

# Indian Child Welfare Act

## What is the Indian Child Welfare Act (ICWA)?

It is a federal law. It has strict standards state courts must follow when custody of an Indian child is at stake.

## When does the ICWA apply?

In these kinds of cases:

- Cases where a non-parent has filed for custody or guardianship of the child
- Foster care placement
- Termination (ending) of parental rights
- Adoptions
- Behavior that would **not** be a crime if an adult committed it, such as drinking alcohol or missing school, when the court is placing an Indian child outside their home

## When does the ICWA not apply?

It does **not** apply to

- custody cases between parents (for example, as part of a divorce)
- placement based on an act which would be criminal if an adult committed it
- tribal court proceedings

## Who is an “Indian child” under the ICWA?

Any unmarried person who is under 18 **and** one of these:

- A member of an Indian tribe.

- Eligible to be a member of an Indian tribe and the biological child of a tribal member.

---

❖ **“Indian”** here includes Alaska Native tribe.

---

## Will tribal court or state court hear my ICWA case?

It depends.

**If an Indian child lives or is “domiciled” within an Indian reservation or is a ward of tribal court**, a state court normally must transfer (send or move) the case to the tribal court.

---

❖ **Domicile** means where a person lives and plans to stay. A child’s domicile is generally the same as the parents’. This can be true even if the child has never been there. The same could be true of an Indian child’s reservation. A child’s domicile may be the reservation even if the child has never been there.

---

**If the child does not live on a reservation**, the state court **must** transfer the case to the right tribal court, unless one of these is true:

- There is good reason not to.
- A parent objects.

## How will I find out that there is a custody case in state court?

When a state court case involves an Indian child, the person who started (filed) the case must notify all of these:

- parents
- the child’s tribe or tribes

- anyone with legal or temporary custody

## **I am an Indian parent or custodian. What are my rights under the ICWA?**

The state court must make sure these happen:

- If you do not have much money, you can ask the court to appoint you a lawyer.
- You have the right to review all documents that have been filed with the court.
- “Active efforts” to prevent the breakup of the Indian family.

---

❖ **“Active efforts”** are actions the person who filed the case must take to support the child staying in your care. The person must ask what you need to safely care for the child and make meaningful efforts in helping you get those things. For example, this could look like finding community resources like housing, counseling, or transportation, and then helping you access those resources. **This requires more than the “reasonable efforts” the state child welfare office must make to keep non-Indian children with their parents in dependency cases.**

---

- If the court is considering placing the child out of your home, it must decide that the child is likely to experience serious emotional or physical damage in your care. The person that filed the case must give the court testimony from an expert witness, who is familiar with tribal culture, to prove this point.
- If the court places the child out of your home, preference must go first to extended family, Indian or non-Indian, then to tribal and other Indian homes near the child’s home.

## **I am an Indian parent facing a guardianship case in state court. Can I get help?**

Yes. If you do not have a lot of money, you should notify the court that your child is Indian and ask the court to

- appoint you a lawyer at public expense
- order rehabilitative services to prevent the breakup of your family

Use our [If you are a parent in a minor guardianship case, you can ask for a lawyer](#) packet, available at WashingtonLawHelp.org.

- 
- ❖ If you ask the court to appoint a lawyer and do not get one, contact Northwest Justice Project's Native American Unit. (See contact info at the end.)
- 

## **I am an Indian parent. My child is in foster care or up for adoption. Do I have rights under the ICWA?**

Yes. **If you consented (agreed) to the foster care placement or parental rights termination:** Your consent is **only** valid if you sign it before a judge at least ten days after the child's birth. You can take back your consent any time before the court enters a final order **or** within two years in certain situations. Talk to a lawyer.

**If you did not consent to the foster placement or parental rights termination:** See, "What are My Rights under ICWA," above.

## **Do tribes have rights under the ICWA?**

**Yes.** They have the same right to take part in the case as the parents and person or agency seeking to remove the child from the parent(s).

## **When do tribal courts hear custody cases filed by a non-parent?**

It depends:

- **Only tribal courts** can make custody decisions about Indian children residing on their reservation and children who are wards of tribal court.
- **If the children are not residing on their reservation, and are not the subject of a current dependency in tribal court, either tribal or state courts** can make custody decisions about the children, regardless of where they live. But there must be “good cause” (good reason) for the state court to keep the case.

### **How does a tribe find out about a custody case in state court involving an Indian child?**

The state court must make sure a child’s tribe gets written notice of the case. If the nonparent does not know who the child’s tribe is, the state court should send notice to the Secretary of Interior. You should get a copy of the notice.

---

❖ The tribe has the right to get involved in the state court case.

---

### **The tribe got notice about the custody case. Now what?**

The tribe may

- Ask the state court to transfer the case to tribal court.
- Ask the court to order services to try to keep the family together.
- Ask the child to be placed somewhere else.
- Ask for a record of any state court placement of a tribal child and proof of efforts made to follow the ICWA placement preferences.



Washington  
LawHelp

[www.WashingtonLawHelp.org](http://www.WashingtonLawHelp.org)

9201EN | March 2021

## Get legal help

The Northwest Justice Project's Native American Unit (NAU) provides free civil (non-criminal) legal services for people who cannot afford a lawyer in Washington.

In King County: Call 2-1-1.

All other counties: Call the CLEAR hotline toll-free at 1-888-201-1014, weekdays 9:15 a.m. - 12:15 p.m.

---

This publication provides general information concerning your rights and responsibilities. It is not intended as a substitute for specific legal advice.

© 2021 Northwest Justice Project — 1-888-201-1014

(Permission for copying and distribution granted to the Alliance for Equal Justice and to individuals for non-commercial use only.)



Northwest Justice Project