



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

The Indian Child Welfare Act

2009 Wisconsin Act 94 created the Wisconsin Indian Child Welfare Act to incorporate the provisions of the federal Indian Child Welfare Act into Wisconsin statutes. Both the federal and Wisconsin acts apply to Indian child custody proceedings, which Wisconsin law defines as proceedings governed by the federal Indian Child Welfare Act in which any of the following occur: (a) an adoptive placement; (b) an out-of-home care placement; or (c) a termination of parental rights (TPR) to an Indian child. “Indian child” means an unmarried person who is under the age of 18 years and is affiliated with an Indian tribe as: (a) a member of the Indian tribe¹; or (b) a person who is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. [ss. 48.02 (8g) and 48.028 (2) (d), Stats.]

THE FEDERAL INDIAN CHILD WELFARE ACT

The federal Indian Child Welfare Act (ICWA) was enacted in 1978. Congressional findings in ICWA included the following:

[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions. [25 U.S.C. s. 1901 (4).]

The Congressional declaration of policy included the statement that part of the policy behind ICWA was to place Indian children in foster or adoptive homes that reflect the unique values of Indian culture. [25 U.S.C. s. 1902.]

THE WISCONSIN INDIAN CHILD WELFARE ACT

The Wisconsin Indian Child Welfare Act (WICWA) was enacted in 2009. [s. 48.028, Stats.] Prior to the enactment of WICWA, ICWA superseded state law with respect to Indian child

¹ The U.S. Supreme Court has held that an Indian tribe has the right to define its own membership. [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).] Indian tribes often require a certain degree of Indian blood or lineal descendency in order for an individual to enroll as a member of the tribe.

custody proceedings because of federal supremacy. Even though state statutes did not explicitly include ICWA provisions of attorneys, county staff, courts, child welfare agencies, and others to were responsible for knowing and complying with ICWA when ICWA applied. WICWA incorporates the provisions of ICWA into state law.

The Wisconsin statutes provide that ICWA supersedes the Children's Code and the Juvenile Justice Code in any Indian child custody proceeding governed by that Act, except that in any case in which Wisconsin statutes provide a higher standard of protection for the rights of an Indian child's parent or Indian custodian than the rights provided under ICWA, the court must apply the Wisconsin statutory standard. [s. 48.028 (10), Stats. Also, see *In Re Interest of D.S.P.*, 166 Wis. 2d 464 (1992).]

DECLARATION OF POLICY

Under Wisconsin law, in Indian child custody proceedings, the best interests of the child are determined in accordance with ICWA and the policy set forth below. It is the policy of this state for courts and agencies responsible for child welfare to do all of the following:

- Cooperate fully with Indian tribes in order to ensure that ICWA is enforced in this state.
- Protect the best interests of Indian children and promote the stability and security of Indian tribes and families by doing all of the following:
 - Establishing minimum standards for the removal of Indian children from their families and placing those children in out-of-home care placements, preadoptive placements, or adoptive placements that will reflect the unique value of Indian culture.
 - Using practices, in accordance with ICWA, the legislative purposes of the Children's Code, and other applicable law, that are designed to prevent the voluntary or involuntary out-of-home care placement of Indian children and, when an out-of-home care placement, adoptive placement, or preadoptive placement is necessary, placing an Indian child in a placement that reflects the unique values of the Indian child's tribal culture and that is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe and tribal community.

[ss. 48.01 (2) and 48.028 (1), Stats.]

JURISDICTION OVER INDIAN CHILD CUSTODY PROCEEDINGS

ICWA and WICWA apply to any Indian child custody proceeding. Current law provides that ICWA and WICWA apply to these proceedings regardless of whether the Indian child is in the

legal custody or physical custody of an Indian parent², Indian custodian³, extended family member⁴, or other person at the commencement of the proceeding and whether the Indian child resides or is domiciled on or off of a reservation. The juvenile court (i.e., the court assigned to exercise jurisdiction under chs. 48 and 938, Stats., the Children’s Code and the Juvenile Justice Code) may not determine whether WICWA and ICWA apply to an Indian child custody proceeding based on whether the Indian child is part of an existing Indian family.

