

# **How does the Indian Child Welfare Act affect me**

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Learn how the Indian Child Welfare Act might affect you or your family. Information for Indian parents, family members and guardians, and Indian children and teens. This also includes information about filing for guardianship of an Indian child.

## **1. Fast facts**

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

It is a federal law (<https://www.law.cornell.edu/uscode/text/25/chapter-21>). It has strict standards state courts must follow when custody of an Indian child is involved. Washington's RCW 13.38 (<https://app.leg.wa.gov/rcw/default.aspx?cite=13.38>) is a 2nd version of the law that helps give additional state specific guidance.

ICWA's goal is to keep Indian families together and to keep Indian children connected to their community and culture. ICWA also restates the inherent rights of tribal nations to be involved in child welfare matters involving their members. When ICWA applies, child welfare must take extra steps to keep Indian families together, to support Indian parents and to involve tribes.

ICWA **doesn't** apply to custody actions between the child's parents, such as divorce, parentage, or changing (modifying) custody orders or parenting plans.

## Who does the Indian Child Welfare Act affect?

It could affect you if you are:

- the parent of an Indian child.
- an Indian parent or custodian. An Indian custodian is an Indian person who has legal or physical custody of an Indian child.
- an Indian child (or teen) yourself.
- a non-parent seeking custody, foster care (including pre-adoptive placement), adoption, or guardianship of an Indian child in a child welfare, adoption, or guardianship proceeding.

ICWA doesn't apply to a divorce case or parenting plan case between two biological parents.

## When does ICWA apply?

In these kinds of cases:

- Cases where a non-parent has filed for custody, foster care, or guardianship of the child
- Foster care placement including pre-adoptive placement
- Termination (ending) of parental rights
- Adoptions
- Status offense cases for Indian children when the court has placed an Indian child outside of their home. Behavior that **wouldn't** be a crime if an adult committed it is called a "status" offense. Status offenses are charges like truancy, runaway, under-age drinking, curfew and other age-related offenses.

## When does 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
- cases in some tribal courts, unless the tribe has adopted ICWA in their Law and Order Codes. Colville, Lummi, Makah, Nisqually, Sauk-Suiattle, Skokomish, Squaxin Island, Swinomish, and Tulalip are some of the tribes in WA that have adopted ICWA type provisions. The Native American Rights Fund has a [list of tribes that have ICWA type provisions](https://narf.org/nill/documents/icwa/tribal/tribalcodes.html) (<https://narf.org/nill/documents/icwa/tribal/tribalcodes.html>).

## Who is an "Indian child" under ICWA?

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

- A member of a federally recognized tribe or Alaska Native tribe, or Alaska Native village.
- Eligible to be a member of a federally recognized tribe or Alaska Native village **and is also** the biological child of a tribal member.

“Indian” here includes members and those eligible to be members of Alaska Native tribes. It doesn’t include members of non-federally recognized tribes or Canadian First Nations.

The person who started the child custody case (the “Petitioner”) **must** make a “good faith effort” at finding out if the child is an Indian child. They should ask all these people about **any known or potential** tribal affiliation for the child:

- The child’s parents
- Any person who has a caretaking connection to the child
- Any tribe the child **could** be affiliated with based on known parents and grandparents
- Any other person expected to have relevant information about the Indian status or Indian community connections of the child

Washington State has its own version of the ICWA. Its definition of an Indian child also includes anyone who **may be** an Indian child. Because of these laws, you must investigate thoroughly **any** tribal relations if you are required to give ICWA notice in your case. It is **not enough** to say that the child and/or parents aren’t enrolled with a tribe.

## Are membership and enrollment in a tribe the same thing?

Enrollment is **one way** of proving membership for an Indian child for ICWA. If the child is enrolled **or eligible for enrollment**, the child is a member.

If the child is not enrolled or eligible for enrollment, then **the Tribe determines** whether the child is a member for the purposes of ICWA. Only a tribe can make a determination of membership. Many tribes will consider whether there is a family on the reservation, other ties to the Tribe, and similar things when determining “membership” of an “Indian child”. The Tribal determination is final and based on the Tribe's individual internal policies. Each tribe could be different.

## Who decides who is an Indian child?

**Only the tribe** has the right to determine who is a member. If someone believes the child may be an Indian child, the person filing the case **must** notify any tribes with which the child has connections or relations.

