



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 14-2

TO: MEMBERS OF THE SPECIAL COMMITTEE ON STATE-TRIBAL RELATIONS

FROM: David L. Lovell, Principal Analyst

RE: The Safe Haven Law and the Indian Child Welfare Act

DATE: October 9, 2014

At its August 13 meeting, the Special Committee on State-Tribal Relations heard presentations regarding two laws: the Wisconsin safe haven law [s. 48.195, Stats.]; and both the federal and Wisconsin Indian Child Welfare Acts [ICWA, 25 U.S.C. 1901, *et seq.* and WICWA, s. 48.028, Stats.]. (While ICWA and WICWA are largely the same, because of some differences between them, this Memo is written in reference to WICWA.) Following committee discussion, you directed committee staff to prepare materials that:

- Describe the safe haven law and WICWA.
- Describe how safe haven laws in other states address the requirements of ICWA.
- Present options for legislation to achieve the policy objectives of WICWA in the context of the safe haven law.

STATEMENT OF THE ISSUE

The safe haven law and WICWA are designed to accomplish separate public policy objectives. The objective of the safe haven law, as expressed in hearing testimony on the legislation that created the law, is to reduce the abandonment of infants. It pursues this objective by offering an alternative to abandonment, one that is safe to both the infant and the parent, i.e., relinquishment of an infant to the state. The law protects the safety of the parent by granting the parent immunity from prosecution for any good faith act or omission related to relinquishing her or his child and by offering the parent anonymity, if she or he wants to remain anonymous.

The objective of WICWA, as stated in the text of the act, is to protect the best interests of Indian children and to promote the stability and security of Indian families and tribes. It pursues these objectives by establishing standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes, standards that reflect the unique values of Indian culture. The standards include procedural requirements that give a central role to tribes and tribal courts in cases involving the termination of parental rights (TPR) to an Indian child or the placement of an Indian child in a foster or adoptive home. [s. 48.01 (2), Stats.]

The safe haven law acknowledges WICWA in two ways. First, the statutes specify that the circuit court has exclusive original jurisdiction over a child relinquished under the safe haven law, except as provided under WICWA. [s. 48.13 (2m), Stats.] Second, the safe haven law specifies that any information received from a person relinquishing a child must be kept confidential; among other exceptions to this, information may be shared with a tribal court that is exercising jurisdiction over the child and with attorneys representing the child and the tribe in such a case. [s. 48.195 (2) (d), Stats.]

Some commentators state, though, that the provisions of safe haven laws guaranteeing the relinquishing parent's anonymity conflict with ICWA because they deprive courts of the information they need to determine whether ICWA applies.¹ As Paul Stenzel, a Wisconsin attorney with an Indian law practice, puts it:

When applied in an Indian child's case, Safe Haven laws directly conflict with the ICWA's goal of keeping Indian children with Indian families. The ICWA's requirements and limitations apply only when the subject child is an Indian tribe member or is eligible for tribal membership. Therefore, it would be impossible to apply the Act in a voluntary termination of parental rights action when the identities of the child and parents are unknown.²

While the safe haven law provides for inquiries about this information, the inquiry is allowed only if the relinquishing parent has chosen to provide identifying information. Even then, providing the information is not required.

A similar issue arises with regard to transferring the information. A person who takes custody of the child must provide information about the relinquishment to the county intake worker, but only if requested. Also, while the law allows disclosure of this information to a

¹ Some assert that there is a legal conflict between the laws and that, under the Supremacy Clause of the U.S. Constitution, ICWA (and, therefore, WICWA) supersede state safe haven laws and must be given effect. To our knowledge, this question has not been addressed by the courts and this Memo does not attempt to answer it. However, it is not necessary to resolve this question in order to consider legislative options to further advance the policy objectives of the laws.

² Paul Stenzel, *Safe Haven Laws and the Indian Child Welfare Act: Conflicting Laws and Policy Goals Leave Indian Children at Risk*, Children's Legal Rights Journal, Vol. 29, No. 3, 2009. [Internal citations omitted.] A link to this article is available on the Internet page of the Special Committee on State-Tribal Relations.

tribal court exercising jurisdiction over the relinquished child under ICWA, it does not require this.