Exclusive Tribal Jurisdiction; Child Residing Within Reservation

An Indian tribe has exclusive jurisdiction over any Indian child custody proceeding involving an Indian child who resides or is domiciled within the reservation of the tribe, except when that jurisdiction is otherwise vested in the state by federal law. If an Indian child is a ward of a tribal court, the Indian tribe must retain exclusive jurisdiction regardless of the residence or domicile of the child.

Transfer of Proceedings to Tribe; Child not Residing Within Reservation

In any Indian child custody proceeding involving an out-of-home placement of, or TPR to, an Indian child who is not residing or domiciled within the reservation of the Indian child’s tribe, the juvenile court must, upon 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:

- A parent of the Indian child objects to the transfer.
- The Indian child’s tribe does not have a tribal court, or the tribal court of the Indian child’s tribe declines jurisdiction.
- The court determines that good cause exists to deny the transfer.

In determining whether good cause exists, the court may not consider the perceived inadequacy of the tribal social services department or the tribal court. The court may

² For purposes of ICWA and WICWA, a “parent” is a biological parent, an Indian husband who has consented to the artificial insemination of his wife, or an Indian person who has lawfully adopted an Indian child, including an adoption under tribal law or custom, and includes, in the case of a nonmarital child who is not adopted or whose parents do not subsequently intermarry, a person acknowledged under state law, a substantially similar law of another state, or tribal law or custom to be the biological father or a person adjudicated to be the biological father, but does not include any person whose parental rights have been terminated. [s. 48.02 (13), Stats.]

³ “Indian custodian” means an Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of the child. [s. 48.02 (8p), Stats.]

⁴ “Extended family member” is defined as a person who is defined as a member of an Indian child’s extended family by the law or custom of the Indian child’s tribe or, in the absence of such a law or custom, a person who has attained the age of 18 years and who is the Indian child’s grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first cousin, 2nd cousin, or stepparent. [s. 48.028 (2) am), Stats.]

determine that good cause exists to deny the transfer only if the person opposing the transfer shows by clear and convincing evidence that any of the following applies:

- The Indian child is 12 years of age or over and objects to the transfer.
- 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 the 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.
- The Indian child's tribe received notice of the proceeding as required under current law, the tribe has not indicated to the court in writing that the tribe is monitoring the proceeding and may request a transfer at a later date, and the tribe files a petition for transfer more than six months after the tribe received notice of the proceeding or, if the proceeding is a TPR proceeding, more than three months after the tribe received notice of the proceeding.

Return of Child to Parent or Custodian if Improperly Removed

If the juvenile court determines that the 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 of the Indian child after a visit or other temporary relinquishment of custody, the court must decline jurisdiction over the petition and immediately return the Indian child to the custody of the parent or Indian custodian, unless the court determines that returning the Indian child to his or her parent or Indian custodian would subject the Indian child to substantial and imminent danger or threat of that danger.

Indian Custodian or Tribe May Intervene at Any Point

An Indian child's Indian custodian or tribe may intervene at any point in an Indian child custody proceeding involving the out-of-home care placement of, or TPR to, the Indian child.

Full Faith and Credit to Tribal Proceedings

The State must give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe that are applicable to an Indian child custody proceeding to the same extent that the State gives full faith and credit to the public acts, records, and judicial proceedings of any other governmental entity.

COURT PROCEEDINGS

Notice to Parent, Custodian, and Tribe

In any involuntary proceeding involving the out-of-home care placement of, or TPR to, a child whom the court knows or has reason to know is an Indian child, the party seeking the out-of-

home care placement or TPR must, for the first hearing of the proceeding, notify the Indian child's parent, Indian custodian, and tribe, by registered mail, return receipt requested, of the pending proceeding and of their right to intervene in the proceeding. The party must file the return receipt with the court.

Notice of subsequent hearings must be in writing and may be given by mail, personal delivery, or facsimile transmission, but not by electronic mail.

If the identity or location of the Indian child's parent, Indian custodian, or tribe cannot be determined, the required notice must be given to the U.S. Secretary of the Interior in the same manner as described above.