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

ICWA doesn't apply to tribal courts. However, all courts of the United States, including tribal courts, must give full faith and credit to (fully honor) orders of other courts that involve custody of Indian children. This includes orders from other tribal courts.

Most tribes have child custody laws governing who may seek custody or visitation rights with tribal children. To get a copy of a tribal code, get in touch with the tribe directly. You can also find some tribal codes online using the State Tribal Directory (<https://goia.wa.gov/tribal->

[directory?fa=forms.contribute&formID=125](#)).

## **How is the “best interest of the child” standard applied differently to Indian children because of ICWA?**

ICWA requires that the standards used to measure the interests of Indian children must be specifically **culturally appropriate** to that child’s Indian or tribal culture. It goes beyond the usual “best interest of the child” standard that is common in non-ICWA child custody proceedings.

## **Does ICWA only apply to cases when child welfare tries to terminate parental rights? (Also called “involuntary proceedings”)**

**No.** Certain parts of ICWA also apply to “voluntary” proceedings like voluntary adoptions. ICWA notice is still required for voluntary proceedings. There are specific procedures for voluntary adoptions and foster care placements that are required by ICWA.

For example, when an Indian parent who voluntarily consents to adoption for their Indian child, **the tribe also has a right** to oppose the biological parent’s choice of adoptive or foster parents. The tribe can require ICWA placement preferences for the Indian child that can override both biological parents’ placement preferences.

## **What are ICWA’s placement preferences?**

ICWA placement preferences prioritize maintaining connection to family, tribe and tribal culture.

ICWA's placement preferences for adoption (in order of preference) are:

1. A member of the child's extended family
2. Members of the Indian child's tribe
3. Other Indian families

ICWA's placement preferences (in order of preference) for **foster care and pre-adoptive placement** are:

1. The Indian child's extended family- even extended family who aren't members of the Indian child's tribe
2. A foster home licensed, approved, or specified by the Indian child's tribe (as near to the child's home as possible)
3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority (as near to the child's home as possible)
4. Another institution approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs (as near to the child's home as possible)

## **Do tribes have rights under 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). Tribes should have a chance to be actively involved in all stages of every type of case and can come to every hearing. Tribes have a right to be involved in all status offense cases involving Indian children who are in placement. Status offenses are charges like truancy, runaway, under-age drinking, curfew and other age-related offenses.

## **I have to give notice in an ICWA case. What do I do?**

You must learn the ICWA's special procedures and requirements, which state that:

- The person filing the case must file and serve the correct kind of notice on the children's tribe(s) and the parents or Indian custodians. You can get these forms (GDN M 401 (<https://www.courts.wa.gov/forms/documents/GDN%20M%20401%20Indian%20Child%20Welfare%20Attachment.pdf>), GDN M 402 (<https://www.courts.wa.gov/forms/documents/GDN%20M%20402%20Indian%20Welfare%20Attachment.pdf>), GDN M 403 (<https://www.courts.wa.gov/forms/documents/GDN%20M%20403%20Proof%20of%20Maternal%20ICWA%20Notice.pdf>)) from the Washington court (<https://www.courts.wa.gov/forms/>).
- The person filing the case must show there were **active efforts to provide services and programs** to the children's parents to address any problems that interfere with their ability to parent. The person must show these efforts didn't correct the parenting problems.
- The person who filed the case must give clear and convincing evidence, including testimony from expert witnesses, that remaining with the parent will probably cause the children serious emotional or physical damage. You can read about this rule in the Washington state ICWA law (<https://app.leg.wa.gov/RCW/default.aspx?cite=13.38.130>).

## 2. Jurisdiction

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### What is jurisdiction?



It is a court's power or authority to decide a case. If a court doesn't have jurisdiction to hear your case, it can't make an order in the case.

Jurisdiction **is especially important** in guardianship cases involving Indian children. A non-parent who wants a court order giving them custody of Indian children might need to file a case in tribal court, not state court. It depends on the facts.

## Which court should the case be in?

It will depend on where the Indian child lives.

**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 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.

## 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, only tribal courts can hear cases involving custody of **Indian children who live on Indian reservations**. There is both a federal law (<https://www.law.cornell.edu/uscode/text/25/1911>) and a

state law (<https://app.leg.wa.gov/rcw/default.aspx?cite=13.38.060>) about this.

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

It depends.

The state court **may** hear a 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 one of these is true:

- a parent objects
- the tribe declines jurisdiction
- there is good cause (a good reason) to not transfer the case

The tribe **must** be given a chance to have the case transferred or decline jurisdiction.

