WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

2009 Assembly Bill 421	Assembly Amendments 1 and 2
Memo published: **October 5, 2009**	***Contact***: **Laura D. Rose, Deputy Director (266-9791)**

2009 Assembly Bill 421

The main purpose of the 2009 Assembly Bill 421 is to incorporate the Federal Indian Child Welfare Act (ICWA) into the Children's Code [ch. 48, Stats.], and the Juvenile Justice Code [ch. 938, Stats.].[1] ICWA was enacted in 1978. Congressional findings in ICWA included the following:

> [T]hat 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. [25 U.S.C. s. 1901 (4).]

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

In very general terms, ICWA: applies to a "child custody proceeding"[2] involving an Indian child; requires certain notices, findings, and placement preferences in child custody proceedings under

[1] Since ICWA does not apply to proceedings based on a criminal act, the bill incorporates ICWA provisions in ch. 938 only with respect to: (a) proceedings involving juveniles in need of protection or services (JIPS) based on the following grounds: s. 938.13 (4) (uncontrollable); (6) (habitually truant from school); (6m) (school dropout); and (7) (habitually truant from home), Stats. (hereinafter, "ICWA JIPS grounds"); and (b) a proceeding which may place an Indian juvenile outside his or her home in order to sanction the juvenile for the first violation of a court order imposed in a case involving one of these four ICWA JIPS grounds or of a municipal court order based on violation of a civil law or ordinance.

[2] "Child custody proceeding" is defined in ICWA as a "foster home placement," termination of parental rights (TPR), preadoptive placement, or adoptive placement, but the term does not include placement based on a criminal act or a divorce proceeding. Under ICWA, a "foster home placement" is any action removing an Indian child from his or her

certain circumstances; and provides grounds for collateral attack of certain decrees. ICWA provides for tribal court jurisdiction in some circumstances and also provides a process for a tribe to reassume exclusive jurisdiction in child custody proceedings under certain circumstances.[3] In addition, ICWA provides that a foster care placement or TPR case may be transferred from state court to tribal court under certain circumstances and that a tribe may intervene in certain child custody proceedings in state court under certain circumstances.

Because of federal supremacy, ICWA supersedes state law. Accordingly, both chs. 48 and 938 currently provide that ICWA supersedes that respective chapter in a child custody proceeding governed by ICWA. [ss. 48.028 and 938.028, Stats.] This means that it is the responsibility of attorneys, county staff, the courts, child welfare agencies, and others to know and comply with ICWA when ICWA applies, even though state statutes do not explicitly include ICWA's provisions. The bill amends various statutes and repeals and recreates ss. 48.028 and 938.028 to incorporate the provisions of ICWA into state law.

Assembly Amendment 1

Assembly Amendment 1 does the following:

1. Amends the definition of "parent" in ch. 48, Stats., for the purposes of ICWA to specifically refer to an "Indian person" who has lawfully adopted an Indian child. Therefore, non-Indian adoptive parents are no longer included in the definition of "parent."

2. Further amends the definition of "parent" to provide an additional means of acknowledging paternity to include an acknowledgement of paternity made under tribal law or custom.

3. Provides that certain court proceedings under chs. 48 and 938, Stats., may not be held until at least 15 days (rather than 10 days, under the bill) after receipt of the notice by the U.S. Secretary of the Interior, in cases where the Indian child's parent, the Indian custodian, or tribe cannot be determined. These changes conform the bill to the notice requirements in ICWA.

4. Amends the definition of "fact finding hearing" on a petition to terminate the parental rights to an Indian child, to provide that if a partial summary judgment on the grounds of TPR is granted, the findings required at the fact-finding hearing may, in that case, be made at the dispositional hearing.

"parent" (as defined by ICWA) 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. [25 U.S.C. s. 1903 (1).] In Wisconsin, a child could be placed not only in a foster home or treatment foster home, but also in other types of facilities, such as a group home or residential care center. Such a placement is commonly referred to as an out-of-home care placement.

[3] It appears that four federally recognized American Indian tribes or bands (tribes) in Wisconsin have exclusive jurisdiction over child custody proceedings for an Indian child who resides on the reservation of that tribe. The Menominee Indian Tribe of Wisconsin is not subject to Public Law 280 and has exclusive jurisdiction; the Forest County Potawatomi Community, Red Cliff Band of Lake Superior Chippewas, and Lac Courte Oreilles Band of Lake Superior Chippewa Indians are generally subject to Public Law 280 but have gone through the reassumption process under 25 U.S.C. s. 1918 and been approved by the U.S. Secretary of Interior (Interior Secretary) to reassume exclusive jurisdiction over child custody proceedings for such children.

5. Amends the definition of "Indian child" to read "is both eligible for membership in **an** Indian tribe and is the biological child of a member of **an** Indian tribe," not **the** Indian tribe as the bill currently is drafted. In the bill, using "the" could be read as referring to one or the same tribe. ICWA does not require the child to be eligible to be a member of the same tribe where the parent is enrolled.

Assembly Amendment 2

Assembly Amendment 2 amends the provision under which a court must find good cause to deny a request to transfer a proceeding to the tribal court. First, the amendment provides that one of the elements for determining whether the proceeding is at an advanced state is that the tribe exceeded six months in requesting a transfer after receiving notice of the proceeding. The time limit in the bill is three months and, under the amendment, is three months if the proceeding is a TPR proceeding. In addition, the amendment eliminates the requirement that if the tribe exceeds the above deadline for requesting a transfer in writing, that exceeding the deadline must be due to "gross negligence."

Legislative History

On September 30, 2009, the Assembly Committee on Children and Families:

- Introduced Assembly Amendment 1 and recommended the amendment for adoption by a vote of Ayes, 8; Noes, 0.

- Introduced Assembly Amendment 2 and recommended the amendment for adoption by a vote of Ayes, 8; Noes, 0 .

- Recommended passage of Assembly Bill 421, as amended, by a vote of Ayes, 8; Noes, 0.

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