

CR 92-167

CERTIFICATE

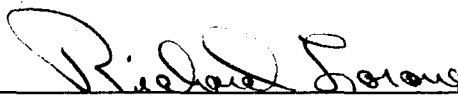
STATE OF WISCONSIN)
) SS
DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

I, Gerald Whitburn, Secretary of the Department of Health and Social Services and custodian of the official records of the Department, do hereby certify that the annexed rules relating to child-placing agency compliance with the federal Indian Child Welfare Act were duly approved and adopted by this Department on March 24, 1993.

I further certify that this copy has been compared by me with the original on file in the Department and that this copy is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 24th day of March, 1993.

SEAL:



Gerald Whitburn, Secretary
Department of Health and Social Services

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ORDER OF THE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
RENUMBERING, AMENDING AND CREATING RULES

To renumber HSS 54.01 (4) (c) to (h) and 54.05; to amend HSS 54.04 (1) (b) 1 and (g) 7; and to create HSS 54.01 (4) (c), (i) and (j) and 54.05, relating to child-placing agency compliance with the federal Indian Child Welfare Act.

Analysis Prepared by the Department of Health and Social Services

Recently a private child welfare agency licensed to place children for adoption did not follow the provisions of the federal Indian Child Welfare Act (ICWA), 25 USC 1901 to 1963, when placing an Indian child in an adoptive home. The agency was aware that the child was an Indian child. The agency was also aware of the requirements of the ICWA to notify the Indian tribe to which the child belongs before proceeding on any child custody matters concerning the child, but the agency did not do so.

While s. 48.028, Stats., states that the ICWA supersedes all provisions of ch. 48, Stats., in all custody proceedings involving an Indian child, most tribes do not have the resources, either legal or financial, to pursue their own court actions for violations of the ICWA. That was true of the tribe in the recent case. It looked to the Department to take action against the child-placing agency. But the Department did not have authority under ch. HSS 54 to take action when provisions of the Indian Child Welfare Act are violated. Consequently, Indian children are at risk of illegal and inappropriate placement into homes that both federal and state laws are written to prevent.

This rulemaking order adds language to the Department's rules for licensing child-placing agencies to enable the Department to take action against a child-placing agency that does not comply with the Indian Child Welfare Act when an Indian child is involved in any of the following child custody proceedings: termination of parental rights, placement in a foster home, or preadoptive placement or adoptive placement.

The Department's authority to renumber, amend and create these rules is found in s. 48.67, Stats. The rules interpret ss. 48.028, 48.48 (1), 48.60, 48.61, and 48.66, Stats.

SECTION 1. HSS 54.01 (4) (c) to (h) are renumbered 54.01 (4) (d) to (h) and (k).

SECTION 2. HSS 54.01 (4) (c), (i) and (j) are created to read:

HSS 54.01 (4) (c) "Child custody proceedings" has the meaning prescribed in the Indian Child Welfare Act, 25 USC 1903 (1), and as provided in that act includes foster care placements, termination of parental right proceedings, pre-adoptive placements and adoptive placements.

(i) "Indian child" has the meaning prescribed in 25 USC 1903 (4), namely, any unmarried person who is under age 18 and is either a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

(j) "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 U.S. secretary of the interior because of their status as Indians.

SECTION 3. HSS 54.04 (1) (b) 1 and (g) 7 are amended to read:

HSS 54.04 (1) (b) 1. ~~Adopt~~ Develop and follow written intake policies that include asking the referring person or agency to indicate if the child or at least one of the child's biological parents is of American Indian descent.

(g) 7. ~~Set~~ Develop and follow written intake policies for the acceptance of children and prospective adoptive families. Intake policies shall include asking the referring person or agency to indicate if the child or at least one of the child's biological parents is of American Indian descent.

SECTION 4. HSS 54.05 is renumbered 54.06.

