

# Indian Child Welfare Act

By: Sara DePasquale  
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WHY

U.S. SUPREME COURT  
OPINION

INITIAL PROVISIONS

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Indian Boarding  
Schools

Carlisle, PA  
1879  
Lt. Col., US Army



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1819-1969:  
408 federal schools  
37 states territories

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Indian Adoption Project

Transition to removals and adoptions

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U.S. Department of the Interior  
**Indian Affairs**

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## Indian Child Welfare Act (ICWA)

25 U.S.C. 1901 *et seq*  
25 C.F.R. Pt. 23  
2016 BIA Guidelines

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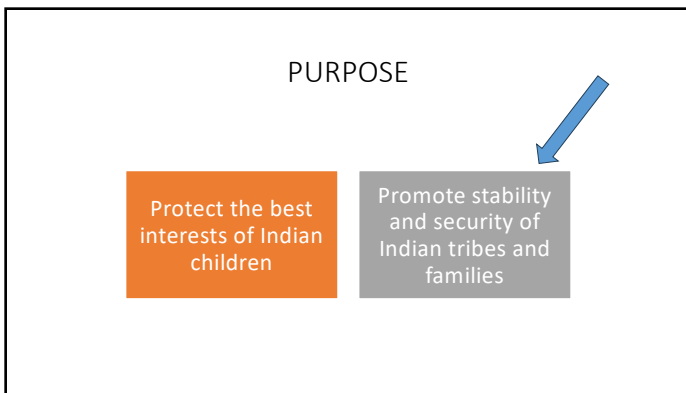
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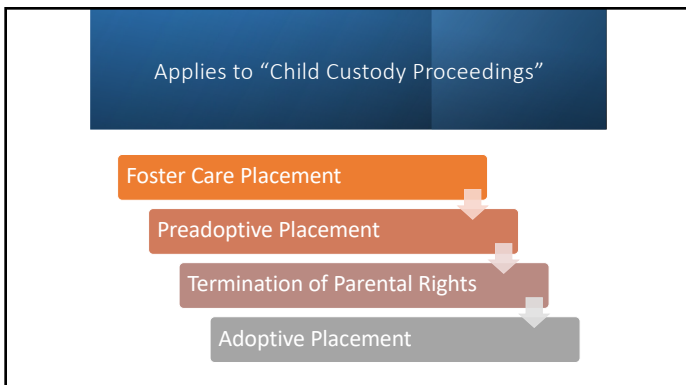
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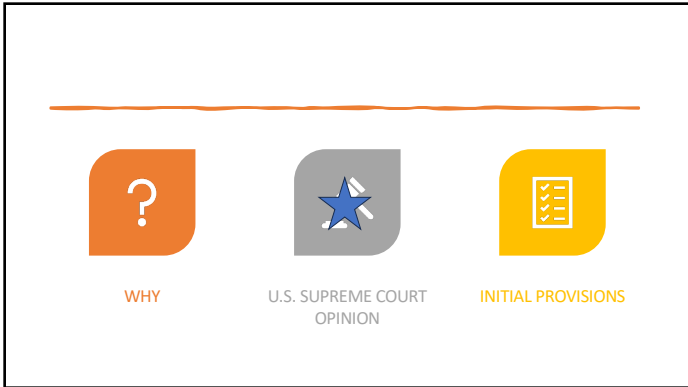
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Recent Challenge to ICWA: Haaland v. Brackeen

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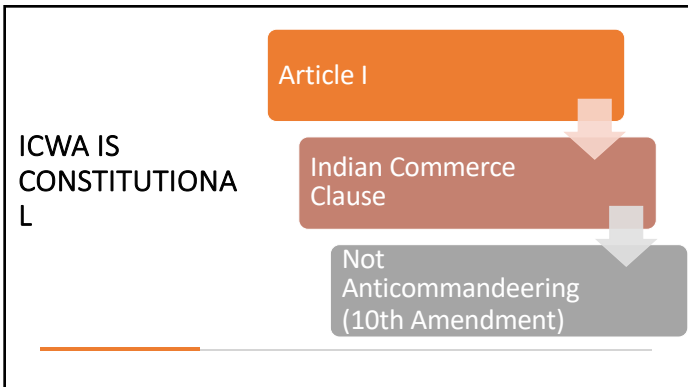
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Equal  
Protection  
: Race

- Standing
- Remedy

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On the Civil Side  
A UNC School of Government Blog

U.S. Supreme Court Holds the Indian Child Welfare Act Is Constitutional

This entry was contributed by Sara DePasquale on June 20, 2023 at 4:10 pm and is filed under Child Welfare Law.