However, the right to anonymity that the safe haven law grants to a parent relinquishing a child is central to that law. It and the waiver of civil and criminal liability for the parent are designed to give the parent confidence that she or he will not suffer consequences as a result of the relinquishment. The more that the parent is pressed for identifying information, or otherwise delayed, the greater is the likelihood that the parent will leave with the child and subsequently abandon the child in an unsafe manner.

This creates tension between the policy objectives of the two laws. In order to ensure that a tribe can exercise its jurisdiction in an Indian child custody proceeding involving a child eligible for membership in the tribe, information about the child's identity must be obtained; however, attempts to obtain that information increase the likelihood that the parent will leave with the child and subsequently abandon it in an unsafe manner, defeating the safe haven law's policy objective.

NOTE ON TERMINOLOGY

WICWA defines "Indian child custody proceeding" to mean a proceeding governed by ICWA in which any of the following may occur: a foster care placement, an out-of-home care placement, a preadoptive placement, a TPR, or a delegation of powers by a parent regarding the care and custody of an Indian child for longer than one year. [s. 48.028 (2) (d), Stats.] In this Memo, "Indian child custody proceeding" has this meaning.

ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." [25 U.S.C. s. 1903 (4).] In this Memo, "Indian," when used as an adjective describing a child, and "Indian child" have this meaning.

Thus, in this Memo, a reference to an Indian child custody proceeding refers to a proceeding to which ICWA applies; similarly, a reference to an Indian child refers to a child to whom ICWA applies.

WISCONSIN SAFE HAVEN LAW

Under the Wisconsin safe haven law, a parent may relinquish a child not more than three days old to the state. The parent may deliver the child to a law enforcement officer, an emergency medical technician, or hospital staff, or may dial 911 and request that a law enforcement officer or emergency medical technician be dispatched to receive the child. The person who takes custody of a child must take any action necessary to protect the health and safety of the child. Within 24 hours, that person must deliver the child to an intake worker of the county social services department, and within five days must file a birth certificate for the child.

Anonymity

With limited exceptions, a parent relinquishing a child, and any person assisting the parent, may remain anonymous. The law's anonymity provisions do not apply if the person who takes custody of the child has reasonable cause to believe that the child has been the victim of abuse or neglect or that a person assisting the parent is coercing the parent to relinquish the child. Although the law generally prohibits any person from attempting to induce a person relinquishing an infant into providing identifying information, Department of Children and Families (DCF) rules specify that, if a parent voluntarily gives identifying information, the person taking custody of the child must make a reasonable effort to obtain the following:

- Information regarding the social and health history of each parent of the newborn, and of the families of each parent as prescribed by the department.
- Information on the ethnicity and race of the newborn, including whether the newborn is of American Indian heritage and, if so, any tribal affiliation.
- The name, address, telephone number, and any other identifying information of each parent, and any person assisting a parent in the relinquishment.

Confidentiality

Any person who obtains information regarding a relinquishment is required to keep that information confidential and may not disclose the information except to the following:

- The birth parent of the child, if the birth parent has waived his or her right to remain anonymous, or the adoptive parent of the child, if the child is later adopted.
- Appropriate staff of the department, county department, or licensed child welfare agency that is providing services to the child.
- A person authorized to provide or providing intake or dispositional services.
- An attending physician for purposes of diagnosis and treatment of the child.
- The child's foster parent or other person having physical custody of the child.
- A court conducting proceedings under the Children's Code and certain persons associated with the proceedings.
- A tribal court, or other adjudicative body authorized by an Indian tribe to perform child welfare functions, that is exercising jurisdiction over proceedings relating to the child, or an attorney representing the interests of the Indian tribe, or an attorney representing the interests of the child in those proceedings.

