

Indian Child Welfare Act – Michigan Indian Family Preservation Act Reference Comparison Chart

2012 Public Act 565, the Michigan Indian Family Preservation Act (MIFPA),¹ strengthens and clarifies provisions of the federal Indian Child Welfare Act (ICWA) into Michigan law, MCL 712B.1 to 712B.41. The MIFPA is not intended to replace ICWA; therefore, child welfare professionals should be knowledgeable about both laws. The chart below provides a comparison between key provisions of ICWA and MIFPA.²

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
Definition of Indian Child	An unmarried person who is under the age of 18 years and is either: 1. A member of an Indian tribe, or 2. Both eligible for membership in an Indian tribe and is the biological child of a member of the Indian tribe. 25 USC 1903(4)	Removes the requirement of being a biological child of a tribal member. An unmarried person who is under the age of 18 years and is either of the following: 1. A member of an Indian tribe. 2. Eligible for membership in an Indian tribe as determined by that Indian tribe. 712B.3(k)
Exclusive Jurisdiction	An Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of the 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. 25 USC 1911(a)	The same as ICWA with additional language clarifying the tribe retains jurisdiction over wards of the tribal court with any subsequent change in residence or domicile. A tribal ward can be non-Indian. 712B.7(1)
Limited Emergency Jurisdiction – child temporarily off reservation	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 of Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law <u>in order to prevent imminent physical damage or harm to the child.</u> 25 USC 1922	The same as ICWA with the reference to Michigan Court Rules and sections MCL 712A.13a, 712A.14, and 712A.14a. 712B.7(2)

¹ <http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0565.pdf>

² This chart is intended as a reference tool and contains paraphrasing of statutory language. Do not rely on this chart as a legal citation go directly to the relevant statute. Citations are provided within the document to assist the user.

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Transfer to Tribal Court & Good Cause Not to Transfer	<p>When there is concurrent jurisdiction and the parent, Indian custodian, or tribe requests transfer to tribal court, the case shall be transferred unless:</p> <ol style="list-style-type: none"> 1. There is good cause to the contrary; 2. Either parent objects; or 3. The tribal court declines the transfer. <p>25 USC 1911(b)</p>	<p>The same as ICWA. Additionally, MIFPA defines good cause. 712B.7(3)</p>
Good Cause Not to Transfer Case to Tribal Court	<p>ICWA is silent regarding what constitutes “good cause.”</p>	<p>In determining whether good cause exists to deny the transfer, the court shall not consider the adequacy of the tribe, tribal court or tribal social services. 712B.7(4)</p> <p>The court may determine good cause not to transfer a case to tribal court only if the person opposing the transfer shows by <u>clear and convincing evidence</u> that either of the following applies:</p> <ol style="list-style-type: none"> (a) The Indian tribe does not have a tribal court. (b) The requirement of the parties or witness to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate. <p>712B.7(5)</p>
Child Custody Proceedings Governed by these Acts	<ol style="list-style-type: none"> 1. Foster care placement <ul style="list-style-type: none"> • 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. • It does 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. Termination of parental rights proceeding 3. Pre-adoptive placement 	<p>MIFPA language mirrors ICWA but also includes guardianships under the Juvenile Code and the Estates and Protected Individuals Code.</p> <p>712B.3(b)(i)(B)&(C)</p>

