



California Indian Legal Services (CILS) Community Legal Education Self-Help Series

Bishop ♦ Escondido ♦ Eureka ♦ Sacramento

What Is the Indian Child Welfare Act?

► What's in this guide and how can it help me?

This guide explains what the Indian Child Welfare Act is, why it was passed, and how it applies in California.

If you're a parent or Indian custodian, this guide can help you decide if ICWA applies to your situation, and explains what your rights are if ICWA does apply. It also explains what rights tribes have in your case, if ICWA applies.

⇒ **TIP:** If a word in this guide appears in **bold**, we define it afterwards. These terms are also defined at the end of this guide in the section called "Some Helpful Terms About ICWA," starting on Page 9.

✧ What Is ICWA ✧

► What is the Indian Child Welfare Act?

The Indian Child Welfare Act (ICWA) is a federal law that was passed in 1978. ICWA sets out rules that state courts have to follow in certain child custody "**proceedings**" (cases) involving Indian children. Under state law, California courts have to follow these rules.

These rules apply in cases where **Indian children** are being taken away from their parents or Indian custodians. **Note:** just because a child is biologically Indian, may not mean they are an "Indian child" under ICWA. See the section below, "Which children does ICWA apply to?"

► Are you an Indian custodian or a legal guardian?

An "**Indian custodian**" is an Indian person who is raising the Indian child instead of the child's parents. For more information about Indian custodians, see the *CILS Community Legal Education Self-Help Guide*, "What Is an Indian Custodian?"



► **Under ICWA, Indian custodians have almost the same rights as parents.**

A “**legal guardian**” is someone who has custody of a child or children by order of the court. The court decides which specific rights each legal guardian has. Legal guardians may be related to the child or children, but they don’t have to be.

If you’re trying to become a legal guardian, or if you’re a legal guardian and an Indian child is being taken away from you, ICWA **may** apply to your case. You can contact CILS to discuss your situation.

The rules are designed to keep Indian children connected to their families and tribes. Maintaining this connection serves the best interests of Indian children and also promotes the stability and security of Indian tribes and families.

One important way ICWA helps to keep children connected to their families and tribes is by requiring social service agencies (commonly called "CPS") to make special efforts to keep Indian families together. These agencies must provide services that reflect the current social and cultural standards of the family’s Indian community. Examples include counseling and parenting classes.

► **What specific problems does ICWA address?**

ICWA was passed to address the following problems:

- Large numbers of Indian children were being removed from their families by state courts and county social service agencies.
- Most of these children ended up in non-Indian homes and institutions.
- Indian children who were cut off from their tribal communities and cultures often later had behavioral and emotional problems.
- State and county officials often did not understand, ignored, or rejected the cultural or social customs of the child’s tribal community.

✧ Does ICWA Apply to My Case? ✧

► **Does ICWA apply to the kind of case I’m involved in?**

If you’re a parent or an Indian custodian, and you’re involved in a child custody case in state court where an Indian child may be taken away from you, ICWA applies. If you’re a parent, it also applies in cases where your rights as a parent are being “**terminated**” (ended). These include cases where:

- the child may be placed in foster care

- someone may become “**legal guardian**” of the child by order of the court
- the child may be put up for adoption
- the child may be removed from the home by a child protective service agency

ICWA **doesn't** apply in custody disputes between the biological mother and the biological father (for example, during a divorce), unless:

- someone who isn't the child's parent(s) may get custody of the child **or**
- one parent is trying to terminate the rights of the other parent

► **Which children does ICWA apply to?**

ICWA applies in cases involving an “**Indian child**.” ICWA defines an “Indian child” as an unmarried person under the age of 18 who:

- is a member of a federally-recognized Indian tribe **or** is eligible for membership in a federally-recognized Indian tribe **and** is
- the biological child of a member of a federally-recognized Indian tribe.

► **Who decides who can be a member of a tribe?**

The child's Indian tribe decides who can be a member. Depending on the tribe's membership laws, enrollment may or may not be necessary for the child to be considered a member.

► **I don't know if my child is an “Indian child” as defined in ICWA. What should I do?**

If you are a parent or an Indian custodian, and you aren't sure if your child is a tribal member or is eligible for tribal membership, you should:

Let the court and the county social worker know that the child **may** be an Indian child. Give them as much information as possible about why you think the child is a tribal member or eligible for membership in a tribe.

Contact the child's tribe immediately and tell them about the court case you have coming up. Ask them if they can provide written proof that the child is a tribal member or is eligible for tribal membership.