Liability

The law creates two waivers of liability. First, it specifies that a parent who relinquishes a child in conformity with the law is immune from civil or criminal liability for any good faith

act or omission in connection with that relinquishment. Second, it specifies that a person who takes custody of a relinquished child is immune from civil liability to the child's parents or criminal liability for any good faith act or omission occurring solely in connection with the act of taking custody of the child, but is not immune from any civil or criminal liability for any act or omission occurring in subsequently caring for the child.

WISCONSIN INDIAN CHILD WELFARE ACT

WICWA declares that 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 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.

Jurisdiction

In general, 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. In addition, 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 court, or the court of the Indian child's tribe declines jurisdiction.
- The circuit court determines that good cause exists to deny the transfer.

Involuntary Proceedings

WICWA establishes procedures and standards a state court must follow in an involuntary Indian child custody proceeding. The procedures include notices that must be given to the parent, Indian custodian, or tribe of the child subject to the proceeding and the appointment of counsel for the parent, Indian custodian, or child. The standards provide that a court or jury may not order the removal of an Indian child from the home of the child's parent or Indian custodian or the involuntary TPR to an Indian child unless all of the following apply:

- The court or jury finds 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 evidence used to make this finding must include the testimony of one or more qualified expert witnesses.
- The court or jury finds that active efforts have been made to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

WICWA includes extensive instructions as to who may serve as a qualified expert witness and what constitutes active efforts to prevent the breakup of the family.

Voluntary Proceedings

WICWA also sets procedures and standards for voluntary Indian child welfare proceedings. A voluntary consent by a parent or Indian custodian to an out-of-home care placement or a TPR or a delegation of parental powers must be executed in writing and recorded before a judge. The consent must be accompanied by written certification by the judge that all of the following apply:

- 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 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.

Within two years 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. 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.³

Placement Preferences for an Indian Child

In placing an Indian child for adoption, WICWA requires that preference be given 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.

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, 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 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.

WICWA allows, and in some cases requires, deviation from these preferences based on considerations related to the following:

- Preferences expressed by the tribe in a tribal resolution or order.
- Personal preferences of the Indian child or parent.
- Social and cultural standards of the tribal community.
- Good cause, as defined in the act.

³ If a dispositional order or agreement that was in effect prior to the TPR provides for a different placement, the child will be placed in accordance with that order or agreement, rather than with the parent.

Failure to Comply With WICWA

An 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.

Higher State Standard

WICWA acknowledges that ICWA supersedes state law in any Indian child welfare proceeding to which it applies. WICWA also specifies, as specified in ICWA, that, if state law provides 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 shall apply the standard under state law.

CONSIDERATION OF ICWA IN STATE SAFE HAVEN LAWS

The safe haven laws of four states--Montana, New Mexico, South Dakota, and Wisconsin--include provisions that refer to ICWA. These were identified by Paul Stenzel in the article cited earlier. We have reviewed the safe haven laws of the other states and have not discovered any others that refer directly to ICWA or include provisions specific to Indian children. However, we cannot state conclusively that no other state's safe haven law has any such provisions, as the provisions could be in a different part of a state's statutes or in administrative rules. Further research would be required to discover such provisions.

Montana

Under the Montana safe haven law, a person may relinquish an infant whom a physician reasonably believes to be no more than 30 days old to an employee of a law enforcement agency, fire department, or hospital. Among other duties, the person receiving the child must "if possible, ascertain whether the newborn has a tribal affiliation and, if so, ascertain relevant information pertaining to any Indian heritage of the newborn." [s. 40-6-405 (2) (c), Montana Code Annotated (MCA).] This statute does not define "tribal affiliation" or "Indian heritage."

In addition, the person receiving a relinquished child must provide written material containing specified information, including a statement that "any Indian heritage of the newborn brings the newborn within the jurisdiction of the Indian Child Welfare Act, 25 U.S.C. 1901, et seq." [s. 40-6-405 (2) (d) (vi), MCA.]

