

## TUESDAY'S TIP – INDIAN CHILD WELFARE ACT (ICWA) ELIGIBILITY

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**Situation:** You or your client have some information that the child may be a member of an Indian tribe.

**The Problem:** You do not have confirmation that the child is a member of a federally recognized Indian tribe.

**Law:** ICWA applies to any involuntary child-custody proceeding. 25 C.F.R. § 23.103(a). A child in DSS' custody may be an Indian child when a participant informs the court the child could be an Indian child. See 25 C.F.R. § 23.107(c)(1)-(2); [In re C.C.G.](#), 380 N.C. 23, 29, 868 S.E.2d 38, 43 (2022) (quoting 25 U.S.C. § 1903(4)) (Indian child defined as "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.")

When a trial court knows a child in DSS' custody may be an Indian child but has insufficient information to know definitively whether the child is an Indian child, the trial court must (1) treat the child as if they are an Indian child and (2) order DSS to use due diligence "to identify and work with the Tribes" by sending required notices to each of the suspected tribes to get confirmation from the tribes themselves on whether the child is an Indian child. 25 C.F.R. § 23.107(a), (b)(1)-(2); 25 U.S.C. § 1912(a); [In re E.J.B.](#), 375 N.C. 95, 109, 846 S.E.2d 472, 480 (2020); [In re N.K.](#), 375 N.C. 805, 822-23, 851 S.E.2d 321, 334 (2020).

If the required notices are not sent, the case should not proceed until DSS sends the notices to the tribes to determine if the trial court has subject matter jurisdiction. *E.J.B.*, *supra* at 106; [In re K.G.](#), 270 N.C. App. 423, 424-26, 840 S.E.2d 914, 915-17 (2020); [In re E.G.M.](#), 230 N.C. App. 196, 204, 750 S.E.2d 857, 862 (2013). In the past, the COA has "err[ed] on the side of caution" when it comes to ICWA and the question of whether the trial court ensured that DSS used due diligence to send required notices. *K.G.*, *supra*; [In re A.P.](#), 260 N.C. App. 540, 544, 818 S.E.2d 396, 399 (2018) (remanding case when DSS did not send required notices to involved tribes); [In re A.R.](#), 227 N.C. App. 518, 524, 742 S.E.2d 629, 634 (2013) (holding the same).

### Action Steps:

1. Before the hearing, discuss with your client if they have information their child may be a member of a [federally recognized Indian tribe](#).
2. At the hearing, inform the trial court on the record of the information you have that the child may be a member of a federally recognized Indian tribe and request that the Court require DSS to seek confirmation from the involved tribes.
3. As the case progresses, if there has been no response, request that the trial court require DSS to send additional notices to the involved tribes or request assistance from the Bureau of Indian Affairs.
4. Consult with the [AND/TPR Manual](#) about additional efforts that must be undertaken for children covered by ICWA.

**Conclusion:** If you have information the child may be a member of a tribe, operate under the assumption that your client's child is a member or eligible for membership in a federally recognized tribe. Refer to the attached flow chart and hold the trial court to its burden to require DSS to investigate whether the child is member of a federally recognized tribe. ICWA can be used in appropriate cases to apply the brakes and hopefully get your client more time to engage relatives or complete objectives on a case plan.