If the child isn't a member, ask the tribe for information on how to apply for membership. Each tribe has its own laws and rules regarding membership. For

example, some tribes may ask for a formal application or a certified birth certificate. Be prepared to give them as much information as you can about the child and his or her Indian parents, grandparents, and other ancestors, such as their full names (including maiden names), dates of birth, and tribal enrollment numbers (if any).

If the court that is hearing the case doesn't have enough information about a child's tribal membership, it may decide that ICWA doesn't apply to the custody case. However, if the child enrolls in their tribe at a later date, the court has to apply ICWA to the custody case.

✧ Under ICWA, What Rights Do I Have? ✧

► Under ICWA, what rights do I have as the parent or Indian custodian of an Indian child?

If you're the parent or Indian custodian of an Indian child, ICWA gives you the following rights:

- the right to get “**notice**” of (be told about) the child custody “**hearing**”
- ⇒ **TIP:** A “**hearing**” is a meeting with a judge, and the people, tribe(s), or institution(s) involved in the court case. It usually takes place in a courtroom. But when children are involved, the meeting takes place behind closed doors. During the hearing, each side argues for their point of view in the case.
- the right to participate in the child custody hearing
- the right to ask for up to 20 more days to get ready for a hearing
- the right to ask that the case be moved to tribal court (if there is one)
- the right to a court-appointed attorney (at no charge) if the court decides that you can't afford to pay for one
- the right to look at the documents about the case that the court has on file
- the right to reunification services (such as counseling or parenting classes) that can help you regain custody of the child
- if you're a parent, you have the right to agree that the child should be placed in foster care or put up for adoption

- if you're a parent, you have the right to change your decision to place the child in foster care or put the child up for adoption
- if you're a parent, you have the right to ask for custody back if the child is adopted and the adoption doesn't work out
- the right to have experts testify in the case and to make sure that enough evidence is presented before your right to keep custody of the child is taken away. (For example, a court can't take custody away from you unless it has proof that the child will suffer serious emotional or physical harm if he or she remains with you. An expert must give this kind of proof.)
- the right to have the rules set out by ICWA, including its "**placement preferences**," followed.

► What are "placement preferences"?

ICWA sets out a "**preferred**" (favored) order of places that an Indian child should live if they are taken away from their parents. The places that are listed as best for the Indian child to live are ICWA's **placement preferences**.

The first choice is to place the child with a member of their extended family. This includes both Indian and non-Indian extended family members.

If that's not possible, the second choice usually is with other members of the child's tribe.

If that's not possible, the third choice usually is with other Indian families.

⇒ **TIP:** This is a general placement order. It may be different, depending on whether the child is going into foster care, or is going up for adoption. Also, ICWA requires that placement decisions reflect the current social and cultural standards of the child's Indian community. Because Indian tribes have the most knowledge about who can best care for the child and preserve the social and cultural standards of the child's community, tribes have the right to change placement preferences.

► What notice will I get if there is a custody case about my child?

In cases where ICWA applies, the law says that the court has to give you proper notice about the case. This means:

- You must receive the notice in writing. The notice must be sent by registered or certified mail, along with return receipt.
- You must receive the notice at least 10 days before the hearing.

- The notice must include information about the “**nature**” of the case (such as what kind of hearing it is, and the date, time, and place the hearing is scheduled for).
- The notice must inform you of your right to “**intervene**” (participate) in the case.

► What if I don’t get proper notice?

If you didn’t get proper notice, but you can come to court on the day of the hearing, you should. You should tell the judge that you didn’t get proper notice. If you need it, you should ask for a “**continuance**” (to have the hearing changed to a future date). A continuance will give you extra time to prepare for the hearing or find an attorney.

If you didn’t get proper notice about a hearing, it is “**subject to invalidation.**” This means that all the “**orders**” made at the hearing may be “**vacated**” (set aside) or reversed. You have the right to ask for invalidation. This means you have the right to ask the court to vacate all the orders made at the hearing.

⇒ **TIP:** “**Orders**” are instructions given by a judge that command (or “order”) another government department or agency to take some specific action. For example, if you got custody of an Indian child in a state court, the piece of paper that the judge signed that gave you custody is called an order. These are also called “**court orders.**”

If you decide to ask for invalidation, you should do it right away. Otherwise, your right to object to the court order may be “**waived**” (lost).

You should always tell the court if you didn’t get proper notice, even if you don’t want to ask for invalidation. This will help make sure you get proper notice of future hearings.

You should inform the court about the child’s Indian ancestry as well so that proper notice to the child’s tribe(s) can begin.

► Can I have a hearing invalidated for any other reasons?