It appears that the MCA does not include the specific requirements of ICWA. Instead, several titles, including the titles relating to family law, minors, and adoption, include a statement such as: "A proceeding under this title that pertains to an Indian child, as defined in the Indian Child Welfare Act of 1978, 25 U.S.C. 1901, et seq., is subject to that act." [s. 42-2-102, MCA. This particular provision relates to adoption proceedings.]

New Mexico

Under New Mexico's safe haven law, a person may relinquish an infant not more than 90 days old to a safe haven site, defined as a hospital, law enforcement agency, or fire department.

A safe haven site may ask the person leaving the infant for the name of the infant's biological father or biological mother, the infant's name and the infant's medical history, but the person leaving the infant is not required to provide that information to the safe haven site. In addition, a safe haven site must ask the person leaving the infant whether the infant has a parent who is either a member of an Indian tribe or is eligible for membership in an Indian tribe, but the person leaving the infant is not required to provide that information to the safe haven site. [s. 24-22-4 D., NMS.]

Once the New Mexico Children, Youth, and Families Department takes custody of a child, it must make reasonable efforts to determine if the child is an Indian child. If the child is an Indian child, the department must notify the tribe and must make any preadoptive or adoptive placement in accordance with the placement preferences specified in the Children's Code. [s. 24-22-5 C., NMS.]

Provisions of ICWA are incorporated into New Mexico's Children's Code, Chapter 34A, NMS. In addition to specific provisions of ICWA, such as placement preferences, that chapter specifies that "[t]he protections set forth in the federal Indian Child Welfare Act of 1978, including provisions concerning notice to the Indian child's tribe, transfer to tribal court and placement preferences, apply to all proceedings involving an Indian child under the Adoption Act." [32A-5-4, NMS.]

South Dakota

Under South Dakota's safe haven law, a person may relinquish an infant not more than 60 days old to an emergency medical service provider or a licensed child placement agency. The law allows, but does not require, the person receiving a child to ask the child's parent for pertinent medical information relating to the child's medical history. The parent is not required to provide any requested information.

The law specifies that "[d]ue regard shall be afforded to the Indian Child Welfare Act (25 U.S.C. §§ 1901-1963), as amended to January 1, 2004, if that Act is applicable." [South Dakota Codified Laws (SDCL) s. 25-5A-36.] It does not appear that the specific requirements of ICWA are codified in the SDCL, although the sentence quoted here appears in various statutes to which ICWA could apply.

Wisconsin

As was stated above, and is repeated here for ease of comparison, the Wisconsin safe haven law is s. 48.195, Stats. Under this law, a person may relinquish an infant not more than three days old to a law enforcement officer, emergency medical technician, or hospital staff member.

A person relinquishing a child under the safe haven law may remain anonymous, and no one may coerce the person to provide identifying information. However, as described earlier, DCF rules require that, if the person voluntarily provides such information, the person receiving the child to make a reasonable effort to obtain the additional information, including information on the ethnicity and race of the newborn, including whether the newborn is of American Indian heritage and, if so, any tribal affiliation. [s. DCF 39.09 (1), Wis. Adm. Code.]

With certain exceptions, information relating to the relinquishment of a child must be treated as confidential. Two of the exceptions are pertinent to the topic at hand:

- When the person who takes custody of a child from the parent transfers custody of the child to the county intake worker, that person must “provide, as requested by the intake worker, all of the information relating to the relinquishment obtained before, during and after the act of relinquishment.” [s. DCF 39.09 (3) (a), Wis. Adm. Code.]
- A person may disclose information relating to a relinquishment to “[a] tribal court, or other adjudicative body authorized by an Indian tribe to perform child welfare functions, that is exercising jurisdiction over proceedings relating to the child or an attorney representing the interests of the Indian tribe, or the child in those proceedings.” [s. 48.195 (2) (d) 7., Stats.]

POLICY OPTIONS

The following policy options all describe amendments to the safe haven law. The options relate primarily to the collection and sharing of information. Additional options are included addressing other topics raised in this context.

The options presented below are drawn from legislative hearing testimony, published literature, conversations with interested persons, and input received during a September 12, 2014, conference call among interested persons.⁴ This list of options is not exhaustive. Committee members may propose any additional options they feel are appropriate. Note that, in all cases, the committee has the option of taking no action.

