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Details:

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Children & Families & Workforce Development (SC-CFWD)

COMMITTEE NOTICES ...

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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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- Miscellaneous ... **Misc**

* Contents organized for archiving by: Gigi Godwin (LRB) (July/2011)

Senate

Record of Committee Proceedings

Committee on Children and Families and Workforce Development

Senate Bill 288

Relating to: Indian child welfare.

By Senators Jauch, Holperin, Vinehout, Coggs, Taylor, Lassa, Kreitlow, Lehman, Hansen, Robson, Risser, Plale, Erpenbach, S. Fitzgerald, Grothman, Olsen, Hopper and Schultz; cosponsored by Representatives Hraychuck, Sherman, Grigsby, Roys, Pasch, Young, Berceau, Sinicki, Pope-Roberts, Seidel, Turner, Benedict, Hilgenberg, Shilling, Hubler, Clark, Mason, Nelson, Radcliffe, Soletski, Vruwink, Smith, Sheridan, Mursau, Roth, Kleefisch, Friske, Tauchen, Huebsch, Vos, Brooks and Ripp.

September 14, 2009 Referred to Committee on Children and Families and Workforce Development.

September 16, 2009 **PUBLIC HEARING HELD**

Present: (5) Senators Jauch, Lassa, Vinehout, Kedzie and Hopper.

Absent: (0) None.

Appearances For

- Bob Jauch — Senator, Senate District 25
- Ann Hraychuck — Representative, 28th Assembly District
- Reggie Bicha, Madison — Secretary, Department of Children and Families
- Gary Sherman — Representative
- Wilfrid Cleveland, Black River Falls — President, Ho-Chunk Nation
- Gregory Miller, Bowler — Stockbridge-Munsee Tribe
- Eugene White-Fish — FC Potawatomi Community
- Lewis Taylor — St. Croix Band of Superior Chippewa
- Brandon Stevens — Oneida Business Committee
- Lisa Waukau — Menominee Indian Tribe of Wisconsin
- Mark Tilden — Native American Rights Fund
- William Thorne — Judge
- James Botsford, Wausau — Wisconsin Judicare
- Ginger Murray, Madison — Children and the Law Section of the State Bar of Wisconsin and Lawton and Cates
- Carolyn Grzelak — St. Croix Band
- Dennis Puzz, Jr., Minneapolic — Forest County Potawatomi
- Kris Goodwill, Black River Falls — Ho-Chunk Nation
- Elizabeth Haller, Neillsville
- Stephanie Lozano, Black River Falls — Ho-Chunk
- Sandy White Hawk
- Todd Matha — Judge, Ho-Chunk Tribal Court
- Mark Mitchell, Madison — Department of Children and Families
- Mary Husby, Keshena, — Menominee Indian Tribe
- Rob Orcutt — Oneida Nations

- Paul Stenzel, Shorewood
- Cyrus Behroozi, Madison — DCF Division of Safety and Permanence

Appearances Against
- Stephen Hayes, Waukesha
- Joan Korb, Sturgeon Bay — Wisconsin District Attorneys Association
- Rachael Cook, Fond du Lac
- Greta Sclavi, Fond du Lac

Appearances for Information Only
- Ryan Sclavi, Madison
- Christopher Dee, Milwaukee — Milwaukee County DA's Office

Registrations For
- Scott Fitzgerald — Senator
- Jeff Mursau, Crivitz — Representative, 36th Assembly District
- Roger Roth — Representative
- Jeff Plale — Senator
- Leland Ninham, Oneida — WTJA
- Forest County Potawatomi, Madison
- Susan Crazy Thunder, Bayfield — Rose Gurnoe-Soulier--Chair Red Cliff Band
- Kitty Kocol — Executive Director, Wisconsin Court Appointed Special Advocates
- Karen Martin, Madison — Ho-Chunk Nation Department of Health and Social Services
- Roberta Decorah, Tomah
- Dale Powless
- Cheryl Powless

Registrations Against
- None.

Registrations for Information Only
- None.

October 7, 2009 **EXECUTIVE SESSION HELD**

Present: (5) Senators Jauch, Lassa, Vinehout, Kedzie and Hopper.
Absent: (0) None.

Moved by Senator Jauch, seconded by Senator Vinehout that **Senate Amendment 1** be recommended for adoption.

Ayes: (5) Senators Jauch, Lassa, Vinehout, Kedzie and Hopper.
Noes: (0) None.

ADOPTION OF SENATE AMENDMENT 1 RECOMMENDED, Ayes 5, Noes 0

Moved by Senator Jauch, seconded by Senator Vinehout that **Senate Amendment 2** be recommended for adoption.

Ayes: (5) Senators Jauch, Lassa, Vinehout, Kedzie and Hopper.
Noes: (0) None.

ADOPTION OF SENATE AMENDMENT 2 RECOMMENDED, Ayes 5, Noes 0

Moved by Senator Jauch, seconded by Senator Vinehout that **Senate Amendment 3** be recommended for adoption.

Ayes: (5) Senators Jauch, Lassa, Vinehout, Kedzie and Hopper.
Noes: (0) None.

ADOPTION OF SENATE AMENDMENT 3 RECOMMENDED, Ayes 5, Noes 0

Moved by Senator Lassa, seconded by Senator Vinehout that **Senate Bill 288** be recommended for passage as amended.

Ayes: (5) Senators Jauch, Lassa, Vinehout, Kedzie and Hopper.
Noes: (0) None.

PASSAGE AS AMENDED RECOMMENDED, Ayes 5, Noes 0

Carrie Kahn
Committee Clerk

Children & the Law Section

State Bar of Wisconsin
Wisconsin Lawyers. Expert Advisers. Serving You.

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September 15, 2009

To: Senator Jauch, Committee Chair
CC: Senate Committee on Children and Families and Workforce Development and Assembly Committee on Children and Families
From: Ginger L. Murray, Children and Law Section of the State Bar
RE: SB 288/AB 421

WHO DO I REPRESENT?

I am the immediate past chairperson and current board member of the Children and the Law Section of the State Bar of Wisconsin. Our membership is comprised of lawyers that routinely work on cases involving children. We are prosecutors, defense attorneys: private and public, parents' attorneys, and guardian ad litems appointed by the court to represent the best interests of children, court commissioners, corporation counsel, and general practitioners that represent litigants in children's cases. **We are here to protect the best interest of children.** Children and the Law Section of the State Bar has been approved by the subcommittee of the Legislative Oversight Committee of the Wisconsin State Bar to lobby our positions regarding SB288/AB 421, as the State Bar has determined that our position is consistent with State Bar policy.

WHAT IS ICWA?

It is the Indian Child Welfare Act, 25 USC Section 1901 et seq. As stated in a State Bar of Wisconsin Position regarding ICWA, "the purpose of the Indian Child Welfare Act is to protect the integrity of Indian families by creating a procedural framework for child custody proceedings involving Indian Children." Congress adopted ICWA in 1978 in response to the concern that tribal children were being disproportionately removed from their homes and placed in non-tribal homes. State courts are required to follow the dictates of the federal Indian Child Welfare Act when it applies to cases in state court. This is the case whether or not ICWA is codified into our Wisconsin Statutes.

WHY CODIFY ICWA?

As a former Family and Circuit Court Commissioner in both Forest and Oneida Counties, I presidedg over cases that had ICWA implications. I can report that it was difficult to find the requirements of ICWA as it is not located in the statutes, the bench books or the other reference guides customarily used in children's court. Despite the difficulty in finding the exact language of ICWA, we would find it and the rules therein were implemented. However, the difficulty in finding the language of ICWA in

our statutes implicates a need to codify ICWA. That is why Children and the Law actively supports codification of ICWA.

PERSONAL ICWA EXPERIENCES

Before coming to Madison to work at Lawton & Cates, SC, I worked in the north woods. I began my private practice in Crandon in 1996. Soon thereafter the judge in Forest County began appointing me to act as guardian ad litem (the attorney appointed by the court to represent the best interest of children) in many cases. As there are two tribes located within the county, many of the cases for which I was appointed involved Indian children. (Case scenario.) The courts need to be able to assess the specific needs of the child, whether an Indian child or not, and make a ruling that protects the best interest of the child. It is not appropriate to allow the tribes to have their interests prevail at all costs, especially when the cost is at the expense of the child.

Children and the Law Involvement in this Legislation

Because ICWA is an act affecting CHILDREN, and is being proposed to be incorporated into chapters 48 and 938, the provisions within the Wisconsin Statutes known as the Children's Code, the Children and the Law Section of the State Bar has a direct interest in the effects of any modifications to ICWA within the drafting of the proposed language intended to codify ICWA. Although we asked to be involved in the early stages of the legislative process for this codification, that request was declined. However, late last fall, at the suggestion of Senator Jauch, we were asked to join the process. We were provided a draft of the legislation, which was approximately 300 pages in total. This was concerning to us as the federal Indian Child Welfare Act is less than 8 pages. WE were told that the legislation was intended to codify, or incorporate into our statutes, the federal ICWA. We were specifically told that the codification of ICWA was not intended as a reform of ICWA. We were told that the proposed legislation did not expand or change the language of ICWA. When we were invited to the table on this legislation, we were provided the draft and asked to attend the public "for information only" meeting which took place approximately 10 days after we were provided the 300+ page draft. We gladly accepted the invitation. We quickly formed a subcommittee and worked through the draft. We attended the public meeting and provided written and oral commentary about our concerns regarding provisions we thought created a reform of ICWA rather than a mere codification. At that meeting several committee members, and Senator Jauch, the chair, told us that our input was valuable and requested that we stay engaged in the efforts to complete the codification. Thereafter, we were invited to and did attend subsequent meetings with the workgroup. Please remember that we were told that the legislation was intended to codify ICWA. Based on that representation we voted, early on, to actively support codification of ICWA, without expansion. Our representatives attended the joint meetings and offered our support when possible and shared our concerns about the provisions within the proposed legislation that we believed rose to the level of ICWA reform rather than simple codification. Ultimately the identified stakeholders were able to compromise on the majority of the draft language. However, there remain two sections of the draft that we simply cannot support. We have obtained State Bar authority to actively lobby for modifications to the proposed legislation as it relates to: 1) **Qualified Expert Witness and 2) Good Cause to Decline to Transfer a case to tribal court.**

Children and the Law Support codification of ICWA, with the amendments as set forth below based on the rationale set forth herein:

I. QUALIFIED EXPERT WITNESS

A. The bill defines qualified expert witness, while ICWA does not. Under the bill, a qualified expert witness means a person who is any of the following, with the order of preference as listed:

(1.) A member of the Indian child's tribe recognized by the Indian child's tribal community as knowledgeable regarding the tribe's customs relating to family organization or child–rearing practices. [Note: this allows the tribe to determine who qualifies as an expert. I am unaware of any other situation in our court system that allows one party of the litigation to dictate who may act as an expert. This provision puts any litigant opposing the tribe's position at a clear disadvantage.]

(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.

(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.

(5.) A professional person having a substantial education and experience in the area of his or her specialty.

B. **ICWA** requires "expert testimony" in cases involving foster care placement of an Indian child or termination of parental rights of an Indian child. 25 USC Section 1912 (e) and (f). ICWA does not set criteria for the qualifications of such expert testimony nor does it require an order of preference of any such criteria as is being requested in the proposed draft.