Yes. You can ask for invalidation if ICWA isn’t followed in any of the following ways:

- The case was dealt with in state court when it should have been dealt with in tribal court. This usually applies if the child was a “ward” of the tribal court already (meaning the tribal court has or had an open case for the child and made orders about the child).
- You asked the state court to move the case to tribal court, but they

refused without “**good cause**” (good reason).

- The state court denied you the right to participate.
- The state court refused to give “**full faith and credit**” to tribal laws, records, or court decisions even though those tribal acts did not conflict with state policy. This means that a state court didn’t apply and recognize tribal laws or tribal court decisions, or honor tribal records.



TIP: “Full faith and credit” means that state courts have to give tribal laws, records, and court decisions the same power in the state courts that they have within tribal lands. It means that the state courts treats tribal laws, records, or court decisions as equal to state court laws, records or decisions.

- You asked the court for an extra 20 days to get ready for a hearing, but they refused to give it to you.
- The state court denied your right to a court-appointed attorney, even when you showed you couldn’t pay for one.
- The state court denied you the right to look at all the documents about the case that the court had on file.
- There was a child protective services agency involved, and they didn’t make an “**active effort**” (provide all the services they could, within reason) to try to keep your family together.
- The state court didn’t hear testimony from an expert, or didn’t make sure that enough evidence was presented before it took away your custody of the Indian child.
- The state court has to follow specific rules when it gets your “**consent**” (permission) to place the child in foster care or put the child up for adoption. This process is called a “**voluntary**” placement (because you or the other parent made this choice of your own free will). For example, your consent to a placement must be given before the judge, in writing, and you have to wait until 10 days after the birth to do so, if the child was recently born. Similarly, in adoptions, if you want to place your child up for adoption, you have to wait 10 days before doing so. If these rules are not followed, the consent is not “valid” and the order placing the child in foster care or for adoption can be **invalidated**.
- The state court wouldn’t “**vacate**” (set aside) a final adoption order that was in effect for less than two years, and where the biological parent’s consent was gotten through fraud or “**duress**” (threat of force or pressure).

✧ Under ICWA, What Rights Does the Child's Tribe Have? ✧

► Under ICWA, what rights does the Indian child's tribe have?

In addition to knowing about the rights that you have as a parent or Indian custodian, it's important for you to know that the child's tribe also has rights under ICWA. For example:

The tribe has a right to participate in custody cases of its Indian children.

The tribe can “**exercise**” (use) “**tribal jurisdiction.**” (The term “**jurisdiction**” refers to which court – tribal or state – has the right to hear a case. Whether the tribe has jurisdiction may depend on whether the child lives on or off the reservation.)

Jurisdiction is a very complicated subject. Contact your local CILS office if you have questions about the jurisdiction of your custody case.

- The tribe has the right to be notified about the child custody case.
- The tribe has the right to ask for up to 20 more days to get ready for a hearing.
- The tribe has the right to ask that the case be moved to tribal court (if there is one).
- The tribe has the right to deny your request that the case be moved to tribal court.
- The tribe has the right to look at the documents about the case that the court has on file.
- The tribe has the right to see records kept by the State on the placement of tribal children.
- The tribe has the right to apply certain tribal laws or customs to the custody case. These include laws that define “Indian custodian” or “extended family,” for example.
- The tribe has the right to disagree with ICWA's placement preferences and to tell the court where the tribe thinks it would be best for the Indian child to live.

⇒ **TIP:** When a tribe exercises this right, they usually have a specific person in mind.

Tribes have all the same rights about getting proper notice from the court that you do, including the right to ask for invalidation (see Pages 6-7).

Notice to the tribe must be sent to the tribal chairperson or other representative that the tribe chooses.

✦ A word about unrecognized tribes and ICWA ✦

► I belong to a federally unrecognized tribe. How does the ICWA apply to me?

Unfortunately, unrecognized tribes do not have rights in proceedings involving children under ICWA; the ICWA applies only to federally recognized tribes. This means the ICWA does not apply to parents or Indian Custodians where the Indian child is a member of a federally unrecognized tribe.

► Does my federally unrecognized tribe have any rights?

However, under California juvenile laws (which apply to cases in dependency court or child protective services cases) certain provisions of the ICWA may apply if the judge hearing the case determines that they can. The provisions allow the unrecognized tribe to participate in the court proceedings and:

- Be present at the hearing.
- Address the court.
- Request and receive notice of hearings.
- Request to examine court documents relating to the proceeding.
- Present information to the court that is relevant to the proceeding.
- Submit written reports and recommendations to the court.
- Perform other duties and responsibilities as requested or approved by the court.

