

ICWA Regulations-WICWA Comparison Chart

The chart below provides a comparison between the Indian Child Welfare Act (ICWA) federal regulations and the Wisconsin Indian Child Welfare Act (WICWA) for some of the key provisions where the federal regulations provide for conflicting or additional requirements. *Please note that this chart is designed as an educational tool and should not substitute an individual's own research and analysis.* The entire ICWA regulations can be found at: <https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf>.

Topic	ICWA Regulations (effective 12-12-16)	WICWA
Inquiry	<p>§23.107 Court must ask each participant in an emergency, voluntary, or involuntary child custody proceeding whether the participant knows or has reason to know that the child is an Indian child.</p> <ul style="list-style-type: none"> • Lists a number of circumstances that would meet the requirement of “reason to know”. • Court must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child. 	Not addressed in WICWA.
Applicability	<p>§23.107 If there is reason to know the case involves an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an Indian child:</p> <ul style="list-style-type: none"> • Additional steps required, including confirming that the agency used due diligence to identify and work with all of the tribes which child may be member or eligible for membership. • Court must treat as Indian child until determined on the record that not Indian child. 	Not addressed in WICWA.
Initial Notice	<p>§23.11 & §23.111 The petitioning party is required to provide initial notice of the proceeding to the parents, Indian custodian, and the tribe (or BIA if identity or location of parent/Tribe is unknown) by registered <i>or certified</i> mail with return receipt requested.</p> <p>The first hearing in the case may not be held until at least 10 days after receipt of notice by the parents (or Indian custodian) and the Tribe (or BIA).</p>	<p>§48.028(4)(a) The petitioning party is required to provide initial notice of the proceeding to the parents, Indian custodian, and the tribe (or BIA if identity or location of parent/Tribe is unknown) by registered mail with return receipt requested.</p> <p>The first hearing in the case may not be held until at least 10 days after receipt of notice by the parents and tribe or <i>15 days</i> after receipt of notice by the BIA.</p>

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Initial Notice (con't)	<p>An original or copy of each notice must be filed with the court, together with return receipt or proof of service.</p> <p>In addition to the right to intervene, the notice must also include the following information:</p> <ul style="list-style-type: none"> • Names, birthdates, and birth places of child and parents and Tribal enrollment numbers (if known). • Names, birthdates, and Tribal enrollment information for other direct lineal ancestors of the child (if known). • Copy of petition, complaint, or other document initiating proceeding, including date, time, and location of the hearing • Name of petitioner and name and address of petitioner's attorney. • Right to court-appointed attorney if indigent. • Right to be granted up to 20 additional days to prepare for the proceeding upon request. • Right to petition the court for transfer to tribal court. • Address and phone number of court and information related to all parties and individuals notified. • Potential legal consequences of proceeding on future parental and custodial rights of parent/custodian. • Parties must keep information in notice confidential. <p>Copies of the notices to the parents, Indian custodian, and tribe must be sent to the BIA regional office by registered or certified mail with return receipt requested or by personal delivery.</p>	<p>The return receipt must be filed with the court.</p> <p>The notice must include a statement regarding the right to intervene.</p>
Advising Unrepresented Parents/Indian Custodian	<p>§23.111(g) If the parent or Indian custodian appears without counsel, the court must advise him or her of right to: court-appointed counsel, request transfer to tribal court, object to transfer, request additional time to prepare, and right to intervene (if not already a party).</p>	<p>Not addressed in WICWA.</p>

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Transfer to Tribal Court	<p>§23.117 When there is concurrent jurisdiction and the parent, Indian custodian, or tribe requests transfer to tribal court, the case shall be transferred unless:</p> <ol style="list-style-type: none"> 1. Either parent objects; 2. The tribe declines transfer; or 3. There is good cause to the contrary. 	<p>§48.028(3)(c) When there is concurrent jurisdiction and the parent, Indian custodian, or tribe requests transfer to tribal court, the case shall be transferred unless:</p> <ol style="list-style-type: none"> 1. Either parent objects; 2. The tribe declines transfer <i>or does not have a court</i>; or 3. There is good cause to the contrary.
	<p>§23.118 Good Cause to Deny Transfer The reasons for believing/asserting good cause must be stated orally on the record or provided in writing on the record and to the parties.</p> <p>Any party must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.</p> <p>The court “should” state basis for denying transfer orally on record or in written order.</p> <p>In determining whether good cause exists, court may <u>not</u> consider:</p> <ul style="list-style-type: none"> • Whether proceeding is at advanced stage if parent, Indian custodian, or tribe did not receive notice until an advanced stage. • Whether prior proceedings involving the child where no petition to transfer was filed. • Whether transfer could affect child’s placement. • Child’s cultural connections with the tribe or reservation. • Socioeconomic conditions or any negative perception of tribal social services or court system. 	<p>§48.028(3)(c)3. Good Cause to Deny Transfer The court may determine that good cause exists to deny the transfer only if the person opposing the transfer shows by clear and convincing evidence that:</p> <ol style="list-style-type: none"> 1. The Indian child (12 years or older) objects to the transfer; 2. Providing evidence or testimony in tribal court would create undue hardship to the parties or witnesses and the tribal court is unable to mitigate the hardship; or 3. The tribe received notice of the proceeding as required by statute, 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, the petition for transfer is filed by the tribe, and the petition for transfer is filed more than 6 months for CHIPS/JIPS cases or 3 months for TPR cases after the tribe received notice. <p>In determining whether good cause exists to deny the transfer, the court may <u>not</u> consider any perceived inadequacy of the tribal social services department or the tribal court of the Indian child’s tribe.</p>