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Child Custody Proceedings (contd.)	4. Adoptive placement 25 USC 1903(1) The language of ICWA and case law from other states hold that ICWA applies to guardianship cases.	
Intervention and Participation in State Court Proceedings	The Indian custodian and tribe have the right to intervene at any point in a state court proceeding involving the foster care placement of or TPR to an Indian child. 25 USC 1911(c)	The same as ICWA. 712B.7(6) MIFPA clarifies that an official tribal representative has the right to participate in any state court proceedings subject to ICWA and MIFPA. 712B.7(7) This person does NOT have to be an attorney. 712B.3(r)
Full Faith and Credit	The United States, every State, every territory or possession of the United States shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable 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. 25 USC 1911(d)	The state 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 given to the public acts, records, and judicial proceedings of any other entity. 712B.7(8)
Definition of Parent (for the purpose of ICWA and MIFPA)	A 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. 25 USC 1903(9)	The same as ICWA except the definition uses putative father language rather than unwed father. 712B.3(s)
Initial Notice & Reason to Believe a Child is an Indian Child	The petitioning party is required to provide initial notice of an involuntary proceeding in State court to the parents, Indian custodian, and the tribe by registered mail with return receipt requested at least 10 days prior to the first hearing. If the tribe is not known, notice shall be given to the Secretary (Bureau of Indian Affairs) in like manner. <u>No foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or Secretary.</u> The parent, Indian	The same as ICWA with additional requirements noted below and guidelines on determining if a child may be an Indian. 712B.9 At initial contact, the department is required to actively seek to determine whether a child is an Indian child. If the department is unable to determine which tribe a child belongs to, at a minimum, the department shall contact in writing any tribes located in the county where the child is located and the Secretary. 712B.9(3)

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Initial Notice & Reason to Believe a Child is an Indian Child (contd.)	Custodian or tribe may request an additional 20 days to prepare. 25 USC 1912	Circumstances under which the court, department, or other party has reason to believe a child may be an Indian, includes but is not limited to any of the following: <ul style="list-style-type: none"> (a) Any party to the case, Indian tribe, Indian organization, or public or private agency informs the court that child is an Indian child. (b) Any public or state-licensed agency involved in child protection services or family support has discovered information that suggests the child is an Indian child. (c) The child who is the subject of the proceeding gives the court reason to believe s/he is an Indian child. (d) The residence or domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community. (e) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.
Active Efforts	The party seeking foster care placement or TPR shall satisfy the court 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. 25 USC 1912(d) ICWA does not define active efforts.	Party seeking placement must satisfy the court active efforts have been made but with a clear and convincing evidence standard and requirement for expert witness testimony. MIFPA defines active efforts. Active efforts means action to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the child with the Indian family. Active efforts require more than a referral to a service without actively engaging the Indian child and family. Active efforts include reasonable efforts as required by title IV-E of the social security act, 42 USC 670 to 679c, and also include doing or addressing all of the following: <ul style="list-style-type: none"> (i) Engaging the Indian child, child’s parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child’s Indian tribes and Indian social services agencies.

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Active Efforts (contd.)		<p>(ii) Identifying appropriate services and helping the parents to overcome barriers to compliance with those services.</p> <p>(iii) Conducting or causing to be conducted a diligent search for extended family members for placement.</p> <p>(iv) Requesting representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child rearing practices within the tribal community to evaluate the circumstance of the Indian child's family and to assist in developing a case plan that uses the resources of the Indian tribe and Indian community, including traditional and customary support, actions, and services, to address those circumstances.</p> <p>(v) Completing a comprehensive assessment of the situation of the Indian child's family, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.</p> <p>(vi) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and actively soliciting the tribe's advice throughout the proceeding</p> <p>(vii) Notifying and consulting with extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, to identify and to provide family structure and support for the Indian child,, to assure cultural connections, and to serve as placement resources for the Indian child.</p> <p>(viii) Making arrangements to provide natural and family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan,, including, when requested by the tribe, arrangements for transportation and other assistance to enable family members to participate in that interaction.</p> <p>(ix) Offering and employing all available family preservation</p>