This means that if the judge decides not to allow a tribe to participate, there is nothing that anyone can do. There is no right to appeal a judge's refusal to allow a federally unrecognized tribe to participate.

✦ Some Helpful Terms About ICWA ✦

► What do some of the legal words I hear about ICWA mean?

ICWA, like other areas of law, has its own special language. Some of the words you might hear or see in a child custody case, and their meaning, are listed below.

Active effort means that social service agencies have to provide services to

keep Indian families together. These services must reflect the current social and cultural standards of the family's Indian community. Examples include counseling and parenting classes. The services have to be provided before the child is taken from the parents at the beginning of the case, and again at the end of the case if the parent(s) are not going to get the child(ren) back.

Consent means permission.

Continuance means to change a hearing to a future date.

Duress means someone made a choice because they were threatened, pressured, or bullied.

Exercise means to use your rights.

Federally recognized tribe refers to a tribe that is acknowledged as a tribe by the United State government (through the Bureau of Indian Affairs). As a federally recognized tribe the tribe has rights of self-determination (i.e. they can own land, enact a Constitution, determine their own membership laws).

Federally unrecognized tribe refers to a tribe where the United States government (through the Bureau of Indian Affairs) does not acknowledge the group as a tribe. This means the tribe is not able to hold land in special Indian trust status and its members are not eligible for the federal government benefits otherwise provided to members of federally recognized tribes.

Foster care placement means placing a child in the custody of foster parents.

Full faith and credit means that state courts have to give tribal laws, records, and court decisions the same power in the state courts that they have within tribal lands. It means that the state courts treats tribal laws, records, or court decisions as if they were equal to state court laws, records or decisions.

Good cause means good reason.

Hearing is a meeting with a judge, and the people, tribe(s), or institution(s) involved in the court case. It usually takes place in a courtroom. But when children are involved, the meeting takes place behind closed doors. During the hearing, each side argues for their point of view in the case.

Indian, according to ICWA, is a member of a federally recognized tribe.

Indian child, according to ICWA, is an unmarried person under the age of 18 who is a member of a federally-recognized Indian tribe; **or** who is eligible for membership in a federally-recognized Indian tribe **and** is the biological child of a member of a federally-recognized Indian tribe.

Indian custodian is an Indian person who is raising an Indian child instead of the child's parents.

Intervene means to participate in a child custody case.

Invalidated means that the orders made at the child custody hearing are set aside or reversed.

Jurisdiction, in this case, refers to which court – tribal or state – has the right to hear a case.

Legal Guardianship is when someone has custody by order of the court. The person who is given custody is called a **legal guardian**. The court decides which specific rights each legal guardian has. Guardians may be related to the child, but they don't have to be.

Nature means the type of court case, and the date, time, and location where it takes place.

Notice means to be told about a child custody case. **Notice is not proper** when the parents, Indian custodian, or tribe were not told about a child custody hearing in the right way or in enough time to prepare for the case.

Orders are instructions given by a judge that command (or "order") another government department or agency to take some specific action. They are also called "**court orders**."

Placement preferences are made by ICWA. They set out the preferred order of places an Indian child should live if they are taken away from their parents.

Proceedings are court cases or hearings.

Vacate means the court sets aside orders made at a child custody hearing.

Voluntary placement means you choose, of your own free will, to place the child in foster care or put the child up for adoption.

Waive means a legal right is given up or lost.

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Disclaimer

This information is intended to assist you with your legal problem. Each area of the law is complex and changing. Your case may have special factors that could affect the applicability of this information. CILS does not guarantee that this information is sufficient to resolve your legal problem. If you have any questions, you should seek the advice and counsel of an attorney.

CILS Community Legal Education Self-Help Series



The Community Legal Education Self-Help Series is a project of CILS. The Series' mission is to expand access to legal resources that increase Indian self-sufficiency. This guide is part of our Community Legal Education Series, providing Indians and Indian tribes with user-friendly information and self-help assistance pertaining to their legal status and rights. Community Legal Education Self-Help guides, and more information about CILS and California Indian issues, are available on our website at www.calindian.org.

California Indian Legal Services

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Do you have a legal problem? For assistance, contact your local CILS office:

Bishop: (760) 873-3581, or toll-free at (800) 736-3582

Escondido: (760) 746-8941, or toll-free at (800) 743-8941

Eureka: (707) 443-8397, or toll-free at (800) 347-2402

Sacramento: (916) 978-0960, or toll-free at (800) 829-0284