 The Indian Child Welfare Act (ICWA) was enacted by Congress in 1978 and applies to designated "child custody proceedings" that involve an "Indian child." An Indian child is a person who is under 18 years old and is either (1) a member of a federally recognized Indian tribe or (2) eligible for membership in a federally recognized Indian tribe and a biological child of a member of a federally recognized Indian tribe. 25 U.S.C. 1903(4). There are four types of child custody proceedings that are governed by ICWA: (1) foster care placements, (2) preadoptive placements, (3) termination of parental rights (TPR), and (4) adoptions.

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Concurrence

"Many sates have struggled with effective implementation...."

Others resist ICWA outright as the present litigation in Texas attests....

And considerable research subsequent to Congress's enactment of ICWA has borne out the statute's basic premise – that it is generally in the best interests of Indian children to be raised in Indian homes"

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WHY



U.S. SUPREME COURT  
OPINION



INITIAL PROVISIONS

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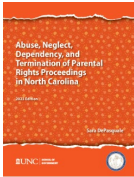
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Chapter  
13  
Relevant  
Federal  
Laws

Chapter 13.2

THERE IS A LOT TO KNOW



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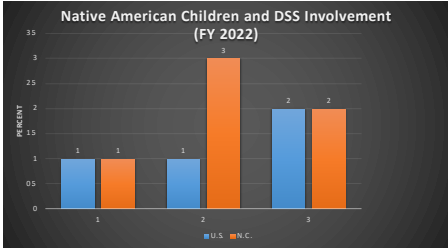
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Disproportionality Continues

*In re E.J.B.*, 375 N.C. 95 (2020)



KIDS COUNT Data Center, Annie E. Casey Foundation

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NC Supreme Court

"All participants should become familiar with the Indian Child Welfare Act of 1978, codified at 25 U.S.C. ch. 21, and the corresponding regulations, ... to ensure compliance with the ICWA and to assert objections on the record if compliance in a proceeding has not occurred.  
*In re M.L.B.*, 377 N.C. 335, n.4 (2021)

"The state courts bear the burden of ensuring compliance with ICWA."  
*In re E.J.B.*, 375 N.C. 95, 101 (2020).

"The ICWA imposes a duty on the trial court to inquire of participants as set forth in 25 C.F.R. § 23.107(a) in all child-custody cases..."  
*In re A.L.*, 2021-NCSC-92, ¶ 27

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574 Federally Recognized Tribes for ICWA

**Cherokee, Eastern Band**

Qualla Boundary  
(NC Cherokee Reservation)

23

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What about State-recognized tribes?

Lumbee

Haliwa-Saponi

Coharie

Meherrin

Sappony

Occaneechi Band of the Saponi Nation

Waccamaw Siouan

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### Mandatory Inquiry by Court

- At commencement of a child-custody proceeding
- Of each participant
- Do you know or have reason to the know the child is an Indian child
- Responses on the record
- Instruct parties to inform court if subsequently receives info that provides reason to know

**Quick Reference Sheet for State Court Personnel**

U.S. Department of the Interior, Bureau of Indian Affairs  
Final Rule: Indian Child Custody Proceedings  
25 C.F.R. 23.107