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Active Efforts (contd.)		<p>strategies and requesting the involvement of the Indian child’s tribe to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child’s tribe.</p> <p>(x) Identifying community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child’s family with special needs, and providing information about those resources to the Indian child’s family, and actively assisting the Indian child’s family or offering active assistance in accessing those resources.</p> <p>(xi) Monitoring client progress and client participation in services.</p> <p>(xii) Providing a consideration of alternative ways of addressing the needs of the Indian child’s family, if services do not exist or if existing services are not available to the family.</p> <p><u>Because the statutory definition of active efforts incorporates the federal definition of reasonable efforts, it is no longer necessary for courts to make both reasonable and active efforts findings for title IV-E eligibility.</u></p> <p>712B.3(a)</p>
Burden of Proof for Active Efforts	ICWA is silent regarding a burden of proof.	<p>The burden of proof for active efforts is <u>clear and convincing evidence</u>, including the testimony of at least one expert witness who has knowledge of child rearing practices of the Indian child’s tribe, in out-of-home placement and TPR cases. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child’s tribe.</p> <p>712B.15(2)</p>
“Serious Damage” & Qualified Expert Witness	No foster care placement may be ordered without a determination, supported by <u>clear and convincing evidence</u> , including the testimony of qualified expert witnesses, that continued custody of the Indian child by the parent or Indian custodian is likely to result in	<p>The same requirements as ICWA, and also provides two categories of persons, in an order of preference, for qualified expert witnesses:</p> <ol style="list-style-type: none"> 1. A member of the Indian child’s tribe, or witness approved by the Indian child’s tribe, who is recognized by the tribal

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	<p>serious emotional or physical damage to the child. 25 USC 1912(e)</p> <p>No termination of parental rights may be ordered without a determination, supported by <u>evidence beyond a reasonable doubt</u>, including the testimony of qualified expert witnesses, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 USC 1912(f)</p> <p>ICWA does not define qualified expert witness.</p>	<p>community as knowledgeable in tribal customs and how the tribal customs pertain to family organization and child rearing practices.</p> <p>2. A person with knowledge, skill, experience, training, or education and who can speak to the Indian child’s tribe and its customs and how the tribal customs pertain to family organization and child rearing practices. 712B.17(1)</p>
Burden of Proof for “Serious Damage”	<p>The burden of proof for foster care placement is <u>clear and convincing evidence</u>. 25 USC 1912(e)</p> <p>The burden of proof for TPR is <u>beyond a reasonable doubt</u>. 25 USC 1912(f)</p>	<p>The same as ICWA. 712B.15(2)&(4)</p>
Placement Preferences	<p>In a foster care, pre-adoptive or adoptive placement, placement shall be made in the order of preference set forth in ICWA unless there is good cause not to follow the placement preferences. There is an order of preference for foster care and pre-adoptive placements and another order of preference for adoptive placements. ICWA provides for an Indian child’s tribe to establish a different order of preference by tribal resolution. 25 USC 1915</p>	<p>The same orders of preference as ICWA.</p> <p>For foster care or pre-adoptive placement of an Indian child, placement is in the following order of preference:</p> <ul style="list-style-type: none"> (a) A member of the Indian child’s extended family. (b) A foster home licensed, approved, or specified by the Indian child’s tribe. (c) An Indian foster home licensed or approved by the department. (d) An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child’s needs.712B.23(1) <p>For an adoptive placement of an Indian, placement is in the following order of preference:</p> <ul style="list-style-type: none"> (a) A member of the Indian child’s extended family. (b) A member of the Indian child’s tribe. (c) An Indian family. 712B.23(2) <p>MIFPA does not require a formal tribal resolution for changing</p>

