms of an established judicial protocol applicable to the juvenile court that the tribal court would be the more appropriate forum, the juvenile court must either dismiss the delinquency petition or JIPS delinquency petition without prejudice or stay the proceeding. The juvenile court's decision must be based on the best interests of the juvenile and of the public.

If the juvenile court stays the proceeding, rather than dismissing the petition, the juvenile court's jurisdiction over the juvenile continues for one year after the last order affecting the stay is entered. During that time, a motion may be made by any of the parties to lift the stay order and have the juvenile court take further action. If, however, the stay order remains in place, the petition will automatically be dismissed one year following the last court order.

5. Venue

If a petition relating to the same delinquent act has been filed in tribal court, the bill prohibits venue for a delinquency proceeding or JIPS delinquency proceeding from being in the county where an American Indian juvenile resides (unless it is also either the county where the juvenile is present or the county where the violation occurred). In contrast, under current law, venue for a delinquency proceeding or JIPS delinquency proceeding may be in any of the following 3 county circuit courts: (a) the county where the juvenile resides; (b) the county where the juvenile is present; or (c) the county where the violation occurred.

The bill does *not* address the issue of possible concurrent tribal court jurisdiction and juvenile court jurisdiction if an American Indian juvenile commits a delinquent act either: (a) *on* a tribe's reservation or off-reservation trust land that is subject to Public Law 280 (that is, Indian country in Wisconsin, other than the Menominee Reservation); or (b) *off* a tribe's reservation and off-reservation trust land if the juvenile was not off the reservation or off-reservation trust land because of a tribal court order. The special committee has not been asked to address either issue.

1 **SECTION 1.** 938.02 (12m) of the statutes is created to read:

2 **938.02 (12m)** "Off-reservation trust land" means land in this state that is held
3 in trust by the federal government for the benefit of a tribe or an American Indian
4 and that is located outside the boundaries of a tribe's reservation.

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1 **SECTION 2.** 938.02 (15c) of the statutes is created to read:

2 **938.02 (15c)** “Reservation” means land in this state within the boundaries of
3 the reservation of a tribe.

4 **SECTION 3.** 938.02 (18g) of the statutes is created to read:

5 **938.02 (18g)** “Tribe” means a federally recognized American Indian tribe or
6 band in this state.

NOTE: SECTIONS 1 to 3 define “tribe”, “reservation”, and “off-reservation trust
land”, in the general definitions section of ch. 938, stats. (the Juvenile Justice Code).

7 **SECTION 4.** 938.185 (1) (intro.) of the statutes is amended to read:

8 **938.185 (1)** (intro.) Subject to ~~sub.~~ subs. (3), and (4), venue for any proceeding
9 under ss. 938.12, 938.125, 938.13, 938.135, and 938.18 may be in any of the following:

10 **SECTION 5.** 938.185 (4) of the statutes is created to read:

11 **938.185 (4)** Venue for a proceeding under s. 938.12 or 938.13 (12) based on an
12 allegation that an American Indian juvenile has committed a delinquent act may not
13 be in the county specified in sub. (1) (a), unless that county is specified in sub. (1) (b)
14 or (c), if all of the following circumstances apply:

15 (a) At the time of the alleged delinquent act the juvenile was under an order
16 of a tribe’s court, other than a tribal court order relating to adoption, physical
17 placement or visitation with the juvenile’s parent, or permanent guardianship.

18 (b) At the time of the alleged delinquent act the juvenile was physically outside
19 the boundaries of that tribe’s reservation and any off-reservation trust land of either
20 that tribe or a member of that tribe as a direct consequence of a tribal court order
21 under par. (a), including a tribal court order placing the juvenile in the home of a
22 relative of the juvenile who on or after the date of the tribal court order resides
23 physically outside the boundaries of a reservation and off-reservation trust land.

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1 (c) A petition relating to the delinquent act has been filed in a tribal court that
2 has jurisdiction over the juvenile.

NOTE: Eliminates the court of the county where an American Indian juvenile resides as the venue for a delinquency proceeding or JIPS delinquency proceeding (unless it is either the county where the juvenile is present or the county where the violation occurred), if the specified circumstances exist.

3 **SECTION 6.** 938.24 (2r) of the statutes is created to read:

4 938.24 (2r) (a) If the intake worker determines as a result of the intake inquiry
5 that the juvenile is an American Indian who has allegedly committed a delinquent
6 act and that all of the following circumstances apply, the intake worker shall
7 promptly notify the clerk of the tribal court under subd. 1., a person who serves as
8 the tribal juvenile intake worker, or a tribal prosecuting attorney that the juvenile
9 has allegedly committed a delinquent act under those circumstances:

10 1. At the time of the delinquent act the juvenile was under an order of a tribe's
11 court, other than a tribal court order relating to adoption, physical placement or
12 visitation with the juvenile's parent, or permanent guardianship.