C. **BIA Guidelines**: do not require such criteria or an order of preference as sought in the proposed legislation. The guidelines do suggest credentials for a qualified expert witness similar to those proposed. However the proposal in the bill expands those criteria recommended by BIA, and then dictates the order of preference.

D. **Wisconsin Statutes**: Section 907 of our statutes incorporates the rules of evidence in Wisconsin as they related to expert witnesses: **907.02 Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

E. **State Bar of Wisconsin**:

(1.) Page 46 of the State Bar of Wisconsin Policy Positions (2008), sets forth the State Bar of Wisconsin position previously asserted, and still in effect, regarding expert testimony which endorses the same position Children and the Law takes on the proposed definition of qualified expert witnesses offered in the current draft of the ICWA codification: "Expert/Lay Witness Testimony- The State Bar of Wisconsin opposes 2003 Senate Bill 49 because it believes that any such changes to rules relating to expert/lay witness testimony are best addressed by Supreme Court rules, not legislatively. 2007 Assembly Bill 121; 2007 Senate Bill 60 [2005 Senate Bill 70; 2005 Assembly Bill 203; 2005 Assembly Bill 278; 2003 Senate Bill 49]"

(2.) State Bar policy, set forth in the preamble to the *Civil Practice and Procedure* chapter of the State Bar of Wisconsin Policy Positions (2008), (page 43), summarizes the constitutional protections provided to all litigants in Wisconsin Court pursuant to Article I, Section 9 of the Wisconsin Constitution. The preamble specifically states, "The overarching principal in Section 9 is best served in today's legal system by a court of law and the gradual evolution of legal principals by a case by case method of legal rule making and not by statutory fiat. Predetermined legislative limits and special exceptions to the gradual development of the common law should be rare. Determining each case on its own merits rather than through a prescribed formula or directive is the best means to protect citizen's constitutional rights to remedy for all injuries and wrongs. The historic position of the State Bar of Wisconsin is that the judicial branch of government is a co-equal branch. The Court's historic role in the development of remedies for injuries and wrongs should be preserved and protected from the pressures of special interests, lobbyists, or those who seek to influence the development of law for their short-sighted benefit. Remedies are best defined by the careful, thoughtful application of historical traditions of the common law on a case by case basis."

(3.) **Children and the Law proposed amendment**: "Qualified expert witness" is and remains a determination to be made by the court consistent with Wis. Stat. 907. The people likely to meet the requirements for a qualified expert witness for the purposes of an Indian Child Custody Proceeding includes: (insert the credentials listed in the draft, without an order of preference)." This proposal is consistent with the State Bar of Wisconsin position on expert witnesses, the Wisconsin State Statutes, and the Bureau of Indian Affairs Guidelines.

II. **GOOD CAUSE TO DECLINE TO TRANSFER CASE TO TRIBAL COURT: ADVANCED STAGE OF PROCEEDING:** Tribal courts have exclusive jurisdiction in cases involving an Indian child who resides or is domiciled within the reservation of the tribe. [42 USC 1911(a)] Tribal courts have concurrent jurisdiction in cases involving Indian children who do not reside or who are not domiciled within the reservation. In the latter cases, the state court is required to transfer a child custody proceeding to the jurisdiction of the child's tribe upon the petition of the child's parent, Indian custodian, or tribe, unless:

i. A parent of the child objects;
ii. The tribal court declines jurisdiction (or the tribe does not have a court); or
iii. The court finds ***good cause*** to not transfer the case to the tribal court.

A. SB 288/AB 421 limits the scope of good cause findings to those situations where: providing evidence or testimony in tribal court would create an undue hardship and the tribal court cannot mitigate that undue hardship;

(1.) the child (if aged 12 or older) objects to the transfer; or

(2.) the proceedings are at an advanced stage, which may be considered **only if** the tribe has received notice as required by 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 because of gross negligence the tribe has not petitioned for a transfer within 3 months after receiving notice of the proceeding. [Note: Proceeding means both the filing of a child in need of protection or services petition and a petition to terminate the parental rights of the Indian child's parent.]

B. **ICWA**: allows the court to decline to transfer the case to tribal court upon a finding of good cause not to do so, without the restrictions included in this proposed legislation

C. **Bureau of Indian Affairs Guidelines**, commentary C. 1): "Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request. Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trail is going in state court and then obtain another trial if it appears the other side will win. Delaying the transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them."

D. **ASFA:** The Adoption and Safe Families Act of 1997 was adopted to improve the safety of children, to promote adoption and other permanent homes for children who need them, and to support families. Among other provisions, ASFA:

(1.) **Requires States to Document Efforts to Adopt.** States are required to make reasonable efforts and document child specific efforts to place a child for adoption, with a relative or guardian, or in another planned permanent living arrangement when adoption is the goal. The law also clarifies that reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts to reunify a child with his or her family.

(2.) **ASFA provides federal funding** (millions of dollars per year) to states that are compliant with the mandates set forth within ASFA.

(3.) **Establishes New Time Line and Conditions for Filing Termination of Parental Rights.** Prior to ASFA, federal law did not require states to initiate termination of parental rights proceedings based on a child's length of stay in foster care. Under the new law, states must file a petition to terminate parental rights and concurrently, identify, recruit, process and approve a qualified adoptive family on behalf of any child, regardless of age, that has been in foster care for 15 out of the most recent 22 months. A child would be considered as having entered foster care on the earlier of either the date of the first judicial finding of abuse or neglect, or 60 days after the child is removed from the home.

(4.) **Children and the Law interpretation of ASFA implications relating to the proposed legislation:** ASFA is a federal law that must be followed by the state courts. Failure to do so puts the state at risk of losing federal funding. The mandates of ASFA include moving toward adoption, which requires termination of parental rights, if the child has been placed out of his/her home for more than 15 out of 22 months. Clearly a child placed out of his or her home for 15 months indicates that the case is at an "advanced stage". The requirements of ASFA demand that the state court move toward TPR/adoption. How is it possibly acceptable, to create a competing law that allows a tribal court at this advanced stage to step in and disrupt to child's life by transferring the case upon filing for termination of parental rights? Consider a ticking clock and advanced stages meaning that the clock has been ticking, and ticking, and ticking. According to ASFA ticking for more than 15 of 22 months is too much. The proposed legislation indicates that the filing of the termination of parental rights starts the clock over. How is it possible that being out of the home for 15 month, or longer, can equate to the beginning of the process? This position is simply unacceptable, certainly is not compliant with ASFA, and is furthermore certainly not in the best interest of the child.

(5.) **Children and the Law proposal**: add, "that the proceeding is at an advanced stage and that the tribe has been given prior notice of the child custody proceedings concerning that child" as another ground for "good cause" to decline to transfer the case to tribal court. **This does not mean that the court must decline to transfer the case at this stage, it simply gives the court the discretion, as set for in federal ICWA, to determine whether or not it is in the child's best interest, given the circumstances of the case, to decline to transfer the case to the tribal court once the case is at an advanced stage.**

SUMMARY

In summary, any proposed changes to the Children's Code are of paramount interest to the Children and the Law Section of the State Bar. We want to thank you for the opportunity to be involved in this legislative process. The members of our section are mindful of ICWA, follow ICWA and support

having the federal ICWA codified. However, we do not support expansion or reform of ICWA. We cannot support provisions that remove, interfere with or limit judicial discretion as we believe the courts must be able to address the facts specific to the case and make rulings that protect the best interest of the child. Simply stated we cannot support provisions of the proposed legislation that reforms ICWA, putting the interests of a tribe above all, at all costs, when that cost is at the expense of the best interests of the child. Therefore we respectfully request that you vote to codify ICWA without expansion, and accept our amendments to the draft to preserve judicial discretion and protect the best interests of children. I ask this in the name of the Children and Law Section of the State Bar, and in the interest of children like Robby.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

If you have questions about this memorandum, please contact Sandy Lonergan, Government Relations Coordinator, at slonergan@wisbar.org or (608) 250-6045.

UNITED STATES CODE TITLE 25
- INDIANS CHAPTER 21 -
INDIAN CHILD WELFARE
Contents

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds -

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes (FOOTNOTE 1) " and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(FOOTNOTE 1) So in original. Probably should be capitalized.

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources; (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that

the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe; (4) that an 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; and (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term -
(1) "child custody proceeding" shall mean and include - (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship; (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.
(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent; (3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43; (4) "Indian child" means 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; (5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts; (6) "Indian custodian" means any 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 such child; (7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians; (8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43; (9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established; (10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation; (11) "Secretary" means the Secretary of the Interior; and (12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of

Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under

State law shall 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.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless 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. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which

most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with -

(i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. (c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for ap-

proval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.
(b) Criteria applicable to consideration by Secretary; partial retrocession (1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things: (i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe; (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe; (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and (iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area. (2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected. (c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval
If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.
(d) Pending actions or proceedings unaffected
Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

§ 1919. Agreements between States and Indian tribes
(a) Subject coverage
States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.
(b) Revocation; notice; actions or proceedings unaffected
Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception
Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child
In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to -

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes; (2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children; (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; (4) home improvement programs; (5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters; (6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs; (7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and (8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act (42 U.S.C. 620 et seq., 1397 et seq.) or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation

Indian child and family service programs which may include, but are not limited to - (1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs; (2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children; (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show -

(1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement. Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended. (b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

§ 1961. Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

§ 1962. Copies to the States

Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

For more information on public policy issues,
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Indian Child Welfare Act Codification
Issues and Responses from Meeting with Stakeholders
March 23, 2009
Room 400 SE, State Capitol

Definition of Parent		CLS Suggestion	Rationale
Certain stakeholders had concerns about this definition because it was believed that it went beyond ICWA and that the language was confusing. Part of the concern relates to how the language in ICWA was being read.	Stakeholders indicated a preference for using the actual language in ICWA. The Codification Workgroup consulted with the drafter in the Legislative Reference Bureau. In order to resolve the interpretive issues, the Workgroup decided that the actual language in ICWA should be used in the bill, as suggested by certain stakeholders. The Legislative Reference Bureau will include the ICWA language with any necessary changes to reflect Wisconsin statutory construction.	Page 13, Section 8 – Definition of Parent On line 21, modify the definition of parent to include a non-Indian person who has lawfully adopted an Indian child.	CLS firmly believes that all Indian children who are adopted should be afforded the same protections under ICWA regardless of whether they have been adopted by Indian or non Indian parents. The proposed language change allows for any Indian child to avail themselves of the full protection of state and federal laws. Therefore, we suggest modifying the definition of parent to include a non-Indian person who has lawfully adopted an Indian child.
Results This issue has been resolved. A "Wisconsinized" version of the ICWA definition of parent will be used as included in LRB-0150/2.			