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<p>Emergency Removal</p>	<p>§23.113 Any emergency removal or placement must be terminated immediately when it is no longer necessary to prevent imminent physical damage or harm to the child by either:</p> <ul style="list-style-type: none"> • Initiation of a child custody proceeding subject to the provisions of ICWA; • Transfer of child to jurisdiction of tribe; or • Restoring child to parent or Indian custodian. <p>Court must promptly hold a hearing and make a finding on the record that emergency placement/removal is necessary to prevent imminent physical damage or harm to the child.</p> <p>Indicates that petition for emergency placement/removal “should” contain information on several items and that the emergency proceeding “should not” last longer than 30 days without making additional findings.</p>	<p>§§48.028(2)(e) & 48.028(7)(bm) Temporary physical custody hearings are excluded from the requirements of WICWA except that the child shall be placed in the order of preference unless there is good cause to depart or emergency conditions necessitate departing from the order of preference.</p>
<p>Active Efforts</p>	<p>§23.2 Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts “should” be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the tribe and conducted in partnership with the child, parents, extended family members, Indian custodian, and tribe. Active efforts are to be tailored to the facts and circumstances of the case.</p>	<p>§48.028(4)(g) Active efforts is defined as an ongoing, vigorous, and concerted level of case work 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.</p> <p>There are nine activities that must be conducted as part of active efforts. Documentation must be provided by agency/petitioner as to why not any of the activities were not conducted.</p>

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	<p>There are a several examples of activities that could be conducted as part of providing active efforts.</p>	
<p>Qualified Expert Witness (QEW)</p>	<p>§23.122 A qualified expert witness must be qualified to testify regarding whether the child’s continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and “should” be qualified to testify as to the prevailing social and cultural standards of the tribe. A person may be designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the tribe.</p> <p>The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.</p>	<p>§48.028(2)(g) Qualified expert witness order of preference:</p> <ol style="list-style-type: none"> 1. A member of the Indian child’s tribe recognized by the Indian child’s tribal community as knowledgeable regarding the tribes’ 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 hand having substantial knowledge of the customs, traditions, and values of the Indian child’s tribe relating to family organization and child-rearing practices. 4. A lay person 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. <p>§48.028(4)(f)2. A qualified expert witness (QEW) from a lower order of preference may be chosen only if there is a showing the party made a diligent effort to secure a QEW from a higher order. The fact that a QEW called by one party is from a lower order of preference than one 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 shall consider as paramount the best interests of the Indian child as provided in the bill. The court shall determine qualifications of a QEW as provided in Ch. 907.</p>

<p>Serious Damage Finding-Causal Relationship</p>	<p>§23.121 When proving serious damage, including QEW testimony, the evidence must show a causal relationship between the conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to this child.</p> <p>Without a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.</p>	<p>Not addressed in WICWA.</p>
<p>Good Cause to Depart from Placement Preferences</p>	<p>§23.132 Good cause to depart from the order of preference “should” be based on one or more of the following:</p> <ol style="list-style-type: none"> 1. Request of the parent, if they attest they have reviewed the placement options, if any, that comply with the order of preference. 2. Request of the child, if child is of sufficient age and capacity to understand the decision. 3. Presence of a sibling attachment that can be maintained only through particular placement. 4. Extraordinary needs of the child, such as specialized treatment services. 5. Unavailability of suitable placement after a determination by the court that diligent search was conducted. <p>A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement or based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement made in violation of ICWA.</p>	<p>§48.028(7)(e) Good cause to depart from the order of preference shall be determined based on one or more of the following:</p> <ol style="list-style-type: none"> 1. Request of the parent or Indian child (if of sufficient age and developmental level) unless the request is made to avoid application of ICWA or WICWA. 2. Extraordinary needs of the child requiring specialized treatment as established by expert witness testimony. (Length of time in placement does not in itself constitute an extraordinary emotional health need.) 3. Unavailability of a suitable placement after diligent efforts have been made to place in the order of preference. <p>The department or child welfare agency must maintain records evidencing efforts made to comply with placement preferences.</p>

	The reasons for believing/asserting good cause must be stated orally on the record or provided in writing to the court and parties. The court's determination of good cause must be made on the record or in writing.	
Voluntary Proceedings - Inquiry	<p>§§23.124(a)-(b) The court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child.</p> <p>If there is reason to believe the child is an Indian child, the court must ensure that the petitioner has taken all reasonable steps to verify the child's status. If the consenting parent requests anonymity, the tribe must keep any documents or information confidential.</p>	Not addressed in WICWA.
Voluntary Proceedings – Placement Preferences	§23.124(c) The court must ensure that the placement preferences are complied with unless there is good cause to depart from the order of preference.	Not addressed in WICWA.
Voluntary Proceedings - Consent	§23.125 Consent by parent or Indian custodian to termination of parental rights, foster care, pre-adoptive, or adoptive placement must be in writing, recorded before a judge, and accompanied by the judge's written certification that the terms and consequences were explained and understood. <i>In addition, the court must explain the limitations on withdrawal of consent for the specific proceeding for which consent is given.</i>	§§48.028(5)(a) & (b) Consent by a parent or Indian custodian to a voluntary placement agreement, delegation of parental powers, or termination of parental rights shall be in writing, recorded before a judge, and accompanied by the judge's written certification that the terms and consequences were explained and understood.
Change in Adopted Child's Status	<p>§23.139 The court must provide notice, by registered or certified mail with return receipt requested, to the Indian child's biological parent or prior Indian custodian and the tribe whenever:</p> <ul style="list-style-type: none"> • Final order of adoption is vacated or set aside, or • Adoptive parent voluntarily consents to termination of parent rights to the child. <p>The parent or Indian custodian may waive his or her right to such notice through a revocable written waiver.</p>	Notice not addressed in WICWA.