



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

Escondido ♦ Eureka ♦ Bishop ♦ Sacramento

# What is an Indian Custodian?

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

This guide explains what an Indian custodian is. It also explains what responsibilities and rights Indian custodians have.

This guide can help you if you are an Indian custodian or you need to become one.

This guide can also help you if you are an Indian parent and you think you want someone else to be an Indian custodian for your child.

An Indian Custodian Form (“Designation of Indian Custodian”) is attached for you to use.

⇒ **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 Legal Terms,” starting on Page 8.

## ✧ What Is an Indian Custodian? ✧

### ► What is an Indian custodian?

An Indian custodian:

- is an Indian person who has custody of an Indian child but who is not that child's biological parent
- has the right and responsibility to make decisions about a child's day-to-day care, well-being, and overall best interests
- has special rights under the Indian Child Welfare Act (ICWA).

⇒ **TIP:** There are several different kinds of custody. See the section, “Some Helpful Legal Terms,” for a more detailed explanation of the different kinds of custody.

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

The Indian Child Welfare Act (ICWA) is a federal law that sets out rules that state courts must follow in child custody cases where Indian children are being removed from the homes of their parents or Indian custodians. These rules are designed to keep Indian children connected to their families and tribes. For more information, see the CILS Community Legal Education Self-Help Guide, “What Is the Indian Child Welfare Act?”

► **Indian Custodian Checklist:**

Three conditions have to be met for someone to be considered an Indian custodian:

- The child is an “Indian child” **and**
- The custodian got custody of the child in one of three specific ways **and**
- The custodian is an “Indian person.”

You will need to read this whole section carefully to find out if you meet each of these three conditions.

► **Who is considered an Indian child?**

The child must be an Indian child as defined in the Indian Child Welfare Act (ICWA). 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.

If you don’t know if a tribe is federally recognized, you can contact the tribe.

► **What are the ways Indian custodians are allowed to get custody of an Indian child?**

In order to be considered an Indian custodian, you have to get custody of an Indian child in one of three specific ways:

- the child’s parent transfers the temporary physical care, custody, and control of the child to you **or**
- you get custody under tribal law or custom **or**
- you get custody under state law (such as through a “**guardianship**”).

⇒ **TIP:** A **guardian** is someone who has custody of a child or children by order of a state court. The court decides what specific rights each guardian has. Guardians may be related to the child or children, but they don't have to be. They can also be called "**legal guardians.**"

► **Who is considered an Indian person?**

There are several definitions of "**Indian person**":

If custody was obtained under state law, or from the parent(s), then an Indian person is someone who is defined as an "Indian" under federal law (such as a member of a federally-recognized Indian tribe).

If custody was obtained under the tribal law or custom of a federally-recognized Indian tribe, then an Indian person is someone who is considered an "Indian" under that tribe's laws or customs.

► **What if I don't meet all three conditions, as listed above, but I've been acting as the child's parent for a long time?**

If you don't meet all three conditions, you can't be considered an Indian custodian.

If you find yourself in court regarding the custody of the child, then you can ask the court to recognize you as the child's "**de facto parent**" under California law.

⇒ **TIP:** A **de facto parent** is someone who has been taking care of the child's day-to-day needs (as if they were the child's parent) for a long time.

The rights and responsibilities of de facto parents are very complicated. You can contact your local CILS office for more information about de facto parent status.

You may also be able to be enroll the child in school or obtain medical care for the child. See our "What is a Caregivers Authorization Affidavit?" Self-Help guide.

## ✧ Rights and Responsibilities of Indian Custodians ✧

► **What are my responsibilities as an Indian custodian?**

You are responsible for the child's day-to-day care and well being. For example, you must be sure that the child goes to school and gets the medical care they need.

If you have problems enrolling the child in school or getting the child medical care because agencies or officials don't recognize your right to do this as an Indian custodian, contact your local CILS office to discuss your situation. See Page 6 for more information on how you can prove you have these rights as an Indian custodian.

You are not responsible for the child's financial support unless the child's parents have had their parental rights "**terminated**" (ended). If the child's parents have not had their parental rights terminated, they are still responsible for supporting the child financially.

► **Can I get financial assistance for the Indian child?**

You may be eligible for a number of state and federal assistance programs. These programs include:

California Work Opportunity and Responsibility to Kids (CalWORKs). This is the federal welfare-to-work program run by the state of California.