Active Efforts		CLS Suggestion	Rationale
Three concerns were expressed related to this topic: • Responsibility for making active efforts • Responsibility for making active efforts and the ability to do so • Difference between "reasonable" and "active"	The Workgroup agreed to make the changes suggested relative to the first two concerns. The Workgroup, however, did not agree with the third concern. 1. Stakeholders indicated that they	Remove language "beyond the level that typically constitutes reasonable efforts" Change "conducted" to "attempted"	If a Tribe chooses not to respond (timely or otherwise), there is no way for an agency to ensure active efforts and the child then remains in limbo status. Clearly this is not the desired status or outcome anyone wants for our children.

	would prefer passive language regarding responsibility for making active efforts. The Workgroup agreed to the change. The Workgroup will confer with the drafter in the Legislative Reference Bureau. 2. The Workgroup and the representatives of the Wisconsin County Human Services Association agreed to language. 3. The Workgroup did not agree that there is no difference between "active" efforts and "reasonable" efforts.	language "beyond the level that typically constitutes reasonable efforts" Change "conducted" to "attempted"	
Results This issue has been resolved with respect to two of the three identified issues because revised language was agreed upon by the Workgroup and stakeholders. The language has been changed to read: 48.028(4) (g) 1.c. Extended family members of the Indian child, including those identified by the tribe or parent, were notified and consulted with 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. 48.028(4) (g) 1.e. All available family preservation strategies were offered or employed and the involvement of the child's tribe was requested to identify strategies and to assure that such strategies are culturally appropriate. 48.028(4) (g) 1.f. Community resources were identified, information about those			

resources was offered or provided to the Indian family, and the Indian family was actively assisted in accessing those resources. There may yet be some disagreement about the difference between "active" and "reasonable" efforts on the part of the Children and the Law Section.		

Good Cause Not to Transfer		CLS Suggestion	Rationale
Stakeholders requested that the language in the BIA Guidelines be used, especially the advanced stage consideration. Under the bill, good cause not to transfer is limited to consideration of hardships to the parties and witnesses. In addition, the bill moves the fact that there is no tribal court from a good cause issue to a mandatory consideration. Stakeholders suggested that the language in the BIA Guidelines be used, especially the advanced stage consideration.	In essence, the Workgroup accepted the language drafted by Chris Dee with the exception of the language at subd. par. a. The Workgroup stands by its decision to not include the advanced stage of a proceeding. There is a long history, continuing up to this day, of significant failure to notify tribes when child custody proceedings in circuit court are held regarding Indian children. Notice is the critical factor in tribes being able to intervene in cases. The Workgroup did, at the suggestion of the stakeholder, include the child over age 12 language.	P 19 (line 7 transfer…or that the proceeding is at an advanced stage of and that the tribe has been given prior notice of child custody proceedings concerning that child.	This change addresses the concerns of the workgroup by supporting the requirement of providing notice to the tribe. CLS agrees that notice must be given but the advanced stage exception is important because children who are in the system will be prevented from achieving permanency; if a child has been in an out of home placement for an extended period of time, this exception allows the court to consider whether the case should remain with the children's court to consider the permanency option or whether the case should be transferred to tribal court. The judge's role is to determine what is in the child's best interest and advanced stage is one of the many factors which are to be considered. (Federal Register – commentary C. 1) Although the Act does not explicitly require transfer petitions to be

			timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request. Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.
Results This issue remains under consideration due, in some part, to a lack of agreement on what constitutes a "proceeding" or "stage" of a case. It is clear that identification of a child's tribe is critical to notification of a tribe; if adequate efforts are not put into such identification, then notice will not occur. In any case, if the tribe does not receive notice, the tribe cannot respond in a timely manner. For a variety of reasons, a tribe may not transfer a case at early stages (e.g., in-			

home placement, change of placement from in-home to out-of-home, placement in foster care) but may wish to do so if, for example, the county is moving toward termination of parental rights. If the entire case is the "proceeding" or if there is a CHIPS proceeding and a TPR proceeding, then "advanced stage" can create a problem for the tribe when it seeks to transfer the case when certain dispositional decisions are being proposed. As a result, advanced stage was not added to the list of good causes for not transferring a case. However, if the case could be broken into more stages or proceedings, then it may be appropriate to consider adding advanced stage as a possible good cause exception. For example, if the stages of a case or the various proceedings were identified separately as the filing of a CHIPS or JIPS petition, change of placement (or revision or extension of the dispositional order), the changing of a permanence goal or the adding of a concurrent permanence goal, permanency plan hearings, guardianship petition being filed, TPR petition being filed, etc., then tribes would be more likely to receive notification and there would be less likelihood of a case ever reaching the "advanced stage." This will continue to be explored. Chris Dee is looking at some potential language identifying the "stages" of a case. It is anticipated that the Children and the Law Section may have some opposition to this.		

Best Interests of an Indian Child/Conflict with ASFA		CLS Suggestion	Rationale
Stakeholders were concerned that a lack of compliance with ASFA would be contrary to the best interests of a child. It was explained that there are no direct conflicts between the two laws and that Wisconsin would not risk Title IV-E funds if it chose compliance with ICWA over compliance with ASFA. It was discussed that "the best interests" of an Indian child under ICWA are different than the best interests of a non-Indian child because, under ICWA and other federal laws, the best interests of an Indian child require consideration of the child's relationship with the tribe and vice versa. Stakeholders asked whether this distinction was being codified in the bill. This distinction is being codified but the current language could be clearer.	The Workgroup agreed to consult with the drafter in the Legislative Reference Bureau and all the parties agreed that this would resolve any issues.	In order to help facilitate understanding of and compliance with ICWA, we suggest placing best interest definition under 48.01.	The proposed language in the draft is confusing in that it does not follow the protocols established in 48.01 for the court to consider in evaluating best interests.
Results			

This issue was resolved with all stakeholders present at the meeting on March 23. It may or may not continue to be an issue with the Children and the Law Section of the State Bar. As such it will be discussed at the meeting on April 14, 2009.

In the previous draft, s. 48.028(1)(intro.) stated the following:

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

In the current draft, s. 48.028(1)(intro.) states the following:

(1)(intro.) DECLARATION OF POLICY. In Indian child custody proceedings, the best interests of the Indian child shall be determined in accordance with the federal Indian Child Welfare Act, 25 USC 1901 to 1963, **and the policy specified in par. (b)**. It is the policy of this state to do all of the following:

Subdivisions 1. and 2. of par. (b), as referenced in the language in the current draft, is essentially a re-write of the language found in ICWA at s. 1902, Congressional declaration of policy. As such, the language in the current draft was inserted in response to a request of the Children and the Law Section that the definition of "best interest of an Indian child" be more clearly stated. Subsequently, the Children and the Law Section indicated that it now believes that this definition "goes beyond ICWA."

The language in par. (b), which did not change from one draft to another, reads as follows:

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

1. 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.

2. Using practices, in accordance with the federal Indian Child Welfare Act, 25 USC 1901 to 1963, this section, 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.

Other Sources

Some may feel it is not fair to the Indian child to be treated differently, to have different rules than non-Indian children. It is the CASA's job to understand and insure that the Indian child's special rights are acknowledged and secured. To be able to advocate in such a manner it is essential that the CASA volunteer understand the basis for this difference. It can best be understood as a citizenship right. Congress in passing the ICWA essentially acknowledged the premise that an Indian child's citizenship within the tribe is a valuable right to be protected for the child. Many tangible and intangible benefits flow from citizenship, many people have strong identity based on citizenship, benefits and responsibilities flow between the sovereign and the citizen. The sovereign has an interest in the welfare of each of its citizens. An Indian child's rights as articulated in the ICWA are not based simply on race or cultural considerations, they are based on the political relationship that exists between the government of the United States and each of the recognized tribes. According to the law, these tribes are considered domestic, dependent nations and as such have a special relationship with the federal government that transcends the relationship of states to other citizens of each state. Each Indian child has an interest in his or her tribe, and each tribe has an interest in each of its children. The ICWA is designed to prevent inappropriate interference with this relationship.

> Abby Abinanti, "The Indian Child Welfare Act and CASA: Advocating for the Best Interests of Native Children," Tribal Court Clearinghouse.

The legislative history and the plain language of ICWA indicate that Congress intended in large measure to re-define the concept of "best interests" as it is applies to Indian children. That redefined concept, what this paper refers to as the federal gloss, incorporates Congress' finding that it is in the best interests of Indian children to be raised in Indian communities that will foster their knowledge of, understanding and involvement with their native heritage and tribal communities. It is this reconceptualized best interests standard that state courts must be urged to adopt in Indian child custody cases.

> Regina M. Cutler and Frank R. Jozwiak (Morisset, Schlosser, Jozwiak & McGaw), "The Best Interests of the *Indian* Child: Federal Gloss on a State Law Concept," presentation to

First Annual Washington State Indian Child Welfare Summit: Exercising Sovereignty Through Protection of Our Children, May 25, 2004.

The stated purpose of the act is to "[p]rotect the best interests of Indian children and to promote the stability and security of Indian tribes." The act seeks to achieve these goals through three principal methods: by establishing minimum federal standards for when Indian children can be removed from their family; by placing children who are removed in a foster or adoptive home that reflects the unique values of Indian culture; and by providing assistance to family services programs operated by Indian tribes.

The ICWA was written with the belief that it was in the best interests of Indian children for them to remain with their tribe and maintain their Indian heritage. To foster this goal, the ICWA enacts minimal federal standards for when Indian children can be removed from their family and seeks to ensure that children who are removed are placed in a foster or adoptive home that reflects the unique values of Indian culture.

Douglas W. Smith, "Indian Child Welfare Act," The Free Dictionary

The standard for the best interest of an Indian child as set forth in the ICWA and interpreted in *Holyfield* are integrally related to the future interest and survival of Indian tribes. The ICWA ensures that culture remains a primary focus for a child's future. The ICWA's best interest standard is drastically different than the best interest test set forth in *Holley v. Adams*, 544 S.W. 2nd 367, 372 (Tex. 1976). The best interest of the Indian child is intertwined with the interest of the child's tribe and recognizes the importance of the extended family in Indian culture and society. The determination of the best interest of the Indian child must include consideration of tribal family practices.

Paul Shunatona and Tricia Tingle, "Indian Child Welfare Act in Texas – An Overview," Texas Bar Journal, April 1995.

The Indian Child Welfare Act preempts Minnesota's "best interests of the child" standard and, absent good cause to the contrary, requires placement of an Indian child with an Indian family.

In re The Adoption of M.T.S., a Minor, Court of Appeals of Minnesota, No. C3-92-290, September 15, 1992

"Best Interests of the Indian Child" means implementation of the policies and placement preferences set forth in the ICWA. Meeting the best interests of the Indian child requires recognition of the importance of maintaining connections with

family, siblings, extended family, the tribe, and the child's cultural heritage, and requires knowledge and understanding of the damage caused by loss of identity for Indian children. (25 U.S.C. § 1902). Minnesota Tribal/State Agreement, Part I.E.5.		

Jury v. Judge/ Fact-Finding Hearing v. Dispositional Hearing		CLS Suggestion	Rationale
Stakeholders were concerned that the bill would have the QEW testimony occur at the fact-finding hearing rather than the dispositional hearing. Stakeholders believed that this would be difficult in cases where the fact-finding was before a jury rather than a judge. In addition, there are different burdens of proof at this stage depending upon whether it is a CHIPS case or a termination of parental rights case.	Everyone agreed that this is a difficult issue. It was determined that the Workgroup would examine how it is handled in other states where fact-finding can be before a jury rather than a judge and we would revisit the issue at the next meeting. We will be contacting the few other states which allow jury trials in either CHIPS or TPR cases to see how the Qualified Expert Witness testimony is handled in those states.	48.424(3) If the facts are determined by a jury, the jury may only decide whether any grounds for the termination of parental rights have been proven. The court shall decide <u>whether the allegations specified in s. 48.42 (1) (e) have been proved in cases involving the involuntary termination of parental rights to an Indian child and the</u> court shall decide what disposition is in the best interest of the child.	Per Mark Mitchell's 3/23/09 summary memo, the workgroup indicated they would be examining how others states handle this issue. To date, that information has not been received but we look forward to receiving it. In meantime, we offer this alternative solution. This provides a less confusing decision for the jury to make in that the burden of proof is different between reasonable efforts by the agency and the active efforts by the agency. In addition, when a qualified expert witness testifies they are frequently allowed to appear by phone in front of the judge but rarely are allowed to appear by phone in front of a jury.