The first hearing of the proceeding may not be held until at least 10 days after receipt of the notice by the parent, Indian custodian, and tribe or at least 15 days after receipt of the notice by the U.S. Secretary of the Interior. On request of the parent, Indian custodian, or tribe, the court must grant a continuance of up to 20 additional days to enable the requester to prepare for that hearing.

Appointment of Counsel for Parent, Custodian, or Child

Whenever an Indian child is the subject of a proceeding involving the removal of the Indian child from the home of his or her parent or Indian custodian, placement of the Indian child in an out-of-home care placement, or TPR to the Indian child, the Indian child's parent or Indian custodian has the right to be represented by court-appointed counsel. The court may also, in its discretion, appoint counsel for the Indian child if the court finds that the appointment is in the best interests of the Indian child.

Requirements for Out-of-Home Care Placement

The court may not order an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in an out-of-home care placement unless all of the following occur:

- The court or jury finds by clear and convincing evidence, including the testimony of one or more qualified expert witnesses chosen in the order of preference described below, 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.
- The court or jury finds by clear and convincing evidence that active efforts, described below, have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful. Current law provides that the court or jury must make

that finding even if circumstances exist for which reasonable efforts need not be made in a child welfare proceeding that does not affect an Indian child.⁵

Requirements for Involuntary TPR

Under WICWA, the court may not order an involuntary TPR to an Indian child unless all of the following occur:

- The court or jury finds beyond a reasonable doubt that the 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. The evidence must include the testimony of one or more qualified expert witnesses chosen in the order of preference described below.
- The court or jury finds by clear and convincing evidence that active efforts, described below, have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

Qualified Expert Witness

Any party to a proceeding involving an out-of-home care placement of, or involuntary TPR to, an Indian child may call a qualified expert witness. In general, a qualified expert witness must be chosen in the following order of preference:

1. A member of the Indian child's tribe who is recognized by the Indian child's tribal community as knowledgeable regarding the tribe's customs relating to family organization or child-rearing practices.
2. A member of another tribe who is knowledgeable regarding the customs of the Indian child's tribe relating to family organization or child-rearing practices.
3. A professional person having substantial education and experience in the person's professional specialty and having substantial knowledge of the customs, traditions, and values of the Indian child's tribe relating to family organization and child-rearing practices.

⁵ Under current law, a court is not required to determine that a child welfare agency (e.g., a county department of human services or the Bureau of Milwaukee Child Welfare) has made reasonable efforts with respect to a parent of the child to prevent the removal of the child from the home if the court finds the parent has: (a) subjected the child to aggravated circumstances, including torture, chronic abuse, sexual abuse, or felony abandonment of the child; (b) committed or attempted murder of the child's other parent; (c) committed an assault crime that resulted in great or substantial bodily harm to the child or another child of the parent (d) had parental rights to another child involuntarily terminated; or (e) relinquished custody of the child within 72 hours of the child's birth. [s. 48.028 (4) (d) 2. and 48.355 (2d) (b) 1. to 5., Stats.]

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

A qualified expert witness from a lower order of preference may be chosen only if the party calling the qualified expert witness shows that it has made a diligent effort to secure the attendance of a qualified expert witness from a higher order of preference. A qualified expert witness from a lower order of preference may not be chosen solely because a qualified expert witness from a higher order of preference is able to participate in the Indian child custody proceeding only by telephone or live audiovisual means.

The fact that a qualified expert witness called by one party is from a lower order of preference than a qualified expert witness called by another party may not be the sole consideration in weighing the testimony and opinions of the qualified expert witnesses. In weighing the testimony of all witnesses, the court must consider as paramount the best interest of the Indian child. The court must determine the qualifications of a qualified expert witness as provided in evidence laws for civil proceedings.