⁴ Participants in this conference call included:

Bridget Bauman, Office of the Director of State Courts

Melissa Blom, Division of Children, Youth, and Families, Outagamie County

Tricia Burkett, Safe Place for Newborns

Nicole Homer, Attorney, Ho-Chunk Nation

Mary Husby, Department of Social Services, Menominee Indian Tribe of Wisconsin

Jodi Johnson, Wisconsin Hospital Association

Carol Kary, Family Birth Center, Shawano Medical Center

Hon. Neal Nielsen, Circuit Court Judge, Vilas County

Obtaining Information

A person relinquishing a child under the safe haven law may remain anonymous. No one may coerce the person to provide identifying information, but, under DCF rules, if the person voluntarily provides such information, the person receiving the child must make a reasonable effort to obtain the following:

- Information regarding the social and health history of each parent of the newborn, and of the families of each parent as prescribed by the department.
- Information on the ethnicity and race of the newborn, including whether the newborn is of American Indian heritage and, if so, any tribal affiliation.
- The name, address, telephone number, and any other identifying information of each parent, and any person assisting a parent in the relinquishment.

[s. DCF 39.09 (1), Wis. Adm. Code.]

The parent is not required to provide any information, and is not even asked these questions if she or he has not already offered some identifying information. Legislation could put the requirements of this rule into the statutes and could expand the requirements by requiring that the questions be asked in all cases or even by requiring the parent to provide the information sought.

Determining if a Child is Indian

Option 1. Require a person relinquishing a child to disclose whether the child is Indian.

Option 2. Require the person to whom a child is relinquished to [inquire as to whether] [make a reasonable effort to determine if] the child is Indian.

Option 3. Require the person to whom a child is relinquished to give the parent a packet of materials that includes: a form to provide the desired information about the child; an explanation of the importance of the information to the child's future; and a return mail envelope to return the form to the county social services department.

Option 4. Add to the statutes the language in current DCF rules regarding requests for information from the relinquishing parent.

NOTE: Option 1 would appear to provide a greater likelihood of obtaining the information sought than Option 2. However, it also may increase the likelihood that the parent would leave with the child and subsequently abandon it in an unsafe manner.

Option 2 represents a middle ground between Option 1 and current law. The desired information must be sought, but the person receiving the child is required to inform the parent that she or he is not required to provide identifying information, further mitigating

the likely impact on the relinquishing parent of the request for information.

Option 3 also represents a middle ground between Option 1 and current law. One can only speculate whether Option 2 or 3 would be more effective in procuring the requested information. However, it does appear that Option 3 would be less likely to prompt a parent to leave without relinquishing the child.

Option 4 has no legal effect, as administrative rules have the force of law. It might be seen, though, as giving this provision higher visibility.

Option 2 offers two alternatives regarding the level of inquiry that must be made. The DCF rule uses the “reasonable effort” form. Presumably, making a reasonable effort to determine is more than asking the parent. If Option 2 and the “reasonable effort” form are selected, should legislation specify what efforts are required?

Also, if legislation proposes to require certain investigations to be made (i.e., making a reasonable effort to ascertain certain information), is it appropriate to assign this task to the person receiving the child--hospital staff, an emergency medical responder, or a police officer? That is, is it a task that the person is trained to do and has the resources to do, and is it reasonably related to the person’s role under the safe haven law? One alternative is to assign this task to the county social services department.

Obtaining Other Information

If it is disclosed or learned that a child being relinquished is Indian, additional information is necessary, or at least helpful.

Option 1. Require the person relinquishing the child to disclose the following:

- a. The tribe to which the child is affiliated.
- b. The names of the child’s parent or parents who are members of the tribe.

Option 2. Require the person to whom the child is relinquished to [inquire as to] [make a reasonable effort to determine] the information described in Option 1.

NOTE: The notes relating to options for determining if a child is Indian apply equally to these options.