Results This issue was largely resolved but additional drafting suggestions may yet be forthcoming (Kris Goodwill and Chris Dee). The primary issue is whether the "active efforts" finding and the testimony of a Qualified Expert Witness should occur at the fact-finding or dispositional stages of cases involving a child in need of protection or services action or a termination of parental rights action. It was essentially decided that there would be a presumption that the qualified expert witness would testify at the fact-finding stage of an action but that the presumption could be defeated by the facts of the case. In essence, if the cultural aspects of the case relate to whether the grounds for a termination of parental rights exist, then the qualified expert witness should testify at the fact-finding hearing. If the cultural aspects of the case relate not to whether the grounds exist but as to whether it would be in the child's best interest to remain with the parent (i.e., whether such a placement would result in serious emotional or physical damage to the child), then the qualified expert witness would testify at the dispositional hearing. Each of the grounds for a termination of parental rights will be examined by Gordon Malaise, Kris Goodwill, and Chris Dee to determine where it fits and the three individuals will compare their analyses.		

Withdrawal of Consent		CLS Suggestion	Rationale
Concern was expressed regarding this issue in terms of a child being returned to the Indian parent upon a withdrawal of consent to a voluntary termination of parental rights and the child being returned to the parent resulting in safety threats to the child. The Codification Workgroup certainly shares this concern.	Options discussed included the creation of language that would differentiate between a truly voluntary termination of parental rights and a voluntary termination of parental rights that occurs subsequent to filing of a petition to involuntarily terminate the parent's rights. Other options include maintaining any CHIPS order until the point that the adoption is finalized or allowing jurisdiction to be reinstituted based on the grounds of a CHIPS order that was vacated or allowed to expire prior to the finalization of the adoption. In consultation with the Legislative Reference	The LRB should consider drafting language under 48.46 and cross reference 48.368 that would clearly indicate that in the event a parent withdraws their consent to a voluntary TPR where the child has already been adopted, that the court would reinstate the underlying CHIPS petition and/or guardianship petition that was previously in effect at the time of the TPR.	CLS believes this proposed change addresses the concerns for child safety which should be paramount at all times when dealing with child placement.

	Bureau, it was determined that that the statutory language to deal with the concerns above already exists at s. 48.368, Stats. A cross-reference to that section will be inserted in the bill at the appropriate place(s).		
Results This issue has been resolved. The language at s. 48.368 deals with this issue.			

Qualified Expert Witness		CLS Suggestion	Rationale
Stakeholders expressed concerns regarding the "power" of a qualified expert witness under the draft bill. In addition, stakeholders indicated that a tribe could "veto" the ability of a district attorney or other prosecutor to obtain a qualified expert witness from the first level since that person would have to be recognized by the child's tribe.	A greater discussion of the issue indicated that the bill, or perhaps a subsequent administrative rule, could provide greater clarity on the primary factors that cause most of the concerns: • The limited focus regarding the issues on which a qualified expert witness would testify (i.e., cultural issues) • The ability of any party in the proceeding to utilize other expert witnesses • The reality that tribal cultural practices and beliefs are not necessarily factors in why the child is being removed from the home • The process for moving from one level of expert to another.	A qualified expert witness is and shall remain a determination to be made by the court under (chapter 907) and the court shall consider the following: 1. A member… 2. a member… 3. a professional… 4. a layperson… 5. a professional person having substantial education and experience in the area of his or her specialty.	The longstanding principle established in statute and case law is that the responsibility for determining who qualifies as an expert witness falls to the judge. The Federal Indian Child Welfare Act acknowledges this role for the judge. It is precisely the role of the judge to balance the rights and needs of all parties involved: child, parents, Tribe, county and State interests.
Results This issue has been resolved with further analysis of the language in the current draft of the bill.			

Timeliness of Tribal Response to Notification		CLS Suggestion	Rationale
Stakeholders expressed concern regarding potential issues when a tribe does not respond to notice – particularly initial notice requesting information about the tribal affiliation of a child – in a timely manner.	ICWA clearly indicates that notice must be provided to tribes and that a proceeding may not occur until at least ten days after the provision of the notice. The overall issue relates to cooperation and a mutual desire to see the best interests of the Indian child, family, and tribe recognized.		The response on timeliness is unclear; if the workgroup has taken the position that the time limits in the draft are controlling then we have agreement. If the workgroup states that the statutes cannot impose any time limits, then there must be further discussions. At the "for informational purposes only" meeting, tribal entities indicated a willingness to share responsibilities for timely responses and early involvement. Those indications have not been implemented in the proposed legislation.
Results This issue has been resolved. State statutes cannot impose any time frames or other limitations on sovereign tribal governments.			

Administrative Rule		CLS
Some stakeholders expressed a concern that the bill requires the Department of Children and Families to create an administrative rule without some limitations on what those rules could contain. Specifically, the stakeholders indicated that the authority/mandate could result in the creation of rules that go beyond the requirement of the current federal law. The rule making authority should be limited to current federal law and BIA guidelines and not exceed those requirements. Stakeholders also suggested language identifying several organizations with whom the Department would have to consult in the creation of any rule.	The Workgroup decided to simply withdraw the mandate that the Department create a rule. Rather, the Department will identify issues that require clarification and then decide the best avenue to resolve those issues (e.g., revisions to the law, establishment of policies, or the creation of a rule). In any case, consultation would occur with any affected organizations.	CLS hopes for and looks forward to broad participation by all stakeholders in the crafting of any and all potential policy revisions regardless of the venue including but not limited to: DCF policy revision, administrative rule making or legislation in order to achieve the best possible outcomes for all children in Wisconsin.
Results This issue has been resolved. The bill will not include a mandate that the Department promulgate an		

administrative rule.	

Notification: Certified vs. Registered Mail	
The bill, as currently drafted, requires notice to tribes of child custody proceedings involving Indian children by registered mail, return receipt requested, which is what is required by ICWA and the BIA Guidelines.	The Workgroup had originally proposed the use of certified mail, return receipt requested, which was supported by the stakeholders who commented on the issue. However, information received from the Legislative Council indicates that the state may be at risk of non-compliance with ICWA by allowing notice by certified mail. In addition, an analysis of the bill provided by the American Indian Law Clinic at the University of Colorado Law School, requested by the Wisconsin Office of the State Public Defender, also suggests that non-compliance could be an issue.
Results This issue has been resolved. ICWA requires notice by registered mail.	

Existing Indian Family Doctrine		CLS
Some stakeholders objected to the language in the bill that would preclude a court in Wisconsin from considering the Existing Indian Family Doctrine, which essentially states that a court can consider whether a child has significant contacts with his or her tribe in determining whether the ICWA applies. The stakeholders argued that this should be left to the courts to consider "based on the facts of each individual case rather than being legislatively banned."	This language was incorporated into the bill because case law clearly indicates that only tribes can determine their own membership. It also directly contradicts the clear language in ICWA defining "Indian child." A large majority of court decisions (approximately a 4 to 1 ratio) have not supported the Existing Indian Family Doctrine. Twenty-five (25) states have rejected it either judicially or legislatively. No state has supported it legislatively. The Workgroup's position is that the Indian Child Welfare Act applies to child custody proceedings [as defined at 25 USC 1903(1)] involving Indian children [as defined at 25 USC 1903(4)]. The Workgroup, therefore, cannot support the Existing Indian Family Doctrine. It should be noted that the case *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982), which established the Existing Indian Family Doctrine, and which was supported by the Kansas Supreme Court, was just abandoned by that same Supreme Court in the case *In the Matter of A.J.S.*, No. 99,130. In that ruling, filed March 27, 2009, the Kansas Supreme Court stated "From this point in ICWA interpretation and the	CLS does not take a position on the Existing Indian Family Doctrine but does wish to clearly state that the bill draft bans any and all judicial discretion regarding the application of this case law doctrine.

	development of common law, we are persuaded that abandonment of the existing Indian family doctrine is the wisest future course. Although we do not lightly overrule precedent, neither are we inextricably bound by it." The Court went on to state that ". . . the existing family doctrine appears to be at odds with the clear language of ICWA, which makes no exception for children such as A.J.S." and "Further, as recognized by the *Holyfield* decision, 430 U.S. at 36-37, tribal interests in preservation of their most precious resource, their children, drove passage of ICWA; . . ." The Court also cited the ruling in the case *Baby Boy C.*, 27 App. Div.3d 34 in which that court stated "Because Congress has clearly delineated the nature of the relationship between an Indian child and tribe necessary to trigger application of the Act, judicial insertion of an additional criterion for applicability is plainly beyond the intent of Congress and must be rejected. . ." In summary, the Kansas Supreme Court stated: "Given all of the foregoing, we hereby overrule *Baby Boy L.*, 231 Kan. 199, and abandon its existing Indian family doctrine. Indian heritage and the treatment of it has a unique history in United States law. A.J.S. has both Indian and non-Indian heritage, and courts are right to resist essentializing any ethnic or racial group. However, ICWA's overall interests—those of both natural parents, the tribe, the child, and the prospective adoptive parents—are appropriately considered and safeguarded."	
Results This issue is no longer a point of any contention with stakeholders present at the March 23 meeting. It is not clear whether the Children and the Law Section continues to have issues with it. As such, it will be discussed on April 14.		

Stakeholders indicated that there is a conflict between the Indian Child Welfare Act and current state statutes related to infant relinquishment.	The Workgroup is aware of this and decided to not address the conflict in this bill. The Department has indicated that it will look at this issue separately with the Legislature.
Results This issue has been resolved by an agreement to address this issue separately from the ICWA codification. The Department will discuss the issue with tribes and legislators and will most likely introduce separate legislation subsequent to the enactment of the ICWA codification bill.	

Cost to Counties	
Stakeholders indicated that the bill would result in increased costs to counties, primarily in terms of additional staff time required for ICWA cases.	This concern will be examined when the fiscal note is completed.
Results This issue has been resolved. The fiscal note to the bill will attempt to identify the costs of the bill on all parties.	


FORWARD
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SB 288?

Testimony of Kris Goodwill, Esq.
Ho-Chunk Nation Department of Justice
and Member of the ICWA Codification Workgroup

Joint Legislative Committee Hearing
on the Bill to Codify the Federal Indian Child Welfare Act

September 16, 2009

- Good morning, Senator Jauch, Representative Grigsby, and members of the Assembly and Senate Committees on Children and Families

- My name is Kris Goodwill and I am a tribal attorney with the Ho-Chunk Nation Department of Justice and a member of the ICWA Codification Workgroup. I am an enrolled member of the Menominee Indian Tribe of Wisconsin. I have also worked for the Oneida and Lac Courte Oreilles Tribes in the area of child welfare. I continue to work in the area of child welfare for the Ho-Chunk Nation.

- My testimony will focus on the legal process of transferring an Indian child welfare case from circuit court to a tribal court, especially relating to whether a proceeding was at an advanced stage.