Active Efforts to Prevent the Breakup of the Indian Family

As noted above, to place an Indian child in an out-of-home care placement or to involuntarily terminate the parental rights to an Indian child, there must be a showing that active efforts have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family. The court may not order an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in an out-of-home care placement unless the evidence of active efforts shows that there has been an ongoing, vigorous, and concerted level of case work and that the active efforts were made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers. The consideration by the court or jury of whether active efforts were made must include whether all of the following activities were conducted:

- Representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child-rearing practice within the tribal community were requested to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the tribe and of the Indian community, including traditional and customary support actions, and services, to address those circumstances.
- A comprehensive assessment of the situation of the Indian child's family was completed, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.
- Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the earliest

possible point in the proceeding and their advice was actively solicited throughout the proceeding.

- Extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, were notified and consulted to identify and provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.
- Arrangements were made to provide natural and unsupervised family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan⁶, including arrangements for transportation and other assistance to enable family members to participate in that interaction.
- All available family preservation strategies were offered or employed and the involvement of the Indian child's tribe was requested to identify those strategies and to ensure that those strategies are culturally appropriate for the Indian child's tribe.
- Community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs were identified, information about these resources was provided to the Indian child's family, and the Indian child's family was actively assisted or offered active assistance in accessing those resources.
- Monitoring of client progress and client participation in services was provided.
- A consideration of alternative ways of addressing the needs of the Indian child's family was provided, if services did not exist or if existing services were not available to the family.

If any of the first three activities listed above were not conducted, the person seeking the out-of-home care placement or involuntary TPR must submit documentation to the court explaining why the activity was not conducted.

⁶ 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 or home providing long-term stability. The plan includes a description of services offered and provided in an effort to prevent the removal of the child from his or her home, while assuring his or her health and safety, and to achieve the goal of permanency, among other items. [s. 48.38, Stats.]

VOLUNTARY PROCEEDINGS—CONSENT AND WITHDRAWAL OF CONSENT

Voluntary Consent to Out-of-Home Care Placement

A voluntary consent by a parent or Indian custodian to an out-of-home care placement of an Indian child or a delegation of powers by a parent regarding the care and custody of an Indian child⁷ is not valid unless the consent or delegation 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 or delegation were fully explained in detail to, and were fully understood by, the parent or Indian custodian. The judge must also certify that the parent or Indian custodian fully understood the explanation in English or that the explanation was interpreted into any language that the parent or Indian custodian understood.

Any consent or delegation of powers given prior to or within 10 days after the birth of the Indian child is not valid.

A parent or Indian custodian who has executed a consent or delegation may withdraw the consent or delegation for any reason at any time, and the Indian child must be returned to the parent or Indian custodian. A parent or Indian custodian who has executed a consent or delegation of powers may also move to invalidate the out-of-home care placement or delegation of powers by moving the court to invalidate the action, as described below.

Voluntary TPR

Under current law, a voluntary consent by a parent to a TPR is not valid unless 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 judge must also certify that the parent fully understood the explanation in English or that the explanation was interpreted into any language that the parent understood.

Any consent or delegation of powers given prior to or within 10 days after the birth of the Indian child is not valid.

A parent who has executed a consent may withdraw the consent for any reason at any time prior to the entry of a final order, and the Indian child must be returned to his or her parent unless there is a dispositional order⁸ or agreement that provides for a different placement. After the entry of a final TPR order, a parent who has executed a consent may withdraw that

⁷ Under current law, a parent who has legal custody of a child, by a power of attorney that is properly executed by all parents who have legal custody of the child, may delegate to an agent for a period not to exceed one year, any of his or her powers regarding the care and custody of the child, except the power to consent to marriage or adoption of the child, performance of an abortion, TPR to the child, or enlistment in the U.S. armed services. [s. 48.979, Stats.]

⁸ A dispositional order is a juvenile court order entered when a child has been found to be in need of protection or services. These orders are generally continued while a TPR proceeding is pending. [See ss. 48.335, 48.368, 938.335, and 938.368, Stats.]

consent, as described below; move to invalidate the TPR, as described below; or move for relief from the judgment, as provided under current law.