- Foster Care benefits
- Kinship Guardianship Assistance Payment (Kin-GAP) benefits. This is a payment program for relatives who become guardians of the child in their care and leave the foster care program.
- Adoption Assistance Program
- Supplemental Security Income (SSI) (for children with disabilities)

Your eligibility for these programs depends on whether you're related to the child and how you got custody of the child.

► **Can I get medical care benefits for the child?**

If you are eligible to receive CalWORKs, Foster Care, SSI, or Kin-GAP on behalf of the Indian child, the child will be eligible to receive Medi-Cal benefits.

The child may also be eligible for federal health care benefits offered by Indian Health clinics.

For more information about health care benefits offered by Indian Health clinics, you can contact the California Area Indian Health Service at (916) 930-3927 or go to their website, at <http://www.ihs.gov> and select Area Offices & Facilities, California.

In some cases, the child may also be eligible for private medical insurance benefits through his or her tribe.

You can contact the child's tribe for more information about getting the child private medical benefits.

If you have private medical insurance, your insurance plan may cover the child's medical care. But insurance companies may want you to have a formal custody arrangement, such as a guardianship.



- You can contact your medical insurance company to find out if your plan covers the child in your custody.
- You should know that if you get state or federal financial assistance for the child, the District Attorney may take the child's parent(s) to court and try to get financial support for the child from them.

### ► What rights do I have as an Indian custodian?

As an Indian custodian, you have the right to:

- enroll the child in school
- get the child the medical care they need
- participate in child custody cases where ICWA applies, and have certain rules followed in those cases

### ► What child custody cases does ICWA apply to?

ICWA applies to child custody cases where an Indian child may be taken away from a parent or Indian custodian, or where parental rights are being "**terminated**" (ended). These include cases where:

- the child may be placed in foster care
- someone may become 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, 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.

⇒ **TIP:** If you are involved in an ICWA case, you may want to refer to the Community Legal Education Self-Help Guide, "What Is the Indian Child Welfare Act?" for more information.

## ✧ Proof of Indian Custodianship ✧

### ► What can I do to make it easier to have my rights as an Indian custodian recognized?

If a parent transferred custody of his or her child to you, the parent can fill out an “Indian Custodian Form.” This form:

- proves that the parent gave you temporary custody **and**
- proves that you have the power to make decisions about medical care for the child

► **Do I have to have a completed Indian Custodian Form in order to prove I’m an Indian custodian or use this power?**

You don’t need to fill out a specific form or go through any specific process to set up an Indian custodianship. But having a form that proves you have custody of the Indian child may make it easier for you to “**exercise**” (use) your rights to make decisions about medical care or enroll the child in school.

► **Why will having proof make it easier for me to exercise my rights as an Indian custodian?**

Schools may not let you enroll the child unless you can prove you have the right to do so.

Medical staff may not treat the child unless you can prove you have the right to make decisions about their medical care.

Proof that you have the right to make decisions for the child provides protection for the school or doctor. For instance, if you didn’t have permission to make medical decisions for an Indian child, a doctor could get in trouble with the parents if he or she treats them.

An Indian Custodian Form (“Designation of Indian Custodian”) is attached for you to use.

► **Is there any other way to prove that I have custody of an Indian child?**

Yes. There are several other ways you can prove that you have custody of an Indian child:

If you got custody of an Indian child from a state court or a tribal court, you can use the court order that gave you custody. You may need to get a certified copy of the court order to prove that it’s still in effect.

- ⇒ **TIP:** You can get a certified copy of the court order from the court clerk where the child custody hearing took place. You may have to pay for the certified copy. A “**certified copy**” is one that is issued directly by the court.

If you got custody under tribal law or custom, but the tribe doesn't have a formal court system, you can ask for a letter from the tribal leader (for example, the Tribal Chairperson) or a resolution from the tribal government.

If you can't get any of the documents listed above, you can complete a "**declaration**" or an "**affidavit**" that describes how you got custody of the child. These may be accepted as proof of custody.

⇒ **TIP:** An **affidavit** is a written statement where the person who signs it swears that the information on the form is true and correct to the best of their knowledge. It must be notarized. A **declaration** is also a written statement where the person who signs it swears that the information on the form is true and correct to the best of their knowledge. The person who makes it promises they are telling the truth under "**penalty of perjury**." This means that if they knew they were lying, they would have to pay a fine or go to jail. A declaration does not have to be notarized.

To find out how you can get an affidavit or a declaration, you can contact your local CILS office.

## ✂ For Indian Parents ✂

### ► I'm an Indian parent and I want someone else to be the Indian custodian for my child. What do I do?

As an Indian parent, you can choose to transfer the temporary custody of your child to someone else. If you make this choice of your own free will, it is called "**voluntary**."