- In ICWA, Congress recognized that there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that States often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. The Act promoted the philosophy that the best interests of Indian children are best assured through Tribal involvement. In fact, Tribes have exclusive jurisdiction over cases involving an Indian child residing or domiciled on the reservation.

- If the Indian child does not reside or is not domiciled on the reservation, then the circuit court has concurrent jurisdiction. However, ICWA clearly states that except in certain circumstances, the circuit court must transfer the case to the Tribal court upon the petition of either parent or the Indian custodian or the Tribe.

- Exceptions to this mandatory transfer provision are if either parent objects, the Tribes declines jurisdiction (or the Tribe does not have a court), or the circuit court finds "good cause to the contrary."All three of these exceptions are included in the bill.

- ICWA does not define "good cause." However, the BIA Guidelines, which are guidelines and not regulations, offers the following: the child is over 12 years of age and objects; transfer would create undue hardship for witnesses or parties and the tribal court cannot mitigate the hardship; and the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

- The Codification Workgroup early on accepted the first two but not the advanced stage concept because there is a long history in Wisconsin – and other states – of social services agencies (both public and private) and courts not making good faith efforts to determine if a child was an Indian child or, even when it was known, and not providing required and prompt notice to the Tribes. As a result, Tribes often find out about a case late in the proceedings. It simply is not fair to be able to use an advanced stage argument if a Tribe has not been provided with adequate notice of a proceeding. Noncompliance with the notice requirement in ICWA continues to be problem as you heard in earlier testimony and it is one of the important reasons why we are in front of you today.

- During the long process of working on this bill, the Workgroup negotiated with the stakeholders that advanced stage could be included in the bill if the various stages of a child custody proceeding would provide the opportunity for the Tribe to petition for a transfer of jurisdiction. Initially, the Workgroup identified approximately 12 such stages and offered this as a compromise.

- This was not acceptable to some stakeholders and the Workgroup, negotiating in good faith, offered four such stages at which the Tribe could petition for transfer of jurisdiction and the advanced stage argument could not be used. Some of the stakeholders accepted this and one did not.

- It should be pointed out that ICWA itself essentially identified four stages or types of child custody proceedings: placement into foster care, termination of parental rights, placement into a preadoptive home, and placement into an adoptive home.

- Finally, the Workgroup, in an effort to create a bill which everyone could support and yet which recognizes the right of Tribes to care for their own members and those eligible for membership, suggested the compromise of two stages: child in need of protection or services (CHIPS) and termination of parental rights (TPR). This still was not acceptable to one stakeholder group.

- The compromise reached is as follows: The Tribe received notice of the proceeding, the Tribe has not indicated to the court in writing that it is monitoring the proceeding and may request transfer at a later date and because of gross negligence the Tribe has not petitioned for transfer within three months after receiving notice of the CHIPs or TPR proceeding.

- It should be pointed out that the Minnesota Court of Appeals clearly stated in a decision that CHIPS and TPR proceedings are separate proceedings. Chapter 48 treats CHIPs proceedings separate from TPR proceedings as each require separate petitions supported by separate statutory grounds.

- Even if a child is, in a timely manner, identified as an Indian child and the Tribe is informed of that in a timely manner, there still may be situations where the Tribe will intervene, but not seek transfer of jurisdiction. For example, a Tribe may not seek to

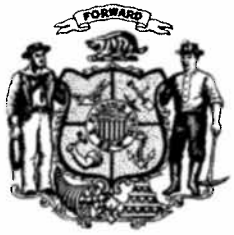
transfer jurisdiction when the family resides some distance from the reservation, such as in Milwaukee, and goal is to reunify the family. Services, including court hearings, should be as closely located to the family as possible. However, over time, the family situation may not improve, placement with a relative in Milwaukee may not work out or the family moves to Black River Falls, then the Tribe may want to transfer the case to Tribal Court. These events usually happen after the first three months of a CHIPs or TPR petition getting filed. This part of the bill is a product of compromise and one which my client, as one part of the workgroup, does not agree with 100%.

- Overall, we believe that the bill strikes an acceptable balance between the interests of all of the parties and is consistent with the intent of the federal law.

- We believe that codification of ICWA will make it easier for everyone in the child welfare and juvenile justice systems to understand and perform their responsibilities.

- Thank you.


WISCONSIN STATE LEGISLATURE


FORWARD

SB 288?

Testimony of Carolyn G. Grzelak, Esq.
St. Croix Chippewa Indians of Wisconsin, Office of Tribal Attorney
and Member of the ICWA Codification Workgroup

Joint Legislative Committee Hearing
on the Bill to Codify the Federal Indian Child Welfare Act
September 16, 2009

Good morning Senator Jauch, Representative Hraychuck, Representative Grigsby and members of the Assembly and Senate Committees on Children and Families.

My name is Carolyn Grzelak and I am with the Office of Tribal Attorney for the St. Croix Chippewa Indians of Wisconsin. I have also participated as a member of the ICWA Codification Workgroup.

My testimony today will provide you with an overview of a child welfare case under ICWA and this bill and also the concept of withdrawal of a voluntary consent to termination of parental rights.

As you have heard from others, the Indian Child Welfare Act (ICWA) was enacted to prevent the breakup of the Indian family. Despite the passage of ICWA over 30 years ago, it is not followed as it should be in Wisconsin. Unfortunately, as a result, the best interests of the Indian child are not always being considered. Thus, there is a great need to codify ICWA in Wisconsin through this bill to ensure that the Indian child's best interest are considered and protected.

I would like to begin by providing you with a basic overview of an Indian child welfare case under ICWA and this bill. The overall process of such a case is similar to all other child welfare cases with the addition of specific provisions that are designed to ensure that the Indian child's best interests are considered by the court.

Child Custody Proceeding
ICWA and this bill define a child custody proceeding as:

1) Any action removing a child from his/her parent or Indian custodian for temporary placement in foster care, an institution, or the home of a guardian where the parent or Indian custodian cannot have the child returned on demand
2) A termination of parental rights (TPR) proceeding
3) A pre-adoptive placement
4) An adoptive placement

Notice
Under ICWA and this bill, notice to the Indian child's tribe, parents and custodian is required before any hearing concerning the child can take place. The notice must be provided at least 10 days prior to the hearing and the parties receiving notice may request an additional 20 days to prepare for the hearing. Notice of the filing of a petition in a CHIPS, JIPS or termination of parental rights case must be sent registered mail, return receipt requested. Notice of all other hearings must simply be made in writing.

Definition of Indian Child
Once notice is properly provided to a tribe, the tribe will make a determination if the child is an Indian child under ICWA and this bill by either being a member of the tribe or being eligible for membership and their parent is a member of the tribe.

Legal Representation
Both ICWA and this bill provide an indigent parent or Indian custodian the right to court appointed legal counsel in every Indian child welfare case.

Intervention
At any point in an Indian child welfare case, the child's tribe has the right to intervene and be a party to the case.

Transfer of Jurisdiction
In an Indian child welfare case, the child's parents or tribe have the right to transfer the case to the child's tribal court, unless a parent of the child objects, the child's tribal court declines transfer or the court finds good cause not to transfer.

Active Efforts
ICWA and this bill require active efforts, instead of reasonable efforts, be made in all cases to prevent the breakup of the Indian family. Before a child can be removed from their home or parental rights be terminated, it must be proven that active efforts were made and were found to be unsuccessful. This bill defines active efforts as an ongoing, vigorous, and concerted level of case work beyond that which is typically viewed as reasonable efforts. Active efforts must be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and utilize the available resources of the tribe, tribal and other Indian child welfare agencies, extended family of the child and other individual Indian caregivers. If any of the activities that constitute active efforts are not conducted, the person seeking the out-of-home-placement or involuntary termination of parental rights must submit documentation to the court explaining why an activity was not conducted.

Qualified Expert Witness
Both ICWA and this bill require that the court find, by clear and convincing evidence in an out-of-home placement or beyond a reasonable doubt in a TPR, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage. Such a finding must include the testimony of a qualified expert witness. The purpose of the qualified expert witness is to ensure that the there is no cultural bias that is prompting the breakup of the Indian family. Thus, the bill defines a qualified expert witness as a person who has substantial knowledgeable of the customs, traditions and values of the Indian child's tribe relating to family organization or child-rearing practices and in the following order of preference:

1) A member of the Indian child's tribe
2) A member of another tribe
3) A professional person
4) A layperson

Placement Preferences

Both ICWA and this bill provide placement preferences that must be followed when placing a child in out-of-home care or in an adoptive home. Placement preferences are as follows:

FOSTER CARE or PRE-ADOPTIVE PLACEMENT	ADOPTIVE PLACEMENT
Home of an extended family member	Extended family of the child
Foster home licensed by the child's tribe	Another member of the child's tribe
Indian foster home licensed by another licensing agency	Another Indian family
Group home or residential care center approved by an Indian tribe or operated by an Indian organization	

That is a basic overview of an Indian child welfare case and how ICWA and this bill would apply to the case to ensure that the best interests of the Indian child are protected.

Withdrawal of Consent

The last issue that I would like to speak to you about today is the issue of withdrawal of consent to a termination of parental rights by the parent for any reason at any time until the order terminating the parental rights is entered by the court. The Workgroup and stakeholders spent considerable time discussing this issue. The Workgroup has taken the position that ICWA is clear and must be followed because to do otherwise would infringe upon the rights provided to parents under ICWA.

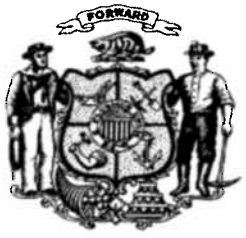
ICWA states that "in a voluntary proceeding for termination of parental rights to ... an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination." The language in this bill mirrors that of ICWA.

ICWA gives this right of withdrawal of consent to all cases regardless of what prompted the consent. It does not distinguish between withdrawals of consent to a TPR that are in response to the filing of a involuntary TPR or those withdrawals of consent that are given without the previous filing of a involuntary TPR. Some people may feel that there should be a distinction and that withdrawal of consent should not be a right provided to a parent when it was given in response to involuntary TRP petition.

While we understand the nature of this belief, it is the Workgroup's position that ICWA does not make such a distinction. Acceptance of this proposal would reduce the rights of the parent under ICWA. In addition, if such a distinction were to be made in this bill, it would be in violation of ICWA and ICWA would trump that provision of the bill. Furthermore, there are two cases specifically on point that support the Workgroup's position, an Alaska Supreme Court decision, *In the Matter of J.R.S., Village of Chalkyitsik v. M.S.F. and J.J.D.*, 690 P.2d 10, and an Arizona Court of Appeals decision, *Cheree L. v. Arizona Department of Economic Security and Precious W.*, No. 2 CA JV 2002-0009, 66 P.3d 1248.

As a result, the Workgroup takes the position that in accordance with ICWA, regardless of what precipitated the consent to termination of parental rights, the parent has the right to withdrawal that consent for any reason at any time prior to the final order of termination.


WISCONSIN STATE LEGISLATURE


FORWARD

SB 288?

Comments in support of the pending Indian Child Welfare Act Legislation
Joint Senate and Assembly Children and Families Committee
Capital Building, Madison, Wisconsin
September 16, 2009

Chairman Lewis Taylor
St. Croix Chippewa Indians of Wisconsin

Good morning Senator Jauch and members of the Committee, and to the other tribal leaders here today.

My name is Lewis Taylor, I am Chairman of the St. Croix Chippewa Indians of Wisconsin.

