



# Non-Parent Custody Cases of Native American Children

## Part 1. Basic Info

### What is the ICWA?

It is a federal law. It has strict standards state courts must follow in nonparent custody cases involving an Indian child.

### Who is an Indian child?

The ICWA defines an Indian child as an unmarried person under age 18 who is one of these:

- a member of an Indian tribe
- eligible for membership in a tribe and the biological child of a tribal member

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❖ “Indian” here includes members and those eligible for membership in Alaska Native tribes.

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Washington State has its own version of the ICWA. Its definition of an Indian child also includes anyone who **may be** an Indian child.

### Who decides who is an Indian child?

Only the tribe has authority to determine who is a member.

### Do tribal courts have to apply the ICWA?

**They do not.** A tribe can choose to make the ICWA’s policies and procedures part of its tribal code. While the ICWA does not generally apply to tribal courts, tribes are required to give full faith and credit to (fully honor) custody orders of other courts, including other tribal courts.

To get a copy of a tribal code, contact the tribe directly. You can use the [State Tribal Directory](http://www.goia.wa.gov/tribal-directory/tribaldirectory.pdf) at [www.goia.wa.gov/tribal-directory/tribaldirectory.pdf](http://www.goia.wa.gov/tribal-directory/tribaldirectory.pdf).

## **The ICWA applies to the child. What now?**

Get to know the ICWA. It has special procedures and requirements. They include these:

- The person filing must file and serve the correct notice on the child's Tribe.
- The person filing must show that there were active efforts to provide services and programs to the child's parent. The person must show that these efforts were unsuccessful.
- The person who filed the case must give clear and convincing evidence, including testimony of expert witnesses, that the parent's custody will likely result in serious emotional or physical damage to the child. ([RCW § 13.38.130\(4\)](#))

## **Part 2. Jurisdiction**

### **What is jurisdiction?**

It is a court's power or authority to decide a case. A court that does not have jurisdiction to hear your non-parent custody case cannot enter an order in the case.

Jurisdiction is especially important in non-parent custody cases involving Indian children. The case might need to be in either state court or tribal court. It depends on certain facts.

### **The child lives on the reservation. Should the case be in state court or tribal court?**

It should be in tribal court. Under the ICWA, tribal courts have exclusive jurisdiction to hear cases involving **Indian children who live on Indian reservations**. [25 U.S.C. 1911\(a\)](#).

### **The child lives off the reservation. Where does the case belong?**

It depends.

The state court **may** exercise jurisdiction over the custody case if the **Indian child lives off the reservation**. If the case is filed in state court, the case must be transferred to tribal court unless a parent objects or the tribe declines jurisdiction.

If the case is in state court, the ICWA applies. It may be easier for a nonparent to prove the case for a non-custody order in tribal court. Read [Indian Child Welfare Act](#).

## **Part 3. Parents**

### **Someone has threatened to file a non-parent custody case against me. How will I know they have done it?**

If they file the case in state court, they must notify all of these:

- parents
- the child's tribe
- anyone with legal or temporary custody

### **I have been served with a nonparent custody case. My child is an Indian child. Do I need a lawyer?**

Maybe. You should at least read this and get advice from a family law attorney familiar with the ICWA before filing a response and going to court.

### **The nonparent filed a custody case in state court. My child and I live off the reservation. Can I ask tribal court to hear the case?**

Yes. If the Indian child does not live on the reservation, any of these can file a motion to transfer the case to tribal court:

- A parent
- The child's Indian custodian
- The tribe
- The child, if age twelve or older

The state court must transfer the case to the jurisdiction of the child's tribe, unless there is good cause not to, or a parent objects to the transfer. [25 U.S.C. § 1911\(b\)](#); [RCW 13.38.080](#).

### **Our tribe is in another state. Can the Washington state court transfer the case to our tribal court?**

Yes.

### **I lost custody of my Indian child in a nonparent custody case. How do I get my child back?**

Read [Parents: You Lost a Non-Parent Custody Case. Now What](#) and talk to a lawyer who is familiar with the ICWA.

## **Part 4. Nonparents**

### **I want to file for non-parent custody of an Indian child. Do I need a lawyer?**

Maybe not.

You could file **pro se**. This is a Latin phrase. It means "on one's own behalf." It describes someone representing themselves, without a lawyer, in a court case. You can file pro se for non-parent custody over an Indian Child in state court.

### **How do I file for non-parent custody in Washington State?**

Read [Non-Parent Custody: Frequently Asked Questions and Answers](#). Use our [File a Non-Parent Custody Case](#) packet.

The packet is long. Its info on ICWA filing requirements is **very limited**. You should do other research and/or see a lawyer.

Before choosing to do so, you should get to know:

- The complex legal issues
- Paperwork and notice requirements
- The evidence you must give the judge

- The consequences if you make a mistake in the process

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❖ You should **at least** get advice from a family law lawyer knowledgeable about the ICWA before going to court.

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## Where can I learn more?

Try these resources:

- Native American Right Fund – “A Practical Guide to the Indian Child Welfare Act” - [narf.org/icwa/index.htm](http://narf.org/icwa/index.htm)
- Indian Child Welfare Act Law Center - [www.icwlc.org](http://www.icwlc.org)
- Our [Indian Child Welfare Act](#) fact sheet has general info. You can also read the ICWA itself at [25 USC § 1901-63](#).
- Washington State’s [Indian Child Welfare Act](#) mirrors the ICWA. [RCW 13.38.080](#). The state law lists the steps needed to meet the requirements in Indian child custody cases.

## Get Legal Help

**Outside King County:** Call the CLEAR Hotline at 1-888-201-1014 weekdays from 9:15 a.m. - 12:15 p.m.

**In King County:** Call 211 for referral to a legal services provider weekdays from 8:00 am – 6:00 pm.

**Persons 60 and Over** can call CLEAR\*Sr at 1-888-387-7111 (statewide).

**Deaf, hard of hearing or speech impaired callers** can call CLEAR or 211 (or toll-free 1-877-211-9274) using a relay service of their choice.

**Apply online with CLEAR\*Online** - [nwjustice.org/get-legal-help](http://nwjustice.org/get-legal-help)

CLEAR and 211 will provide a free interpreter.

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