Withdrawal of Consent After Order Granting Adoption

After the entry of an order granting adoption of an Indian child, a parent who has consented to TPR may withdraw that consent and move the court for relief from the judgment on the grounds that the consent was obtained through fraud or duress. Any such motion must be filed within two years after the entry of an order granting adoption of the Indian child. A motion under this provision does not affect the finality or suspend the operation of the judgment or TPR or adoption order. If the court finds that the consent was obtained through fraud or duress, the court must vacate the judgment or order terminating parental rights and, if applicable, the order granting adoption, and return the child to the custody of the parent, unless a dispositional order or agreement that was in effect prior to the TPR provides for a different placement.

INVALIDATION OF OUT-OF-HOME CARE PLACEMENT OR TPR

A Indian child who is the subject of an Indian child custody proceeding; a parent or Indian custodian from whose custody that Indian child was removed; or the Indian child's tribe may move the court to invalidate an out-of-home care placement, delegation of parental powers, or TPR on the grounds that it was made in violation of ICWA. If the court finds that those grounds exist, the court must invalidate the placement, delegation, or TPR.

PLACEMENT PREFERENCES FOR AN INDIAN CHILD

Adoptive Placement

In placing an Indian child for adoption, preference must be given, in the absence of good cause, as described below, to the contrary, to a placement with one of the following, in the order of preference listed:

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

Out-of-Home Care Placement

Any Indian child who is accepted for an out-of-home care placement or a preadoptive placement must be placed in 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 those special needs. In placing an Indian child, preference must be given, in the absence of good cause, as described below, to the contrary, to placement in one of the following, in the order of preference listed:

1. The home of an extended family member of the Indian child.

2. A foster home licensed, approved, or specified by the Indian child's tribe.
3. An Indian foster home licensed or approved by the Department of Children and Families (DCF), a county department of human or social services, 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.

Any Indian child who is being held in temporary physical custody must be placed in compliance with the provisions, described above, relating to out-of-home care placement preferences unless the person responsible for determining the placement finds good cause, as described below, for departing from the order of placement preference or finds that emergency conditions necessitate departing from that order. When the reason for departing from that order is resolved, the Indian child must be placed in compliance with the order of placement preferences.

Tribal or Personal Preferences

If the Indian child's tribe has established, by resolution, an order of preference that is different from the ones set forth in statute, the order of preference established by that tribe must be followed, in the absence of good cause, as described below, to the contrary, so long as an adoptive placement is appropriate to the Indian child's special needs, if any, and so long as an out-of-home care, preadoptive, or temporary physical custody placement is the least restrictive setting appropriate for the Indian child's special needs.

When appropriate, the preference of the Indian child or parent must be considered, and, when a parent who has consented to the placement evidences a desire for anonymity, that desire must be given weight, in determining the preference.

Social and Cultural Standards

Current law provides that the standards to be applied in meeting the placement preference requirements, described above, must be the prevailing social and cultural standards of the Indian community in which the Indian child's parents or extended family members reside or with which the Indian child's parents or extended family members maintain social and cultural ties.

Good Cause to Depart From Preferences

The statutes set forth the requirements for findings of good cause to depart from the placement preferences described above. Whether there is good cause to depart from the placement preferences must be determined based on one or more of the following considerations:

- When appropriate, the request of the Indian child's parent or, if the Indian child is of sufficient age and developmental level to make an informed decision, the Indian

child, unless the request is made for the purpose of avoiding the application of WICWA and ICWA.

- Any extraordinary physical, mental, or emotional health needs of the Indian child requiring highly specialized treatment services as established by the testimony of an expert witness, including a qualified expert witness. The length of time that an Indian child has been in a placement does not, in itself, constitute an extraordinary emotional health need.
- The unavailability of a suitable placement for the Indian child after diligent efforts have been made to place the Indian child in the applicable order of preference.

The burden of establishing good cause to depart from an order of preference is on the party requesting that departure.

RETURN OF CUSTODY TO FORMER PARENT OR CUSTODIAN

If an Adoption is Vacated, Set Aside, or Terminated

If a final order granting adoption of an Indian child is vacated or set aside, or if the parental rights to an Indian child of all adoptive parents of the Indian child are voluntarily terminated, the Indian child's former parent or former Indian custodian may petition for the return of custody of the Indian child.