If the case stays in state court, then the ICWA applies.

## 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 child is **not** residing on their reservation and is **not** the subject of a current dependency in tribal court, **either** a tribal **or** state court can make custody decisions about the child, regardless of where they live.

But there must be good cause for the state court to keep the case.

### 3. Finding out if there is a case

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#### How will I find out that there is a 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 any tribes the child could be affiliated with
- anyone with legal or temporary custody of the child

Even if ICWA doesn't apply, **if it is a guardianship case**, under state law (<https://app.leg.wa.gov/RCW/default.aspx?cite=11.130.195>) they must still notify:

- The parents
- Any guardian or legal custodian of the child
- Any adult providing primary care for the child now or recently
- Each grandparent and known adult sibling of the child
- The child themselves if the child is at least 12 years old

#### How does a tribe find out about a 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 doesn't know who the child's tribe is, the state court should

send notice to the Secretary of Interior and to all possible tribes known to be connected to the child. The Indian parent should also get a copy of the notice if they are known.

The tribe has the right to get involved in the state court case and have a representative present at all the hearings.

### **The tribe got notice about the 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.

## **4. Indian parents, custodians, and family members have rights**

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

The state court must make sure these happen:

- **You have the right to try to stop** any child custody involving your Indian child. This includes foster care proceedings, pre-adoptive hearings, and parental rights termination hearings.
- **You should have received notice** of a child custody case filed against you with enough time to respond. You can ask the court for more time preparing for the hearing if you need it. Any tribe the child has membership in should also have received notice.
- **You can ask the court to appoint a lawyer** if you can't afford one.
- **You have the right to review all documents** that have been filed with the court.
- **You have the right to "active efforts" to prevent the breakup** of your Indian family. This means the goal of everyone should be to keep the Indian family together if possible and if in the best interests of the Indian child. This also means that you as the Indian parent should get **extra support** to help you rehabilitate, get the support you need, and keep your family together. Services should heavily favor parental support, avoid termination, and actively enable reunification.

**"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 your child and make meaningful efforts in helping you get those things. For example, this could look like finding community resources like housing, counseling, financial support, mental health or substance abuse support, peer support, or transportation. Then they **must also** help 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.

- **You have a right to culturally specific experts.** 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. You also may be able to request that a tribal representative be with you at every hearing. You also may be able to ask for an Indian Guardian Ad Litem to speak for your child in court.
- **You can ask for ICWA placement preferences.** 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.
- **You can ask for a confidential hearing.** Any affected tribe and other parties will remain a part of the hearing. But you can ask for a confidential hearing that can help the process stay private from other extended family members and the broader community.
- **You have a right to strict conditions for any emergency removals** or placements that should favor quick reunification of your family once the emergency is over.
- Intensive family/parent rehabilitation services should be **favored over** child removal for your case.

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

Yes. If you don't 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 no cost
- order rehabilitative services to prevent the breakup of your family

Get more [information about your parental rights](#) if this is your situation.

**If you ask the court to appoint a lawyer and don't get one,**  
contact Northwest Justice Project's [Native American Unit \(NAU\)](#).

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

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 didn't consent to the foster placement or parental rights termination:** Read [the list of your rights](#). If those things didn't happen in your case, you should [talk to a lawyer](#).

## **I am an Indian relative of an Indian child who is involved in a child custody proceeding. Do I have any rights?**

**Yes**, if ICWA applies to the proceeding, you have some rights related to the Indian child. You should:

- Get priority for ICWA placement for the child as an Indian family member
- Have your Indian or tribal standards and customs be the standard for your home evaluations for foster care placement in your home

You could have additional rights if you are grandparents involved in raising the child immediately prior to when child protection got involved.

## 5. Indian children and teens have rights

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### I am an Indian child or teen. Do I have rights under ICWA?

**Yes.** Indian children and teens have rights under ICWA.

- **You have a right to a lawyer** that the court will give you and pay for. This lawyer can help you in any **child custody proceeding** that involve you. For foster care and parental termination, you should have a lawyer automatically assigned to you by the court. This lawyer is just for you and is different than your parent's lawyer. For other types of cases like adoption, or guardianship, you might have to show the Judge how having your own lawyer **is in your best interest**.
- **You can ask for your tribe or tribes to get notice** from the court if the tribe doesn't know the case is happening. This applies to all types of cases that involve you.
- **You have the right to try to stay in your extended family**, in your tribal community and connected to tribal culture.