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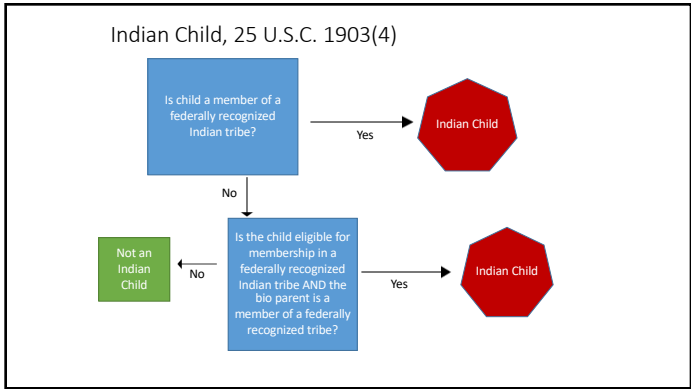
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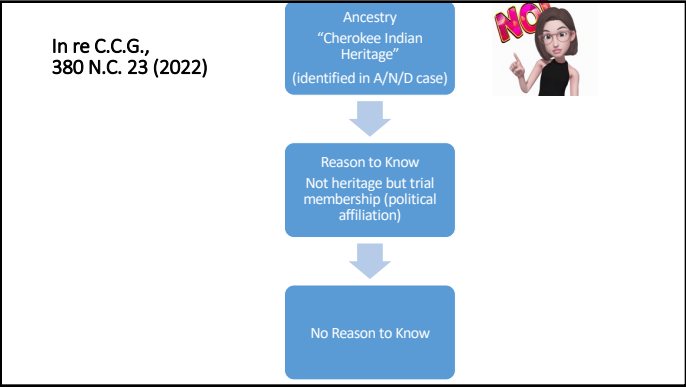
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Departure from prior opinions of COA

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ICWA Inquiry		
Biological Parent	Child	Indian Child Status
	Child is Member	KNOW INDIAN CHILD
Parent is a member	Child is eligible for membership	KNOW INDIAN CHILD
	Child is not eligible for membership	NOT AN INDIAN CHILD
Parent has ancestry with federally recognized tribe but is not a member	Unknown if child is eligible for membership	NO REASON TO KNOW <i>In re C.C.G., 380 N.C. 23 (2022)</i>
Parent has ancestry with federally recognized tribe	Child is not eligible for membership	NOT AN INDIAN CHILD
Parent has ancestry with federally recognized tribe	Child is eligible (if child becomes a member)	REASON TO KNOW (Know)

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## Nonsecure Custody Order, AOC-J-151

- 8a. Based on an inquiry of each participant, the Court finds that the participants  
☐ do not know ☐ know ☐ have reason to know that the juvenile is an Indian Child.  
☐ (if applicable) The juvenile is an Indian Child and a member or eligible for membership in the \_\_\_\_\_ tribe.  
☐ (if applicable) Following the inquiry, the Court instructed each participant to notify the Court if he or she subsequently obtains information that provides reason to know that the juvenile is an Indian Child.

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## Suggestion

STATE OF NORTH CAROLINA _____ County	File No: _____ In the General Court of Justice District Court Division
IN THE MATTER OF _____ (Name of Juvenile)	INQUIRY AS TO WHETHER CHILD IS AN "INDIAN CHILD" (25 C.F.R. 23.107)
This matter is before the court as a juvenile proceeding under Subchapter I of G.S. Chapter 7B and is a child custody proceeding under ICWA. See 25 U.S.C. § 1903(1). The court has made the inquiry of all the participants in this matter as to whether the child who is the subject of this matter is an Indian child and whether any participant knows or has reason to know the child is an Indian child.	

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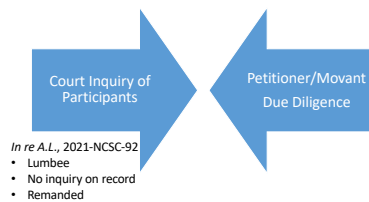
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Burden: 25 CFR 23.107



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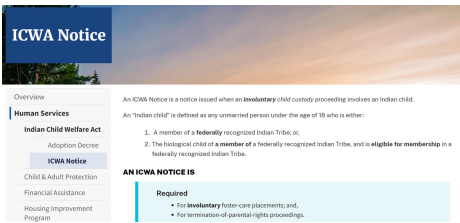
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<https://www.bia.gov/bia/ois/dhs/icwa/icwa-notice>



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## Notice

- Registered/Certified Mail, Return Receipt
- Parents
- Indian custodians
- Tribe
- Copy to Regional Director
- Specific Contents
  - Include right to intervene



