

# Indian Child Welfare Act

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## What is the Indian Child Welfare Act?

The Indian Child Welfare Act (ICWA) is a federal law that creates strict standards for state courts to follow in Indian child custody proceedings. The ICWA declares “the policy of this Nation is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”

## What proceedings does the ICWA govern?

The ICWA governs state court proceedings concerning the custody of an Indian child, including foster care placement, termination of parental rights, and adoptive placement.

The law does not apply to:

- parental custody in a divorce proceeding, or
- placement based upon an act which would be criminal if committed by an adult or tribal court proceedings (these are governed by tribal law).

## How does the ICWA define “Indian child?”

The ICWA applies only to proceedings involving the custody of an “Indian child.”

This means any unmarried person who is under age 18 and is either:

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

Under the ICWA, the term “Indian” includes tribal members and Alaska Natives.

In Washington State, administrative rules expand the definition for some purposes to include both Canadian Indians and individuals considered to be Indian by a federally or nonfederally recognized tribe or urban Indian/Alaskan Native community organization.

## What do state courts have to do under the ICWA?

If an Indian child is domiciled within an Indian reservation or has been made a ward of a tribal court, a state court normally must transfer the case to the tribal court. “Domicile” means where a person lives and intends to remain, although a child’s domicile is generally that of his/her parents, even if the child has never been there.

If the child’s domicile is outside the reservation, the law also requires the state court to transfer the case to the appropriate tribal court, absent good cause to the contrary or an objection by either parent. A state court which decides not to transfer the case to tribal court must ensure that active efforts are made to reunify the family, and that preference for out of home placements is given first to the extended family and then to tribal and other Indian homes.

The law establishes minimum federal standards of evidence, including testimony of expert witnesses with knowledge of tribal culture, before a state court may remove an Indian child from his or her home. States must maintain a record of each state court placement of an Indian child, together with evidence of efforts made to comply with the ICWA placement

preferences. State courts must report adoptive placements to the Department of the Interior and, upon request, must provide information regarding tribal affiliation to adult Indian adoptees.

### **What rights do Indian parents or custodians have under the ICWA?**

State courts must notify the parents and any person who has legal or temporary custody whenever the court has reason to know the proceedings involve an Indian child. Indigent Indian parents or custodians are entitled to court-appointed counsel and to rehabilitative services designed to preserve the family. An Indian parent's voluntary consent to foster placement or termination of parental rights is invalid unless executed before a judge in writing at least ten days after the birth of the child. Consent may be withdrawn at any time prior to entry of a final order or within two years in the event of fraud or duress.

### **What rights do tribes have under the ICWA?**

The United States Supreme Court has recognized that tribes have an interest in

their children that is distinct from and on a par with that of parents. Tribal courts have exclusive jurisdiction concerning custody of reservation-domiciled Indian children and children who are wards of tribal court. Tribal courts have concurrent jurisdiction concerning all tribal children, wherever they reside. State courts must give "full faith and credit" to tribal court proceedings, meaning they generally must respect and enforce such rulings. State courts must ensure that notice of an Indian child custody proceeding in state court is given to the child's tribe, which has the right to intervene. The tribe may request transfer to tribal court, or advocate for family reunification or other placement. The tribe may by resolution alter the ICWA placement preferences. A tribe may obtain upon request a record of any state court placement of a tribal child, together with evidence of efforts made to comply with the ICWA placement preferences. Tribes and states may enter into agreements regarding jurisdiction and custody matters.

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