Thank you for the opportunity to share my thoughts about this Bill and how important it is to Indian people.

The Federal government passed the Indian Child Welfare Act 30 years ago. My main comment about the Wisconsin Bill is that *it's about time.*

I brought along a picture today that speaks better than just my words. It shows my family and it brings to my mind many memories of how Indian families were treated before the law was changed.

What I remember from those days is that it was common for the government to take Indian children away from their families.

There were raids and Indian children would disappear.

After children were taken we would never hear from them again. Some are still lost.

It was like they had died.

In the picture you can see my nephew Martin Johnson. Martin was taken from our family and put in several foster homes. For a long time I did not know if he was alive or dead.

My own nieces were taken away and for many years they were lost. Because they grew up outside of their real families and their culture, they had terrible problems in life.

I do not want my grand children and their children to have to go what I went through.

Representatives from the Wisconsin Department of Children and Families and Tribal Representatives have worked hard to fix this situation for Wisconsin.

Senator Jauch is leading the effort to get this Bill passed.

I urge all of Wisconsin's elected representatives to support this important bill.

It's about time.

Thank you.

St. Croix Chippewa Indians of Wisconsin

24663 Angeline Avenue • Webster, WI 54893 • (715) 349-2195 • Fax (715) 349-5768

ST. CROIX TRIBAL COUNCIL RESOLUTION NO. 03-16-09-02

WHEREAS, the St. Croix Chippewa Indians of Wisconsin (Tribe) is a federally recognized Indian Tribe duly organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and possessing a government-to-government relationship with the United States of America; and

WHEREAS, the Tribe is organized under a Tribal Constitution and By-laws approved by the Secretary of the Interior or his authorized delegate on November 12, 1942; and

WHEREAS, Article V, Section 1(a) of the Constitution and By-Laws of the St. Croix Chippewa Indians of Wisconsin authorizes the Tribal Council to negotiate with federal, state, and local governments on all matters affecting the welfare of the members of this organization; and

WHEREAS, the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 to 1963, was enacted on November 8, 1978, for the purpose of, among other things, protecting the best interests of Indian children and promoting the stability and security of Indian Tribes and families; and

WHEREAS, many of the negative effects on Indian families sought to be remedied by the ICWA still exist today, some 30 years after the Act's passage, due to ignorance of the ICWA and failure to comply with its terms; and

WHEREAS, there is therefore a need to codify the ICWA in Wisconsin to attempt to remedy these negative effects on Indian families and to ensure compliance with the ICWA in Wisconsin; and

WHEREAS, in addition to the negative consequences felt by Indian families due to ignorance of and noncompliance with the ICWA, there is a concept created by a court in Kansas referred to as the Existing Indian Family doctrine which erodes the very core of the ICWA insofar as the doctrine provides that the ICWA applies only if an Indian child is part of an existing Indian family; and

WHEREAS, there is an urgent need to ensure that the codification of the ICWA into Wisconsin law includes a provision explicitly stating that a court assigned to exercise jurisdiction under the Children's Code or the Juvenile Justice Code may not determine whether the ICWA applies to an Indian child custody proceeding based on whether the Indian child is part of an existing Indian family; and

WHEREAS, such a provision is absolutely necessary to avoid the disastrous effects the Existing Indian Family doctrine would have on Indian families if it were applied;

NOW THEREFORE, BE IT RESOLVED: that the St. Croix Chippewa Indians of Wisconsin fully supports the codification of the ICWA into Wisconsin law proposed by the Tribes in collaboration with the Wisconsin Department of Children and Families, and

BE IT FURTHER RESOLVED: that the St. Croix Chippewa Indians of Wisconsin emphatically supports the provision of the codification of ICWA stating that the Existing Indian Family doctrine shall not apply in the State of Wisconsin.

CERTIFICATION

I, the undersigned as Secretary/Treasurer of the St. Croix Tribal Council, do hereby certify that the Council is composed of five(5) members of whom 3 were present, constituting a quorum, at a meeting duly called, convened and held this 16th day of March, 2009 and that the foregoing resolution was adopted at said meeting by an affirmative vote of 3 members for 0 against and 0 members abstaining from the vote, and that said resolution has not been rescinded or amended in any way.

Hazel Hindsley
St. Croix Chippewa Indians of Wisconsin Tribal Council

Taylor Family 1948

Baby Floyd Taylor, Agnus Butler-Taylor, George Taylor, John D. Taylor, Phillip Taylor, Irene Taylor, Baby Robert Johnson, Lewis Taylor, Roberta Taylor, Harold Taylor, John Taylor, Betty Johnson-Freemantle, Martin Johnson, Lawrence Johnson


FORWARD

SB288?

TESTIMONY PROVIDED ON BEHALF OF ONEIDA TRIBE OF INDIANS OF WISCONSIN

To the Assembly Committee on Education

RE: Indian Child Welfare Act (ICWA) Codification

Wednesday, September 16, 2009

Good Morning:

I am Councilman Brandon Stevens, an elected member of the Oneida Business Committee. On behalf of the Oneida Tribe of Indians of Wisconsin, I am here today to not only express support for this legislation, but to urge its swift passage as this legislation is long overdue.

Before I proceed with my general comments I would like to thank the many people who have worked so hard and so long to get this bill before you today. First, Senator Jauch - Your due diligence in working with all interested parties made it possible for us to all gather here today. I also want to thank the secretary and staff of the Department of Children and Families. I want to recognize the work of the dedicated staff who have represented Wisconsin's Tribal nations and who have been successful in helping others understand the importance of this legislation to Wisconsin's Tribes.

The legislation before you today sheds light on a little known, but recent chapter of Native American history in this country. You have heard the statistics: Prior to the passage of ICWA in 1978, Indian children were six (6) times more likely to be separated from their families; and an overwhelming majority of these were placed in non-Indian homes. But these statistics hardly scratch the surface of the impact of a purposeful policy that attempted to erase the ties that Indian children have to their culture.

You will have an opportunity today to hear testimony from individuals who have lived the nightmare of this policy. I want to thank Dale and Cheryl Powless who are here today to share their personal stories. I am sorry to say that these stories are not isolated, nor are they a thing of the past. Certainly, the passage of ICWA at the federal level has resulted in improvement in how Indian Child Welfare cases are handled. However, within the states, Wisconsin included, have been slow to codify the federal provisions. As a result, compliance with the federal law has been inconsistent. Even today, after all these years, and despite the best efforts of many, Indian children are still placed in out-of-home care at twice the rate of non-Indian children.

Oneida has taken steps to recognize and implement the provisions of ICWA just a few years after the federal law passed in 1978 when we created the Oneida Child Protective Board (OCPB). This board was vested with authority over child custody and placement proceedings in accordance with ICWA. The purpose of the board is to protect the best interests of Oneida children and to promote the stability and security of Oneida families by the establishment of minimum standards for the removal of Oneida children from their families. In accordance with ICWA, the OCPB may intervene in federal, state and county courts in the following proceedings: foster care placement, termination of parental rights, pre-adoptive placement, adoption and out-of-home placement. In the past year alone, the Oneida Child

Protective Board had 53 court cases through the State of Wisconsin which involved Oneida children. As a result of those court cases, 65 Oneida children were in out-of-home placements.

The Oneida Child Protective Board has had a great deal of success in placing Oneida Children with loving Oneida families. I would like to submit to you a letter from Lisa Duff, who with her husband Michael, provided foster care to Oneida children. Because they had trouble conceiving, they were overjoyed when they learned that they could adopt two (2) foster children who had been placed in their care. The Oneida Protective Board helped Lisa and her husband maneuver through the system and while the process was not easy, they are today very proud and happy parents of Michael Vernon James Duff and Liv Duff. This success story, while difficult, serves as an example of how the system should work. Despite the years that have passed since ICWA became law, the Oneida Child Protective Board reports today that many courts are not aware of the provisions in federal law. The problems continued to be encountered include the courts not sending notice in time for the OCPB to review the cases in a timely manner and insufficient notification prior to the placement of Indian children being placed in non-native homes. This has caused children to be placed in one home, then removed and then placed in another home which has been proven to be traumatizing for some of the children.

In order for this system to work properly, to ensure that these children are properly protected **today**, it is vital that Wisconsin Courts and those who execute Wisconsin's Child Welfare Laws first be aware of the provisions of ICWA. Second, it is vital the provisions of ICWA be uniformly applied throughout Wisconsin. It is critical that everyone involved in making life-changing decisions for children understand importance of preserving a sense of identity and culture for our Indian children as they are our future. Passage of this bill will help accomplish these shared goals.

Thank you.


FORWARD

SB 288?

Jim Doyle
Governor

Reggie Bicha
Secretary

State of Wisconsin
Department of Children and Families

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September 16, 2009

TO: Senate Committee on Children and Families and Workforce Development and Assembly Committee on Children and Families

FROM: Reggie Bicha
Secretary, Department of Children and Families

RE: Indian Child Welfare

Good morning Senator Jauch, Representative Grigsby, and members of the Senate Committee on Children and Families and Workforce Development and the Assembly Committee on Children and Families.

I am pleased and honored to be here to testify in favor of this bill which, at long last, will codify the Federal Indian Child Welfare Act into Wisconsin statutes.

As many of you know, this bill is of great importance to the Department of Children and Families and to me.

The bill creates the roadmap that all participants in the child welfare and juvenile justice systems in our state need in order to fulfill the important mandates of the federal law and to meet the needs of Indian children.

The legislation before you protects the interests of Indian children and will ensure the maintenance of cultural, emotional, and psychological ties between Indian children and the Tribes with which they are affiliated.

Too often in the past Tribes experienced the unwarranted removal of Indian children from their homes by nontribal agencies. A high percent of these children were placed in non-Indian foster and adoptive homes.

This is not ancient history. This was national policy up through the 1970s and continues in many ways even today. Indian children in Wisconsin are more than twice as likely to be removed from their homes as non-Indians.

This bill will create vital clarity to direct and guide professionals in child welfare as they seek to make the best decisions for the immediate and long-term needs of Indian children and to maintain tribal heritage.

Allow me to share with you a real example of why this legislation is so critical. As a young social worker in Monroe County, I had the opportunity to work with a family, some of whom were enrolled members of the Ho-Chunk nation. To best serve this family, I filed a (ChIPS) petition child in need of protection and services with the Monroe County Court. The Ho-Chunk Nation expressed their intent to assume jurisdiction of the matter and to assist the family through tribal court.

We all wanted to do the right thing for this family, for the Ho-Chunk people and for the law. The judge wanted to do the right thing; the Guardian ad Litem wanted to do the right thing; the Corporation Counsel wanted to do the right thing; and I wanted to do the right thing. But, when we looked to Chapter 48 of the Wisconsin Statutes for direction on Indian Child Welfare law and how to proceed on this important matter, it was silent.

Too often situations such as this continue to occur in our state. The consequence can be tragic. Failure to comply with the federal law could result in adoptions being overturned, children being severed from their tribal connections unnecessarily, and ultimately, the loss of tribal nations as a whole.

This bill is the result of 4 years of development involving each of the 11 sovereign tribes in Wisconsin, the Department of Children and Families, counties, court systems, advocates, private attorneys, and other stakeholders. In that time, many compromises have been made. This legislation builds upon existing federal law and provides workable procedures for implementation in this state.

On behalf of the Department of Children and Families and those we serve, I strongly encourage passage of this bill by the Senate and the Assembly.