13 2. At the time of the delinquent act the juvenile was physically outside the
14 boundaries of that tribe's reservation and any off-reservation trust land of either
15 that tribe or a member of that tribe as a direct consequence of a tribal court order
16 under subd. 1., including a tribal court order placing the juvenile in the home of a
17 relative of the juvenile who on or after the date of the tribal court order resides
18 physically outside the boundaries of a reservation and off-reservation trust land.

19 (b) If the intake worker is notified by an official of the tribe that a petition
20 relating to the delinquent act has been or may be filed in tribal court, the intake
21 worker shall consult with tribal officials, unless the intake worker determines under
22 sub. (4) that the case should be closed. After the consultation, the intake worker shall
23 determine whether the best interests of the juvenile and of the public would be served

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1 by having the matter proceed solely in tribal court. If the intake worker determines
2 that the best interests of the juvenile and of the public would be served by having the
3 matter proceed solely in tribal court, the intake worker shall close the case. If the
4 intake worker determines that the best interests of the juvenile and of the public
5 would not be served by having the matter proceed solely in tribal court, the intake
6 worker shall proceed under sub. (3) or (4).

NOTE: Under current law, if a juvenile is alleged to have committed a delinquent act, information is referred to an intake worker who must conduct an intake inquiry to determine whether the available facts establish on their face that the juvenile court has jurisdiction and also to determine the best interests of the juvenile and of the public with regard to any action to be taken. An intake worker must do one of the following: (a) request that the district attorney file a delinquency petition or, for juveniles under 10 years of age, request that the district attorney (or the corporation counsel, if designated by the county board of supervisors to handle JIPS delinquency cases) file a JIPS delinquency petition; (b) enter into a deferred prosecution agreement requiring the juvenile to undertake various actions; or (c) close the case. This generally must occur within 40 days of receipt of the referral information. An intake worker must perform his or her responsibilities under general written policies formulated by the circuit judges for the county, subject to approval of the chief judge of the judicial administrative district.

Under current law, if an intake worker decides to close a delinquency or JIPS delinquency case, the intake worker must provide written notice to the district attorney (or corporation counsel if the juvenile is under 10 years of age and the county board has designated the corporation counsel to handle JIPS delinquency cases) and must attempt to provide written notice to all victims of the juvenile's act that the case is being closed. Even if the intake worker has closed the case, the district attorney may initiate a delinquency proceeding and the district attorney or the corporation counsel may initiate a JIPS delinquency proceeding if the juvenile is under 10 years of age. Except in certain circumstances, the petition must be filed within 20 days after the district attorney or corporation counsel has been notified that the case has been closed by the intake worker.

This bill provides that if the intake worker determines as a result of the intake inquiry that the juvenile is an American Indian and that, at the time of an alleged delinquent act, the juvenile was under an order of a tribal court, other than a tribal court order relating to adoption, physical placement or visitation with the juvenile's parent, or permanent guardianship, and was physically outside the boundaries of that tribe's reservation and any off-reservation trust land of either that tribe or a member of that tribe as a direct consequence of the tribal court order, the intake worker must promptly notify the clerk of the tribal court, a person who serves as the tribal juvenile intake worker, or a tribal prosecuting attorney that the juvenile has allegedly committed a delinquent act under the specified circumstances. If the intake worker is notified by a tribal official that a petition related to the delinquency has been or may be filed in tribal court, the intake worker must consult with tribal officials.

After the consultation, the intake worker must determine whether the best interests of the juvenile and of the public would be served by having the matter proceed solely in tribal court. If the intake worker determines that the best interests of the juvenile and of the public would be served by having the matter proceed solely in tribal court, the intake worker must close the case. If the intake worker determines that the best interests of the juvenile and of the public would not be served by having the matter

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proceed solely in tribal court, the intake worker must, as under current law, enter into a deferred prosecution agreement, request that a delinquency petition or JIPS delinquency petition be filed, or close the case. The bill specifies that the intake worker may close a case without consultation with tribal officials.

The bill does *not* eliminate the duty of the intake worker to inform the district attorney or corporation counsel that the case has been closed or the authority of the district attorney or corporation counsel to initiate a delinquency proceeding or JIPS delinquency proceeding even though the intake worker has closed the case. The bill also does *not* eliminate the intake worker's duty to notify the victim of the delinquent act.