Sharing of Information

Current law allows, but does not require, the disclosure of information regarding the tribal status of a relinquished child. The person who takes custody of a child from the parent must transfer custody of the child to the county intake worker and must “provide, as requested by the intake worker, all of the information relating to the relinquishment obtained before, during and after the act of relinquishment.” [s. DCF 39.09 (3) (a), Wis. Adm. Code.] Under this provision, the information is transferred only if requested by the intake worker.

In addition, a person who obtains any information relating to the relinquishment of a child may not disclose that information except to specifically listed entities, including to “[a] tribal court, or other adjudicative body authorized by an Indian tribe to perform child welfare functions, that is exercising jurisdiction over proceedings relating to the child, an attorney representing the interests of the Indian tribe in those proceedings, or an attorney representing the interests of the child in those proceedings.” [s. 48.195 (2) (d) 7., Stats.] Again, this transfer of information is discretionary, not mandatory.

Option 1. Require a person who [obtains any information described above] [knows or has reason to know that a relinquished child is Indian] to disclose that information to the appropriate tribe.

NOTE: Should there be any exceptions to this requirement? For example, if the person receiving the child has reason to believe that the person relinquishing the child could experience domestic abuse if the relinquishment became known, should the person receiving the child be allowed to withhold the information?

As noted earlier, under current law, information regarding a relinquished child may be disclosed to a tribal court exercising jurisdiction in a proceeding over a relinquished child and attorneys in that proceeding. The information may not be disclosed to the tribal social services department, nor may it be disclosed before the court is exercising its jurisdiction. The social services department is the entity that will commence the proceeding, so it needs information about a relinquished Indian child and, obviously, needs it before the proceeding is commenced.

Option 2. Specify that information regarding a relinquished Indian child must be disclosed to [the tribe] [the tribal social services department], in addition to the court and the attorneys.

Option 3. Replace the reference to a court exercising jurisdiction to a court that has jurisdiction.

Other Options

Age of Relinquished Child

Under ICWA, a person may not voluntarily consent to a foster care placement or TPR to an Indian child prior to, or within 10 days after, birth of the Indian child. The procedure for

voluntarily consenting to foster care placement or TPR to an Indian child requires the consent to be “executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.” [25 U.S.C. s. 1913 (a).]

Safe haven relinquishments are treated as *involuntary* TPR cases and are therefore not subject to the requirements for voluntary TPR. However, some suggest that just as a parent may not consent to the termination of his or her parental rights to an Indian child within 10 days after birth of the child, a parent should also not be allowed to relinquish an Indian child within this same time frame.

There are considerable hurdles to implementing this concept, for which reason this Memo does not present specific policy options. Note that the safe haven law uses a maximum age (three days) at which a child may be relinquished, while this concept sets a minimum (11 days) at which an Indian child may be relinquished. These provisions are incompatible; one cannot be simultaneously less than three days old and more than 11 days old. The practical result would be that no Indian child could be relinquished. A different maximum age (greater than 11 days) could be specified for Indian children, but enforcement would be difficult, with a need for documentation that the child is Indian (although such documentation would clearly indicate that WICWA applies).

Alternatively, legislation could specify a higher maximum age for the relinquishment of any child, with an 11-day minimum age for Indian children. Legislation in the 2011-12 and 2013-14 Sessions proposed to increase the maximum age at which a child may be relinquished to 30 days. An 11-day minimum age for Indian children could be established in combination with this. However, there remains an enforcement problem: in light of the anonymity that the relinquishing parent is granted, how does a person receiving a child less than 11 days old know that the child is **not** Indian?

Coercion to Relinquish a Child

The safe haven law specifies that the central provisions of the safe haven law--the ability of a person to relinquish a child anonymously--do not apply if the person receiving the child believes that the person relinquishing the child is being coerced to do so by a person assisting her or him. The law does not address coercion or advocacy for or against relinquishment by a person authorized to receive a relinquished child.

Option. Prohibit any person who is authorized to receive a relinquished child from advocating for or against the relinquishment of a child.

DLL:ksm;jal