SECTION 5. HSS 54.05 is created to read:

HSS 54.05 INDIAN CHILDREN. (1) DETERMINATION THAT A CHILD IS OR MAY BE AN INDIAN CHILD. If an agency has obtained information at intake or through other means that the child or at least one of the child's biological parents is or may be of American Indian descent, the child's case manager shall:

(a) Carry out and document in the child's case record diligent efforts, including but not limited to contacting the potential tribe or tribes' membership or enrollment offices and child welfare offices, and the U.S. department of interior's bureau of Indian affairs where contacts with individual tribes do not document the child's Indian descent, to verify that the child is an Indian child and to identify the child's Indian tribe;

(b) Inform the court of a determination that the child is an Indian child and of the factual basis for that determination and document and date in the child's case record that determination; and

(c) Comply with 25 USC 1912 (a).

(2) COMPLIANCE WITH INDIAN CHILD WELFARE ACT. If the agency determines under sub. (1) that a child is an Indian child, the agency shall comply with all provisions of the Indian Child Welfare Act, 25 USC 1901 to 1963, and s. 48.028, Stats.

(3) SERVICES FOR INDIAN CHILD AND FAMILY. (a) Before providing services to an Indian child and the Indian child's family, the agency shall inform the child's tribe, if known, and ask for the tribe's participation in efforts to

provide services to the Indian child and the Indian child's family. The child's case manager shall document and date in the child's case record agency efforts to inform the tribe and seek its participation.

(b) The Indian child's case manager shall undertake active efforts to prevent breakup of the child's family by providing remedial services and rehabilitative programs to the Indian child and the child's family in accordance with 25 USC 1912 (d). The child's case manager shall document and date those efforts in the child's case record.

(4) **TERMINATION OF PARENTAL RIGHTS.** An agency seeking the termination of parental rights to an Indian child shall notify the parents and tribe in accordance with 25 USC 1912 (a) of their rights of intervention and shall provide the court of jurisdiction with information on agency efforts described under sub. (3). The information shall include the reasons why those efforts proved unsuccessful. The agency shall record in the Indian child's case record the date the information was given to the court.

(5) **PLACEMENT OF AN INDIAN CHILD.** (a) Adoptive placement. 1. For the adoptive placement of an Indian child, 25 USC 1915 (a) requires that preference be given, in the absence of good cause to the contrary, to placement with, in order of priority, a member of the Indian child's extended family, another member of the Indian child's tribe or another Indian family. The Indian child's case manager shall investigate the availability of a placement in the order of priority indicated.

2. After completing the adoption of the Indian child, the child's case manager shall request in writing that the court that ordered the adoption notify the secretary of the U.S. department of the interior of the following enrollment information:

- a. The name and tribal affiliation of the Indian child;
- b. The name and address of the adoptive parents; and
- c. The name and address of any agency having files or information on the child's adoptive placement.

3. The Indian child's case manager shall file a copy of the written request under subd. 2 in the child's case record.

(b) Foster care or preadoptive placement. 1. For foster care or preadoptive placement of an Indian child, 25 USC 1915 (b) requires that the child be placed in the least restrictive setting which most approximates a family and in which any special needs of the child may be met, within reasonable proximity to the child's home. Preference is to be given, in the absence of good cause to the contrary, to placement, in order of priority:

- a. With a member of the Indian child's extended family;
- b. In a foster home licensed, approved or specified by the Indian child's tribe;

c. In an Indian foster home licensed by the department, a county social services or human services department or a child-placing agency; or

d. In 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.

2. For foster care or preadoptive placement of an Indian child, except for an emergency placement under 25 USC 1922, the child's case manager shall investigate to determine the availability of a placement under subd. 1 in the order of priority indicated. The Indian child's case manager shall document in the child's case record the investigative efforts and results, as well as any emergency placement and the reason for it.

