

# ICWA Doesn't Apply to My Child Welfare Case. What Other Help Can I Receive?

A publication of the National Indian Child Welfare Association

*This brochure is not a substitute for legal counsel. You should always contact a lawyer for advice on any legal matter relating to ICWA or child custody issues.*

*Note: The terms "Indian" and "American Indian/Alaska Native" are used interchangeably throughout this document. Additionally, the term "tribe" includes all federally recognized Alaska Native villages and tribes located in the United States.*

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## ICWA THE "GOLD STANDARD" OF CHILD WELFARE PRACTICE

The Indian Child Welfare Act (1978) was established due to the extremely high rates of Indian children being removed from their homes (Indian Child Welfare Program, 1974). Now, over 40 years later, we continue to see disproportionately large numbers of Indian children removed from their homes by state child welfare systems (National Indian Child Welfare Association [NICWA], 2019a). ICWA's requirements provide protections for Indian children and families to address bias in state child welfare systems and help Indian children stay connected to their families and tribal culture.

ICWA has been called the "gold standard" of child welfare for many reasons; one of the main reasons is ICWA's foster care placement preferences for family, with extended family first, members of the child's tribe next, and then with another Indian family (Casey Family Programs et al., 2019). We know that children benefit when they are able to maintain connections to their birth parents and siblings, as well as extended family and community (NICWA, 2019c). ICWA also requires active efforts to prevent removal of Indian children from their families and strengthen their family so they can be safely returned home.

Each year NICWA receives over 1,000 calls from birth parents and extended family asking for information and support regarding state child welfare cases involving Indian children. Unfortunately, many families that may identify as American Indian or Alaska Native are not eligible for ICWA's protections.

In order for ICWA to apply in a case, the child must be an Indian child as defined under the law. ICWA defines an ICWA eligible child as:

- Unmarried;
- Under age 18; and
- Either a member of an Indian tribe OR is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe (25 U.S.C. § 1903).

Only tribes have the right to determine their membership. In order for ICWA to apply in a child welfare case, the child must be a member of, or eligible for membership in, a federally recognized tribe. Individuals that are seeking confirmation of a child's tribal membership status must contact the child's tribe (see listings of [ICWA Designated Agents](#)).

## WHAT PROTECTIONS DO I HAVE IF ICWA DOES NOT APPLY IN MY CASE?

NICWA receives a number of requests for information from family members who believe that ICWA applies in their child welfare case, but in some cases the Indian child and their caregivers are not eligible for ICWA protections. Below are a number of fictional scenarios and resources that may help if you have American Indian or Alaska Native ancestry but are not eligible for ICWA's protections.

*Scenario #1: My granddaughter got removed by the state child welfare system and they placed her in a non-Indian foster home. I didn't even know that they were going to remove her. I would have taken her. Both of her parents are members of federally recognized tribes, but she is not.*

ICWA should be applied in the case if there is reason to know that there is American Indian or Alaska Native ancestry. The state must reach out to the tribe to find out if the child is a member or eligible for membership (inquiry process). Until the state has received confirmation that the child is not a member or eligible for membership in the tribe, the state must apply ICWA. If the child's tribe does not provide confirmation of the child's tribal membership status after a period of time, the state court may determine if ICWA applies going forward.

If it is found that the child is **not** a member of a federally recognized tribe and that ICWA does not apply, the case will be treated in much the same manner as other non-Indian child welfare cases. This includes applying other federal and state child welfare policies. There are, however, other federal laws that give preference to children being placed with family members. Under Title IV-E of the Social Security Act, states must consider giving preference to a relative over a non-relative placement (42 U.S.C. § 671 [19]). States also must make a thorough relative search and notify all adult relatives that the child has been removed within 30 days of removal (42 U.S.C. § 671 [29]).

*Scenario #2: I am a member of a state-recognized tribe and my child was removed from my home. Does ICWA apply to my case?*

ICWA **does not** apply to children who are members of state-recognized tribes, however, your tribe may have a tribal/state agreement with the state on child welfare issues or state policies that allow for similar protections as those found within ICWA to be applied in your case. Many states have enacted their own state ICWA laws that may also apply to state-recognized tribes. Contact your case worker or your tribe to find out more information.

*Scenario #3: ICWA doesn't apply to my case because my kids are not members or eligible for membership in my tribe. They were placed with their non-Native grandma who doesn't know anything about our tribal culture. I want my kids to be able to connect with their culture.*

Culture is important in helping children develop a positive identity and heal from trauma. If it is possible, reach out to grandma to educate her on the specific cultural needs of your children. Talk to your case worker and ask that connection to culture be part of the case plan, such as visitation with tribal relatives and attending tribal cultural events. Reach out to your tribe to see if they have suggestions; even though they may have limitations on how much involvement they can have in the case, they may still have some services or supports that they can offer.

Even if your children cannot participate with tribal events and ceremonies due to distance, there may be other ways to connect, such as peer mentoring programs or social media. Some tribes have language apps or other online resources. There are many ways that your children can still connect with their tribe and culture (NICWA, 2019b).

## CONCLUSION

ICWA has been called the “gold standard” of child welfare for many reasons including its out-of-home placement preferences for Indian children. It is important that case workers are complying with ICWA so that Indian children are getting their needs met. When ICWA protections are not available, there are other federal and state laws that may be helpful to families who are involved with the child welfare system. Title IV-E provisions give preference to relative caregivers over non-relative caregivers. Some states may also have laws that give protections to families with state-recognized tribes.

Navigating the child welfare system can be difficult! Remember to ask questions if you don't understand something. Reach out to family and friends for support. And keep a log of all communication you have with your case worker; this can be a notebook with names, dates, and any notes you may have.

For more information on ICWA and a list of Frequently Asked Questions, visit us online at: [www.nicwa.org](http://www.nicwa.org).

## REFERENCES

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