The court must hold a hearing on the petition and, at the conclusion of the hearing, the court must grant a petition for the return of custody of the Indian child to the Indian child's former parent or former Indian custodian unless there is a showing that return of custody is not in the best interest of the Indian child.

Removal From an Out-of-Home Placement

If an Indian child is removed from an out-of-home care placement in order to place the Indian child in another out-of-home care placement, a preadoptive placement, or an adoptive placement, the new placement must be made using the procedures for placement of Indian children, described above. However, if the Indian child is removed from an out-of-home care placement in order to return the Indian child to the home of a parent or Indian custodian from whose custody the Indian child was originally removed, that placement is not subject to the procedures described above.

ADOPTIVE COUPLE V. BABY GIRL

The U.S. Supreme Court recently ruled on a case regarding ICWA. [*Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).] The case interpreted the portions of ICWA relating to barring involuntary TPR in the absence of a showing that serious harm to the Indian child is likely to result from the parent's continued custody of the child; requiring a showing of remedial efforts made to prevent the breakup of an Indian family before an involuntary TPR may be ordered; and the placement preferences for adoptive placements.

Insofar as the language in ICWA is consistent with the language in WICWA, this holding applies to Wisconsin cases. It is possible that Wisconsin will provide heightened protections for Indian parents, custodians, and tribes in some cases, but it is not clear at this point.

BACKGROUND

The case involved a couple who were engaged to be married but ended their relationship when the woman became pregnant. In a text message, the father said that he wanted to relinquish his rights to the child.

The mother decided to place the child for adoption and selected a couple through a private adoption agency. Because she believed that the father had Cherokee Indian heritage, her attorney contacted the Cherokee Nation. However, the inquiry to the tribe misspelled the father's name, so the tribe could not verify whether the father was a member or not.

After the baby was born, the birth mother relinquished her parental rights and consented to the adoption of the baby. The adoptive couple then initiated adoption proceedings in South Carolina.

Shortly after receiving notice of the adoption proceedings, the father requested a stay of the adoption proceedings and sought custody of the baby. The case eventually made its way to the South Carolina Supreme Court which held that the child must be placed with the biological father based upon three provisions of ICWA described below. The U.S. Supreme Court reversed the state court decision.

SHOWING REQUIRED FOR INVOLUNTARY TPR

The South Carolina Supreme Court held that the adoptive couple violated the provision of ICWA which provides that “[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt,...that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” [25 U.S.C. s. 1912 (f).]

The U.S. Supreme Court found that holding was in error. In its analysis, the Court focused on the phrase “continued custody,” and determined that s. 1912 (f) of ICWA does not apply in cases in which the Indian parent never had custody of the Indian child as of the time of the adoption proceedings.

ACTIVE EFFORTS TO PREVENT THE BREAKUP OF THE INDIAN FAMILY

The South Carolina Supreme Court also found that the biological father's parental rights could not be terminated because the adoptive couple did not “satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” [25 U.S.C. s. 1912 (d).]

The U.S. Supreme Court did not agree with this holding. The Court found that this provision was inapplicable to the circumstances at issue because the breakup of the family was not precipitated by the TPR proceeding.

PREFERENCES FOR ADOPTIVE PLACEMENT

The South Carolina Supreme Court suggested that, if it had terminated the biological father's parental rights, it would have been required to abide by the placement preferences for adoption set forth in ICWA. The preferences are, in order: (a) a member of the child's extended family; (b) other members of the Indian child's tribe; or (c) other Indian families. [25 U.S.C. s. 1915 (a).]

The U.S. Supreme Court disagreed and found that the preferences are not applicable in cases in which no alternative party formally sought to adopt the child. The Court stated, "This is because there simply is no 'preference' to apply if no alternative party that is eligible to be preferred...has come forward."

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Anne Sappenfield, Senior Staff Attorney, on October 2, 2013.

WISCONSIN LEGISLATIVE COUNCIL

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
Telephone: (608) 266-1304 • Fax: (608) 266-3830
Email: leg.council@legis.state.wi.us
<http://www.legis.state.wi.us/lc>