3. An agency seeking to place an Indian child in foster care shall notify the parents and tribe in accordance with 25 USC 1912 (a) of their right of intervention and shall provide the court of jurisdiction with information on agency efforts described under sub. (3). The information shall include the reasons why those efforts proved unsuccessful. The agency shall record in the Indian child's case record the date the information was given to the court.

(c) Preference of tribe, child or parent. In the case of a placement under par. (a) or (b), if the Indian child's tribe establishes a different order of preference by resolution, the agency shall follow that order so long as the placement is the least restrictive setting appropriate to the particular needs of the child as provided in par. (b). Where appropriate, the preference of the Indian child or the child's parent shall be considered provided that where a consenting parent evidences a desire for anonymity, the agency shall give weight to that desire in applying the preference.

(d) Informing the court. Prior to the court ordering termination of parental rights, foster care placement, adoptive placement or adoption of an Indian child, the agency shall inform the court in writing of agency investigative efforts and results to determine the availability of a placement in order of priority under pars. (a) or (b) including when there is an emergency placement or when a different order of preference is expressed under par. (c).

(e) Record of placement. When an agency places an Indian child under par. (a) or (b), the agency shall forward a record of the placement to the department. The record shall provide evidence of efforts to comply with the order of preference under par. (a) 1 or (b) 1, as appropriate. The department, pursuant to 25 USC 1915 (e), shall maintain the record and shall make it available at any time upon request of the secretary of the U.S. department of the interior or of the Indian child's tribe.

Note: Send records of placement to the Bureau of Children, Youth and Families, Division of Community Services, P.O. Box 7851, Madison, WI 53707.

(6) SANCTIONS FOR NOT COMPLYING WITH THE INDIAN CHILD WELFARE ACT. A child-placing agency which fails to follow the provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 to 1963, concerning child custody proceedings

involving an Indian child shall be subject to the following department sanctions:

(a) If the child-placing agency knowingly and intentionally disregards a requirement of the ICWA, the department shall by letter of notification order the child-placing agency to stop accepting for service all Indian children referred for service to the agency. The agency shall ensure that no child accepted for service is an Indian child;

(b) If the child-placing agency knowingly and intentionally disregards the department's letter of notification under par. (a), the department shall revoke or not renew, as appropriate, the child-placing agency's license;

(c) If the child-placing agency is informed or discovers that it has unknowingly or negligently violated a requirement of the ICWA, the child-placing agency shall do the following:

1. Notify the court and the department upon being informed of or discovery of the violation of the ICWA;

2. Notify the parent Indian custodian, tribe and child upon being informed of or discovery of the violation of the ICWA; and

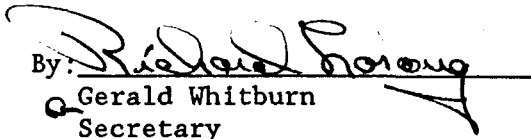
3. Cooperate with all parties in promptly correcting any inappropriate placements; and

(d) If the child-placing agency under par. (c) does not comply with par. (c) 1 to 3, the child-placing agency shall be subject to the sanctions under pars. (a) and (b).

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2), Stats.

WISCONSIN DEPARTMENT OF HEALTH
AND SOCIAL SERVICES

Date: March 24, 1993

By: 
Gerald Whitburn
Secretary

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Tommy G. Thompson
Governor
Gerald Whitburn
Secretary



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State of Wisconsin Department of Health and Social Services

March 24, 1993

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Revisor of Statutes
Bureau

Mr. Bruce E. Munson
Revisor of Statutes
131 W. Wilson St., Suite 800
Madison, WI 53703

Dear Mr. Munson:

As provided in s. 227.20, Stats., there is hereby submitted a certified copy of ch. HSS 54, administrative rules relating to child-placing agency compliance with the federal Indian Child Welfare Act.

These rules are also being submitted to the Secretary of State as required by s. 227.20, Stats.

Sincerely,

A handwritten signature in cursive script that reads "Richard G. [unclear]".

Gerald Whitburn
Secretary

Enclosure