- **You can ask to stay with extended family members** even if they aren't a member of your tribe.
- **You have right to stay connected to Indian culture** even when in placement.
- **You should be able to ask for placement** in adoptive or foster care homes that support the values unique to your tribal culture or community **and** that are **as close to your home as possible**.
- **If you are in placement, you can ask for tribal involvement in truancy, under-age drinking, curfew, runaway cases,** or any other offenses that are related to you being underage. You should be able to ask for a tribal representative to be with you at these hearings.
- You can ask for a Guardian Ad Litem who knows your culture and is familiar with your specific tribal community.
- You can ask to give evidence in the hearings if you are a certain age.
- You can ask for emancipation (or to live on your own) if you are 16 or 17. It can be very hard to meet the requirements for Emancipation.
- You have rights if you are the child named in guardianship case.

## 6. Guardianship issues for Indian parents

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### **I received guardianship papers for my child. Do I need a lawyer?**

If you are an Indian parent and you were served guardianship papers, you may be able to ask the court to appoint a lawyer to represent you.

If your child **is an Indian child**, ICWA applies to the case, and you have the right (<https://app.leg.wa.gov/rcw/default.aspx?cite=13.38.110>) to have a lawyer appointed to represent you. You should give the court proof of your low income and ask the court to appoint you a lawyer.

If ICWA **doesn't apply** to your case, **you can still ask the court to appoint you a lawyer** under the state guardianship law.

Get more information about your parental rights that can help you if either of these are your situation.

### **Someone filed in state court for guardianship of my Indian child. My child and I live off the reservation. Can I ask our tribal court to hear the case?**

Yes, if the Indian child doesn't live on the reservation, you or your tribe can ask to transfer the case. Any of these can ask to transfer an ICWA case to the tribal court of the child's tribe:

- A parent
- The children's Indian custodian
- The tribe
- A child who is at least 12 years old

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.

A tribal court might not have a guardianship procedure but it should still be able to decide custody of Indian children. A tribe **can**

decline to accept a case transfer. Some tribes may not have court systems.

### **Do I have to ask in writing to have the case transferred to tribal court?**

**No.** You can also ask verbally on the record during a hearing.

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

Yes. You can ask to have the case transferred to your tribe's court even if it is in another state.

### **I lost custody of my Indian children in a non-parent custody case before 2021. That case is closed. How do I get my children back?**

It could be hard to do on your own without a lawyer.

If you believe the ICWA requirements weren't followed in that case, you may be able to ask a court to invalidate (cancel) the custody order.

Get more [information about your parental rights](#) and [talk to a lawyer](#) who is familiar with parental rights under the ICWA.

## **7. Filing for guardianship of an Indian child**

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## I want to file for guardianship of an Indian child. Do I need a lawyer?

**Maybe**, at least for advice.

Following the ICWA's requirements and special notice rules is critical. If you don't, any orders the court makes may be **invalid**. Make sure you understand the ICWA's requirements before filing.

## How do I file for minor guardianship in Washington State?

Before choosing to try to get guardianship, you should get to know:

- The complex legal issues
- Paperwork and notice requirements
- The proof (evidence) you must give the judge
- What could happen if you make a mistake in the process

Try to get advice from a family law lawyer knowledgeable about the ICWA before going to court.

Get more information and the forms you will need for filing for guardianship. You will also need the required tribal notice forms. If the child you want to be the guardian of **could be** an Indian child, you should make sure to notify **everyone** who is required under the ICWA rules including all potential tribes affiliated with the child. Be thorough and don't make assumptions about the child's tribal connections or lack of connections. Every tribe the child has connections to must be notified and given a chance to be involved.

## 8. Helpful resources

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### Where can I learn more?

The Native American Rights Fund (<https://narf.org/>): A Practical Guide to the Indian Child Welfare Act

(<https://www.narf.org/nill/documents/icwa/index.html>)

The Indian Child Welfare Act Law Center (<https://www.icwlc.org/>)

Washington State's Indian Child Welfare Act

(<https://app.leg.wa.gov/RCW/default.aspx?cite=13.38>) lists the steps needed to meet the requirements in Indian child guardianship cases.

### How can I talk to a lawyer about my ICWA rights?

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

**WashingtonLawHelp.org** gives general information. It is not legal advice. Find organizations that provide free legal help on our Get legal help page.