Thank you for the opportunity to speak with you this morning.

SB 288 AB 421

Testimony of James Botsford
for the
JOINT PUBLIC HEARING
of the
Senate Committee on Children and Families and
Workforce Development
and the
Assembly Committee on Children and Families
on
September 16, 2009

Chairman Jauch, Chairman Grigsby, and members of both committees represented today, thank you for your leadership interest in this vital subject and I particularly want to thank Senator Jauch for inviting me to testify today on this important and carefully crafted bill. I think I was asked to provide testimony for two reasons. **The first reason** being that since 1991 I have been the Director of the Indian Law Office of Wisconsin Judicare, Inc. That means I manage the only grant in the state from the Legal

Services Corporation that is directed specifically to the legal needs of low income Native Americans.

Our office has been involved in scores of ICWA cases over the years – sometimes as legal back-up to tribal or private attorneys. Additionally, starting before my time here and continuing to the present, our office has put together and distributed a book called, "The Indian Child Welfare Act: A Manual for Wisconsin Practitioners." We have updated and republished this book four times over the years in an attempt to help lawyers, courts and social services offices in Wisconsin understand and comply with the federal law as it has evolved through case law over time. We've distributed hundreds of copies of each of the four volumes.

Since the early 1990's I have listed my name in the category of "Indian Law" in the "Lawyer to Lawyer" section of the Wisconsin Lawyer Directory. It's a place where lawyers can go to seek out expertise from other lawyers in a subject area that they may not know so much about. I have kept that "Indian Law" listing ever since. Every year I get numerous calls from private attorneys saying they have an adoption or a custody battle or a CHIPS case involving a Native kid or a kid they think might be Native and they have a vague sense that there may be some particular legal considerations that apply. Sometimes they even know the name of the federal Indian Child Welfare Act, but aren't sure how it really works. The number of such calls I get every year has not diminished. The attorneys are typically very grateful for the guidance, and sometimes even confess that had they not been set on the right course regarding ICWA it could have resulted in an adoption or a TPR being undone, a wrenching and disruptive result no one would want.

I have also worked closely with the Wisconsin Tribal Judges Association since the early '90's. From time to time they find the resources to put on judicial education seminars, which they like to tailor for state court judges. These seminars are approved by the state Supreme Court for continuing judicial education credits for the state court judges who attend. Of the eight of these day-long seminars we have done over the years, four have focused almost exclusively on the Indian Child Welfare Act. That's remarkable. With all the tribal/state relations issues and jurisdictional issues out there, the tribal court judges felt that fully half of their educational initiatives should focus on educating state court judges on the Indian Child Welfare Act. And those continuing

education seminars have been well received. The evaluations urged that more be done. And yet I must tell you that attendance by the state court judges has been relatively meager. As you know they have very full dockets and we could only catch about five or ten of them per seminar even though we've moved the location around each time. I believe this emphasizes the importance of this issue, and the need to address it more comprehensively. We simply will never get all the judges up to speed through periodic regional seminars.

I began by saying I thought I had been invited to testify on this ICWA legislation for two reasons. Everything I've said thus far goes to the first reason: the intimate, daily working knowledge my office has of how ICWA works and doesn't work in Wisconsin and the need for this bill.

The second reason I think I was asked here revolves around my earlier experience. Prior to coming to Wisconsin in 1991, I ran an Indian Legal Aid office in Nebraska for seven years. During that time, for reasons much like those that bring us here today, I and my colleagues there had the opportunity to work successfully on the inclusion of the Indian Child Welfare Act into the Nebraska state statutes in 1985. I can tell you unequivocally that there was a significant positive change in compliance with ICWA in Nebraska after we did that. But as proud as I am that we were able to do that, regrettably I must report that we didn't do enough and problems persist there today and would not have to exist had we done something akin to what is before you today.

In Nebraska in '85 we simply took the federal ICWA and stuck it into the state statutes essentially verbatim as a separate set of statutory sections. In fact, I've been teased that I am the author of that law because it was my idea to put the word "Nebraska" in front of "Indian Child Welfare Act" and simply incorporate it wholesale into the state law.

We didn't have all the talent that has gone into this effort in Wisconsin. I sure wish we had. Recently I spoke with Sherri Eveleth, the Indian Child Welfare Program Specialist in the Policy Section of the Division of Children and Family Services of the Nebraska Department of Health and Human Services. She confirmed what we've been tracking up here.

The gaps and ambiguities in the federal ICWA have been, in her words, "contentious and problematic." There continues to be litigation in that state over issues like "Qualified Expert Witness" and "Active Efforts." She said that they continue to experience, again in her words, "an inconsistent application of some areas of ICWA in Nebraska, and inconsistent results." She assured me that we would be further ahead in Wisconsin if we addressed and clarified those contentious or ambiguous areas.

Members of the legislature, that is precisely what this ICWA Workgroup has done over the past months and years in arriving at the bill before you. It is remarkable how much talent and commitment and good thinking has gone into this bill. The state should be proud of the extraordinary expertise and good will they brought to the table. And the same is true on the tribal side. It was an uncommonly cooperative endeavor. Rarely does one see such a thorough and thoughtful collaboration between the state and the tribes, and most importantly, with such a well written result.

I think the bill before you is the most well-written articulation of ICWA in the whole country. I think it does more to clarify and protect the purposes of ICWA than any similar law in any other state. I think that if it is enacted as presented in this well-refined bill, Wisconsin will be in the forefront in terms of consistency of results, minimized litigation and good will all around in protecting the rights of Indian children and preserving the future of thriving Indian cultures in Wisconsin.

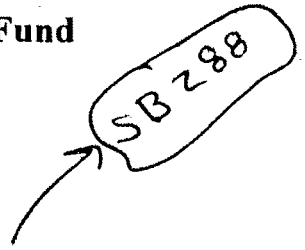
Thank you again Senator Jauch for inviting me here today, and thank you to members of both the Senate and Assembly Committees for this opportunity to talk to you.

Submitted the 14th day of September, 2009.
James Botsford


FORWARD

September 16, 2009
Wisconsin Legislature
Madison, Wisconsin

Statement by Mark C. Tilden
Senior Staff Attorney, Native American Rights Fund
On behalf of
National Indian Child Welfare Association



Dear Legislators,

My name is Mark Tilden. I have been invited to speak on a LRB 0150/3 which would enact a state Indian Child Welfare Act into law, primarily Chapters 48 (the Children's Code) and 938 (the Juvenile Justice Code). I am a Senior Staff Attorney with the Native American Rights Fund (NARF) which was founded in 1970 and is the oldest and largest non-profit law firm dedicated to asserting and defending the rights of Indian tribes, organizations and individuals on a nationwide basis. NARF represents the National Indian Child Welfare Association (NICWA) on this matter. NICWA is an Indian organization that specializes in Indian child welfare. It is the most comprehensive source of information on American Indian child welfare and works on behalf of Indian children and families. It provides public policy, research, and advocacy; information and training on Indian child welfare; and community development services to a broad national audience including tribal governments and programs, state child welfare agencies, and to other organizations, agencies, and professionals interested in the field of Indian child welfare. NICWA works to address the issues of Indian child abuse and neglect through training, research, public policy, and grassroots community development. It also works at a national level to support compliance with the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963 (2000).

Turning to the bill, it is designed to remedy the continuing problem of Native American children being disproportionately over-represented in the substitute-care system, including the disproportionate placement of those children in non-Native homes. As of 2005, 3.5 percent of Wisconsin's foster care population was Indian, while Indian children represent only 1 percent of the State's total child population (2005 Adoption and Foster Care Analysis and Reporting System (AFCARS), U.S. Department of Health and Human Services). The bill articulates a cooperative and collaborative approach between the sovereign Indian nations located in Wisconsin and the State, a true government-to-government relationship which should be fostered at all levels, especially when it deals with the tribes' most valuable resource, their children, who are also citizens of the State. This collaborative approach goes a long way toward improving services and outcomes for Indian children.

Congress necessarily intended to give ICWA a broad scope because of the massive problem it meant to remedy

To begin, the Congress necessarily intended to give the ICWA a broad scope because of the massive problem it meant to remedy, a problem which exists here in the state of Wisconsin. The Federal Government has, through extensive legislation and course of dealings, established a "trust relationship" with the Indians of the United States. The ICWA was passed in the exercise of that trust responsibility. 25 U.S.C. § 1901 (2000); *Navajo Nation v. Hodel*, 645 F. Supp. 825, 827 (D. Ariz. 1986) ("The ICWA does create a special trust relationship between the government and the Indians for purposes of the statute."). Its enactment stemmed from a growing tribal and federal concern in the late 1960s and early 1970s that the intentional and unintentional practices of non-tribal public and private child welfare agencies led to the disproportionate,

wholesale, and often unwarranted, separation of Indian children from their families. *Holyfield*, 490 U.S. at 32-33. The separation usually led to the subsequent permanent placement of those children in non-Indian foster or adoptive homes and institutions. 25 U.S.C. § 1901(4). These practices eventually reached a level that caused tribes to fear for their very survival.

By 1974, so many tribal children were lost to the states' foster care systems and public and private adoption agencies that the tribes' survival had become a "crisis...of massive proportion". *H.R. Rep. No. 85-1386, at 9 (1978) as reprinted in* 1978 U.S.C.C.A.N. 7530, 7532 (hereinafter *House Report*).

The House Interior and Insular Affairs Committee explained:

> [T]his committee has been charged with the initial responsibility in implementing the plenary power over, and responsibility to, the Indians and Indian tribes. In the exercise of that responsibility, the committee has noted a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.

House Report, at 19.

The Senate Subcommittee on Indian Affairs conducted oversight hearings to address the crisis. These hearings produced overwhelming evidence documenting state practices damaging to Indian children, families and tribes. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93rd Cong., 2d Sess. (1974).* Indeed, "[s]tudies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their

families and placed in adoptive families, foster care, or institutions. (citations omitted). Adoptive placements counted significantly in this total: in your sister State of Minnesota, for example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes. (citation omitted)." *Holyfield*, 490 U.S. at 32-33.

The statistics were alarming and are not much better today—31 years later. In April 2005, the U.S. Government Accounting Office (GAO) issued a report titled "Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used To Target Guidance and Assistance to States". GAO-05-290, *available at http://www.gao.gov/new.items/d05290.pdf.* It noted that "[i]n 23 states, for example, American Indian children represented less than 1 percent of all children served in foster care in fiscal year 2003. In five states, however, at least one-quarter of the foster care population was American Indian, as shown in table 3." *Id.* at 13. As I stated before, as of 2005, we see that 3.5 percent of Wisconsin's foster care population was Indian, while Indian children represent only 1 percent of the State's total child population. Thus, at present in the state of Wisconsin Indian children are still disproportionately over represented in its foster care system, resulting in many adoptions of Indian children, most likely to non-Indian homes. The ICWA was clearly intended to remedy this problem.

Hearings were again held in 1977 and 1978. At these hearings there was considerable focus on the crisis facing tribes as a result of the "massive removal of their children" to the states' foster care systems and public and private adoption agencies and

the ultimate permanent placement of those children in non-Indian settings. *Holyfield*, 490 U.S. at 34.

Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association explained the unmitigated erosion to the tribes' existence caused by the tribes' loss of their children. He lamented:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Id. at 34. (*quoting Hearings on S. 1214 Before the Subcomm. On Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs,* 95thCong., 2d Sess. (1978).