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Placement Preferences (contd.)	ICWA is silent on who has the burden of establishing good cause not to follow the placement preferences.	the order of placement preference. 712B.23(6) MIFPA places the burden of establishing good cause not to follow the order of preference on the party requesting the deviation. 712B.23(3) The court shall address efforts to place an Indian child in accordance with the placement preferences at each hearing until the placement meets the requirements. 712B.23(4)
Good Cause Not to Follow Placement Preferences	ICWA does not define “good cause,” other than that the preference of the child or parent shall be considered where appropriate, including the parent’s desire for anonymity. 25 USC 1915(c) Because ICWA provides greater rights to the parent by allowing his or her preference to be considered, this aspect should be followed over MIFPA. MIFPA does not afford the parent the same opportunity as it is currently written.	Good cause not to follow the order of preference shall be based on one or more of the following conditions: <ul style="list-style-type: none"> (a) A request was made by a child of sufficient age. (b) A child has an extraordinary physical or emotional need as established by testimony of an expert witness. 712B.23(5) The department or court must maintain records evidencing efforts made to comply with placement preferences and be made available upon request to the BIA or Indian child’s tribe. 712B.23(7)
Voluntary Placement and TPR	Voluntary consent by an Indian custodian or parent to a foster care placement or termination of parental rights shall be in writing, recorded before a judge, and accompanied by the judge’s written certification that the terms and consequences were explained and understood. Voluntary consent may not be given within 10 days of the child’s birth. 25 USC 1913	The same basic requirements as ICWA, <u>except</u> MIFPA requires the consent of BOTH parents and also addresses guardianships. The requirements for consent, notice, and each of the types of the proceedings are listed in the statute. 712B.13
Withdrawal of Consent (Placement & Guardianship)	A voluntary consent to foster care placement may be withdrawn by a parent or Indian custodian at any time. 25 USC 1913	The same as ICWA. 712B.13(2) MIFPA includes withdrawal of consent to a guardianship. 712B.13(4)
Withdrawal	In any voluntary proceeding for termination of parental	A parent may withdraw the consent to TPR for any reason at any

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of Consent (TPR)	rights, consent may be withdrawn by a parent for any reason at any time prior to the final decree of termination or adoption. 25 USC 1913(c)	time prior to the entry of a final order of adoption. 712B.13(3)
Guardianships	<p>ICWA includes a guardianship in its definition of a child custody proceeding. 25 USC 1903(1)</p> <p>ICWA does not provide further information regarding guardianships.</p>	<p>For EPIC or juvenile guardianships determined to be involuntary and the court knows or has reason to know the child is an Indian child, MIFPA permits the court to order the department or a court employee to conduct an investigation and file a written report. In addition to information required in EPIC at 700.5204, MIFPA requires the report to include, but does not limit it to:</p> <ul style="list-style-type: none"> (a) Whether or not the child is an Indian child. (b) The identity and location of the child’s parents, if known. (c) If the child is an Indian child, the report must also address all of the following: <ul style="list-style-type: none"> (i) The tribe or tribes of which the child is a member or eligible for membership. (ii) If the child and family need culturally appropriate and other services to preserve the Indian family. (iii) The identity and location of extended family members and if no extended family members can be found, what efforts were made to locate them. <p>712B.24(1)</p> <p>MIFPA sets forth requirements for the guardianship hearing. 712B.25</p>
Invalidation of Action	An Indian child, parent, Indian custodian, or tribe may petition the court to invalidate a foster care placement or termination of parental rights action upon a showing that any provision of ss. 1911, 1912, and 1913 of ICWA.	An Indian child, parent, Indian custodian or tribe who is the subject of an action for foster care placement or termination of parental rights under state law, any parent or Indian custodian from whose custody an Indian child was removed, and the Indian child’s tribe may petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of sections 7, 9, 11, 13, 15, 21, 23, 25, 27 and 29 of MIFPA. 712B.41
State Court Final Adoption	ICWA requires any state court entering a final decree or order in any Indian child adoptive placement to provide	MIFPA adds the requirement that the listed information also be sent to the tribal enrollment officer of the appropriate tribe.

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Information to Bureau of Indian Affairs (BIA)	<p>the Secretary (BIA) with a copy of the decree or order together with such other information as may be necessary to show:</p> <ul style="list-style-type: none"> (1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and address of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement. <p>*Where the court records contain an affidavit from the biological parent(s) requesting their identity remain confidential, the court shall include the affidavit with the other information. It is up to the BIA to ensure the confidentiality of this information is maintained. 25 USC 1951</p>	712B.35