SECTION 7. 938.25 (2g) of the statutes is created to read:

1
2 **938.25 (2g)** If the circumstances described in s. 938.24 (2r) (a) apply, before
3 filing a petition under s. 938.12 or 938.13 (12) the district attorney or corporation
4 counsel shall determine whether the intake worker has received notification under
5 s. 938.24 (2r) (b) from a tribal official that a petition relating to the alleged delinquent
6 act has been or may be filed in tribal court. If the intake worker has received that
7 notification or if a tribal official has provided that notification directly to the district
8 attorney or corporation counsel, the district attorney or corporation counsel shall
9 attempt to consult with appropriate tribal officials before filing a petition under s.
10 938.12 or 938.13 (12).

NOTE: Requires the district attorney or corporation counsel to attempt to consult with appropriate tribal officials before filing a delinquency petition or JIPS delinquency petition under the specified circumstances.

SECTION 8. 938.255 (1) (cr) of the statutes is created to read:

11
12 **938.255 (1) (cr) 1.** If the petition is initiating proceedings under s. 938.12 or
13 938.13 (12) and all of the following circumstances apply, a statement to that effect:

14 a. The juvenile is an American Indian.

15 b. At the time of the alleged delinquent act, the juvenile was under an order
16 of a tribe's court, other than a tribal court order relating to adoption, physical
17 placement or visitation with the juvenile's parent, or permanent guardianship.

18 c. At the time of the delinquent act the juvenile was physically outside the
19 boundaries of that tribe's reservation and any off-reservation trust land of either

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1 that tribe or a member of that tribe as a direct consequence of a tribal court order
2 under subd. 1. b., including a tribal court order placing the juvenile in the home of
3 a relative of the juvenile who on or after the date of the tribal court order resides
4 physically outside the boundaries of a reservation and off-reservation trust land.

5 2. If the statement under subd. 1. is included in the petition and if the intake
6 worker, district attorney, or corporation counsel has been notified by an official of the
7 tribe that a petition relating to the delinquent act has been or may be filed in tribal
8 court with respect to the alleged delinquent act, a statement to that effect.

NOTE: Requires that a delinquency petition or JIPS delinquency petition filed with
respect to an American Indian juvenile include specific information if the specified
circumstances exist.

9 **SECTION 9.** 938.255 (2) of the statutes is amended to read:

10 938.255 **(2)** If any of the facts in sub. (1) (a) to ~~(em)~~ (cr) and (f) are not known
11 or cannot be ascertained by the petitioner, the petition shall so state.

12 **SECTION 10.** 938.299 (9) of the statutes is created to read:

13 938.299 **(9)** (a) If a petition under s. 938.12 or 938.13 (12) includes the
14 statement in s. 938.255 (1) (cr) 2. or if the court is informed during a proceeding under
15 s. 938.12 or 938.13 (12) that a petition relating to the delinquent act has been filed
16 in a tribe's court with respect to a juvenile to whom the circumstances specified in
17 s. 938.255 (1) (cr) 1. apply, the court shall stay the proceeding and communicate with
18 the tribal court in which the other proceeding is or may be pending to discuss which
19 court may be the more appropriate forum.

20 (b) If the court and tribal court either mutually agree or agree under the terms
21 of an established judicial protocol applicable to the court that the tribal court would
22 be the more appropriate forum, the court shall dismiss the petition without prejudice

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1 or stay the proceeding. The court's decision shall be based on the best interests of the
2 juvenile and of the public.

3 (c) If a stay is ordered under par. (b), jurisdiction of the court continues over the
4 juvenile until one year has elapsed since the last order affecting the stay was entered
5 in the court. At any time during which jurisdiction of the court continues over the
6 juvenile, the court may, on motion and notice to the parties, subsequently lift the stay
7 order and take any further action in the proceeding as the interests of the juvenile
8 and of the public require. When jurisdiction of the court over the juvenile terminates
9 by reason of the lapse of the one year following the last order affecting the stay, the
10 clerk of the court shall, without notice, enter an order dismissing the petition.

NOTE: Includes provisions relating to juvenile court procedure when a delinquency
or JIPS delinquency case involves an American Indian juvenile and the specified
circumstances exist.

The bill does not include details as to how the communication between the courts
is to be conducted, for example, on or off the record, after a hearing, or with or without
the parties present.

11 **SECTION 11.** 938.315 (1) (i) of the statutes is created to read:

12 938.315 (1) (i) Any period of delay resulting from consultation under s. 938.24
13 (2r) or 938.25 (2g).

NOTE: Provides that any period of delay resulting from consultation by an intake
worker, district attorney, or corporation counsel with tribal officials is not counted in
computing time periods under ch. 938, stats. (the Juvenile Justice Code).

14 **SECTION 12. Initial applicability.**

15 (1) This act first applies to delinquent acts committed on the effective date of
16 this subsection.

NOTE: Provides that the bill first applies to delinquent acts committed on the
effective date of the bill.

17 (END)