The Chief's view was shared by the members of Congress. Congressman Morris Udall said "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy", and Congressman Lagomarsino stated: "[t]his bill is directed at conditions which ... threaten ... the future of American Indian tribes ..." *Id.* at 34 n.3 (*quoting* 124 Cong. Rec. 38102 (1978)). In 1978, after long consideration by the Congress, the Act was passed. *Id.* at 33-34.

As set forth in 25 U.S.C. §1901, the Congress found:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . .;
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

In the Act, the Congress recognized that it had the responsibility to protect and perpetuate tribes and to protect their present and future tribal members. 25 U.S.C. § 1901(2). It declared that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture ..." 25 U.S.C. § 1902.

This background makes clear, and the BIA Guidelines stress, that ICWA is a remedial statute and must be liberally interprested to achieve its goals. *Holyfield,* 490 U.S. at 52; *In re K.H. and K.L.E.*, 981 P.2d 1190, 1195 (Mont. 1999) (recognizing remedial nature of ICWA); *In re Adoption of Mellinger*, 672 A.2d 197, 197 (N.J. Super. Ct. App. Div. 1996) (same); *In re Angus*, 655 P.2d 208, 211 (Or. Ct. App. 1982), *cert. denied*, 464 U.S. 830 (1983) (same); Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67583, 67586 (Nov. 26. 1979 (BIA Guidelines); 3 Norman J. Singer, *Sutherland Statutory Construction,* § 60:1 (6th ed. 2001).

It is difficult to imagine a law more protective of Indian children and tribes than the ICWA. The Act's jurisdictional, substantive and procedural requirements guard Indian children against the permanent separation from their families and tribes, protect the integrity of Indian families, and improve the chances that Indian tribes will survive as viable sovereign, political entities. *Holyfield*, 490 U.S. at 49-50; *see also, People in*

Interest of J.L.G., 687 P.2d 477, 478 (Colo. Ct. App. 1984) ("Congress passed [ICWA] with the express purpose of protecting the best interests of Indian children and promoting the stability and security of Indian tribes and families); *In re J.M.*, 718 P.2d 150, 152 (Alaska 1986) (same); *In re Adoption of Lindsay C,* 280 Cal. Rptr. 194, 196 (Cal. Ct. App.1991) (same); *In re Crystal K.* 276 Cal.Rptr. 619 (Cal. Ct. App. 1990), *cert. denied,* 502 U.S. 862 (1991); *In re Appeal of Pima County Juvenile Action,* 635 P.2d 187, 189 (Ariz. Ct. App. 1981), *cert denied,* 455 U.S. 1007 (1982) ("[t]he Act is based on the fundamental assumption that it is in the Indian child's best interests that its relationship to the tribe be protected."); *In re Custody of S.B.R.*, 719 P.2d 154, 156 (Wash.Ct.App. 1986) (same).

Through the ICWA, Congress has made a determination that tribes be given every opportunity to maintain their membership, that Indian children have a right to their heritage, and that their right to determine the future of their children be protected and fostered. ICWA contains statutory presumptions as to what is in the best interest of the Indian child. The purpose of these presumptions is to remedy the problem discussed and the result of Indian children who grow up in a non-Indian setting who become spiritual and cultural orphans as adults. They do not entirely fit into the culture in which they were raised and yearn throughout their life for the family and tribal culture robbed from them as children. *Holyfield*, 490 U.S. at 33, n. 1. As adults, they disproportionately experience problems with identity, drug addiction, alcoholism, incarceration and, most disturbingly, suicide.[1]

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[1] Carolyn Attneave, *The Wasted Strengths of Indian Families*, 32 (1977); Robert Bergman, *The Human Cost of Removing Indian Children From Their Families*, 35 (S. Unger ed. 1977).

The ICWA and its history plainly show Congress' intent to protect the existence and integrity of tribes and to protect and foster the best interest of Indian children. With these goals in mind, the State of Wisconsin, through this legislation, would help remedy an existing and persistent problem and act to serve the best interest of Indian children here in the State of Wisconsin.

In the ICWA, Congress clearly recognized and reinforced tribal sovereignty as an essential means of achieving the Act's objective

In the ICWA, Congress specifically found that to achieve its goals it needed to protect and preserve tribal sovereignty. 25 U.S.C. § 1901(2). Thus, through the ICWA, it declared a policy "to promote the stability and security of Indian tribes and families," that is, a policy that would strengthen tribal self-government and improve internal tribal relations. 25 U.S.C. § 1902; *J.W. v. R.J*, 951 P.2d 1206, 1212 (Alaska 1998) ("...Congress was concerned with two goals: protecting the best interests of Indian children and promoting the stability and security of Indian tribes and families." (citations omitted)); *In re Adoption of Riffle*, 922 P.2d 510, 513-514 (Mont. 1996) (same). By acknowledging tribal authority over these matters, Congress exercised its judgment in the way it saw best "to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." *Holyfield,* 49 U.S. at 36-37, *citing House Report* at 23 (emphasis added). Indeed, the Supreme Court of the United States quoted with approval language from an ICWA decision of the Supreme Court of Utah which wrote: "The protection of [the tribe's ability to assert its interest in its children] is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interests of the parents." *Id.* at

53, *quoting In re Adoption of Halloway*, 732 P.2d 962, 969-970 (1986). In *Holyfield*, the Supreme Court pointed out the most obvious parts of the ICWA that were crafted to accomplish Congress' goals to protect tribal sovereignty. It began by noting the jurisdictional elements of the ICWA which recognized the scope of tribal sovereignty in an Indian child custody proceeding:

> At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe," as well as for wards of tribal courts regardless of domicile. Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court. (footnotes omitted).

Holyfield, 490 U.S. at 36. In addition, it noted that Congress also provided federal funds under Title II of the Act for the establishment and operation of on and off-reservation child and family service programs.[2] *Id.* at 37 n.6. Such programs were intended to directly strengthen tribal self-government and improve internal tribal relations.

Courts have consistently held in ICWA cases that it is the sovereign prerogative of a tribe to determine the future of it children. In *Holyfield*, the U.S. Supreme Court held that twins born out-of-wedlock to parents who were enrolled members of the

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[2] *See*, 25 C.F.R. Part 23. "The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and to ensure that the permanent removal of an Indian child from the custody of his or her Indian parent or Indian custodian shall be a last resort." Purpose of Tribal Gov't Grants, 25 C.F.R. § 23.22 (2006); *see also,* Purpose of Off-Reservation Grants, 25 C.F.R. § 23.22 establishing same objective for off-reservation programs

Choctaw Indian Tribe and residents and domiciliaries of the Choctaw Reservation located in Mississippi were "domiciled" on that reservation within the meaning of the ICWA's exclusive jurisdiction provision even though neither the parents nor the children were present on the reservation when the twins were born. Thus, the state court lacked jurisdiction to enter an adoption decree even though the twins were "voluntarily surrendered" for adoption. The Court wrote "[t]hese congressional objectives make clear that a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme is inconsistent with what Congress intended." *Holyfield*, 490 U.S. at 51.

Similarly, Congress intended for Indian tribes to have presumptive jurisdiction to determine custody issues involving their tribal children, and state law or policy that interferes with that intent must stand aside. *In re Adoption of Halloway*, 732 P.2d at 968; *In re A.B.*, 663 N.W.2d 625, 633 (N.D. 2003); *In re Marriage of Skillen*, 956 P.2d 1, 10-11 (Mont. 1998); *In Re J.L.P.*, 870 P.2d 1252, 1256 (Colo. Ct. App. 1994); *In re Youpee's Adoption*, 1991 WL 134556, 11 Pa.D & C.4th 71 (Pa. Comm. Pl.1991); *see In re Andrea*, 10 P.3d 191, 195 (N.M. Ct. App. 2000) (children's court transfer follows the congressional intent underlying ICWA where its unclear if 1911(b) applied); *In re Guardianship of Ashley Elizabeth R.*, 863 P.2d 451, 453 (N.M. Ct. App.1993) (in 1911(b)) case, construction of the term 'Indian custodian' is in conformity with the Congressional declaration of policy 'to promote the stability and security of Indian tribes and families.'"); *In re Armell*, 550 N.E.2d 1060, 1065-66, (Ill. App. Ct. 1990) (Congress intended uniformity of terms and state laws should not frustrate that intention; thus "good cause" not to transfer jurisdiction should not be interpreted by individual state law)

In *In re Marriage of Skillen,* a non-ICWA case involving a dissolution proceeding, the Supreme Court of Montana turned to its ICWA cases to help guide its decision to determine if the tribal court was the preferred forum. 956 P.2d at 15. It stressed the clear import from its ICWA cases of Congress' intent contained in ICWA's statutory presumptions favoring a tribal role in Indian child custody proceedings across the board. 956 P.2d at 10. For example:

- "granting the tribe, as opposed, to the Bureau of Indian Affairs, ultimate authority to determine whether a child is eligible for tribal membership, and thus, final authority to determine whether a child satisfies the ICWA definition of Indian child" (citations omitted) *id.*
- "stating that the ICWA is paramount to a natural parent's desire for anonymity" (citations omitted) *id.*
- "interpreting broadly language from the tribal court to conclude that Indian child was a ward of the tribal court and subject to exclusive tribal jurisdiction pursuant to the ICWA" (citations omitted) *id.*
- "recognizing a family member's right to intervene pursuant to the ICWA even after considerable steps in adoption proceedings had occurred." (citations omitted) *id.*

ICWA cases informed the Montana Supreme Court's jurisdictional analysis in three ways:

> First, that Congress felt the need to curtail states in these matters indicates that state courts are apt to exercise jurisdiction when the best interests of the Indian child do not necessarily support that assumption of jurisdiction. In other words, it puts states on notice that they are, in fact, a significant part of the problem, and that they should weigh their potential assumption of jurisdiction very judiciously. (citation omitted). Second, the ICWA

> indicates that regardless of the child's residence, tribal courts are uniquely and inherently more qualified than state courts to determine custody in the best interests of an Indian child. . . . Finally, the ICWA demonstrates confidence in the tribal forum, not only for the substantive expertise of its perspective, but also for its ability to make a fair and appropriate determination and to serve the interests of all the parties, including the state. (citation omitted.)...

956 P.2d at 11-12. In the end, the court was emphatic that any disregard for the clear policy contained in the ICWA statutory presumptions favoring a tribal role in an Indian child custody proceeding would diminish tribal sovereignty. True to its word, it ultimately favored tribal jurisdiction in the dissolution proceeding.

Likewise, here the State of Wisconsin would clearly indicate its intent to favor tribal court jurisdiction by passing the bill. Similar to 25 U.S.C. § 1911(b), it specifically provides for transfer of jurisdiction, which, *a fortiori*, evinces the statutory presumption that it is in the best interest of an Indian child for its tribe to decide its fate. *See, In re Adoption of M.T.S.*, 489 N.W.2d 285, 288 (Minn. Ct. App. 1992). Moreover, when viewed in its entirety, the bill patently evinces an overall intent to favor a tribal role in Indian child custody proceedings.

In sum, the bill would demonstrate the State of Wisconsin's intent to clearly recognize and reinforce tribal sovereignty as an essential means of achieving the Federal ICWA's objectives, which are echoed in the bill, which also provides an even greater possibility for improving services and outcomes for Indian children in this State.

Thank you.

Respectfully submitted,

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