⇒ **TIP:** If you don't freely choose to transfer temporary custody of your child to another person, it is called "**involuntary**." An example is if Child Protective Services removes your child from your home.

If you want someone else to be the Indian custodian for your child:

- Review the information on Pages 1-6 of this guide so you know what an Indian custodian is, understand how someone can become one, and know what rights and responsibilities the Indian custodian will have.
- Remember, you will still have rights as the child's parent, as well as the responsibility to support the child financially.
- Remember that your decision to name someone else as Indian custodian does not have to be permanent. If your decision to transfer custody was **voluntary**, you can reverse your decision whenever you want.

If you want to make someone else an Indian custodian, you can fill out the attached Indian Custodian Form.

If you're an Indian parent and you're considering making someone an Indian custodian, you can call CILS to discuss your situation.

► **What if my decision to transfer custody to an Indian custodian was involuntary? Can it be reversed?**

If, for instance, Child Protective Services removed your child from your home, then your decision to give up custody was **involuntary** and can only be reversed by the court.

You can contact your court-appointed attorney to discuss your situation.

## ✧ Some Helpful Legal Terms ✧

► **What do some of the legal words I hear about Indian custodians mean?**

Some of the words you might hear or see in relation to Indian custodians, and their meaning, are listed below.

**Affidavit** is a written statement where the person who signs it swears that the information on the form is true and correct to the best of their knowledge. It must be notarized.

**Certified copy** is one that is issued directly by a government agency. It is printed on official government paper and has an official government seal.

**Custody** includes being able to make decisions about a child's day-to-day care and well-being and overall best interests. There are several different kinds of custody.

**Legal custody** means having the right to make all major decisions about a child's well-being, such as where to go to school and what doctor to see. Parents have legal custody by right, but the court can give legal custody to someone besides a parent.

**Physical custody** means having the child live with you and making decisions about his or her day-to-day care, such as what to eat and when to sleep. Many Indian custodians have physical, not legal, custody.

**Joint custody** is when more than one person, such as both parents, has custody of the child.

**Declaration** is a written statement where the person who signs it swears that the information on the form is true and correct to the best of their knowledge.

The person who makes it promises they are telling the truth under “**penalty of perjury.**” This means that if they knew they were lying, they would have to pay a fine or go to jail. Unlike an affidavit, it does not have to be notarized.

**De facto parent** is someone who has been taking care of the child’s day-to-day needs (as if they were the child’s parent) for a long time. De facto parent status must be given by a judge.

**Guardian** is someone who has custody of a child or children by order of the court. The court decides which specific rights each guardian has. Guardians may be related to the child or children, but they don’t have to be. He or she can also be called a **legal guardian.**

**ICWA** (the Indian Child Welfare Act) is a federal law that sets out rules that state courts must follow in child custody cases where Indian children are being removed from their parents, Indian custodians, or guardians. These rules are designed to keep Indian children connected to their families and tribes.

**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.

**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.**”

**Proceedings** are court cases or hearings.

**Terminated** means a parent(s)’ rights have been ended.

**Voluntary** means you choose to transfer the temporary custody of your child to another Indian person of your own free will. **Involuntary** means you did not freely choose to transfer temporary custody of your child to another Indian person. An example is if Child Protective Services removes your child from your home.

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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 Series**

The Community Legal Education 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 Self-Help 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](http://www.calindian.org).



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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



**DESIGNATION OF INDIAN CUSTODIAN**  
(25 U.S.C. 1901, *et seq.*)

I, \_\_\_\_\_, am the parent of \_\_\_\_\_, date of birth \_\_\_\_\_.

I hereby transfer the care and custody of my son/daughter, to \_\_\_\_\_, an Indian person, and pursuant to the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901, *et seq.*, I hereby designate \_\_\_\_\_ as my son/daughter's Indian custodian.

I do hereby authorize \_\_\_\_\_ to consent to any medical treatment and hospital care of my son/daughter which is deemed advisable, enroll my child (ren) in school, and otherwise exercise responsibility for the day-to-day care and well-being of my child (ren).

This placement is revocable at any time pursuant to the terms of the Indian Child Welfare Act. By making this placement I do not waive my rights under the Indian Child Welfare Act to notice in any future state court proceeding involving the custody of son/daughter.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature of Parent)

I accept this designation as the Indian custodian of \_\_\_\_\_.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature of Custodian)