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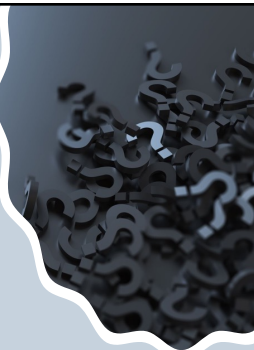
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Fails to  
respond to  
“multiple  
written  
requests”

*In re E.J.B.*



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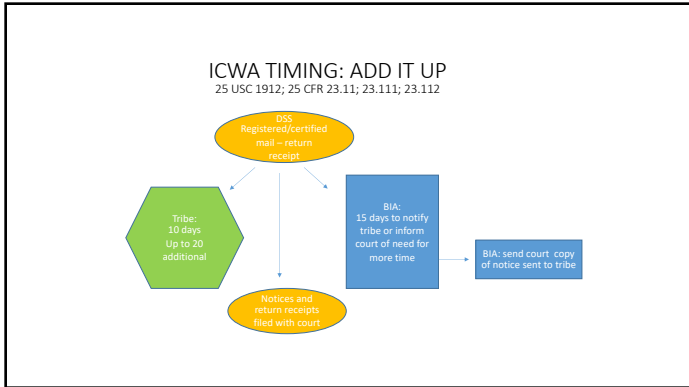
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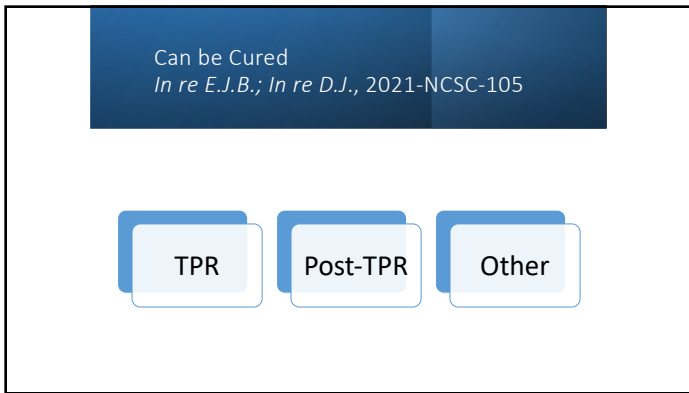
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If Indian Child, ICWA applies

- Tribe determines if Indian child
- Court can't substitute judgment or consider
  - Blood Quantum
  - Existing Family Doctrine
  - Child – parent relationship

25 C.F.R. 23.103(c); 23.108(b)

The slide features a blue header with the text "If Indian Child, ICWA applies". Below the header is a bulleted list. The second bullet point has a sub-list. At the bottom of the slide is a photograph of a classical building with columns, likely a courthouse, with a large red 'X' superimposed over it. To the right of the photo is a small speaker icon. Below the photo is the text "25 C.F.R. 23.103(c); 23.108(b)".

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## Tribe's Right to Intervene

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Jurisdiction, 25 U.S.C. 1911, 1919



- Child domiciled or resides on reservation
- Child is ward of tribal court



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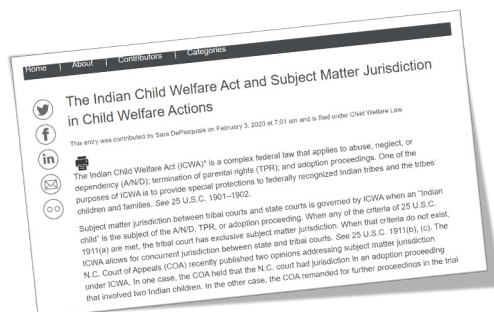
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On the Civil Side



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## Transfer to Tribal Court

- Upon request by parent, Indian custodian, or tribe
- Orally or in writing
- At any stage



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## Criteria for Transfer to Tribal Court: On the record

- No Transfer if
  - Parent object
  - Tribal court declines (state court notices tribal court)
- Good cause
  - NOT advanced state of proceeding if notice was given late
  - NOT prior proceedings for child where there was no request for transfer
  - NOT impact on placement
  - NOT child's cultural connections with Tribe or reservation
  - NOT SES
  - NOT negative perceptions of tribe, social services, tribal justice system

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## Panel: How It Works in Practice



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