Oregon Indian Child Welfare Act Dependency Benchbook

SUPPORTED BY CASEY FAMILY PROGRAMS & OREGON JUDICIAL DEPARTMENT JUVENILE COURT IMPROVEMENT PROGRAM

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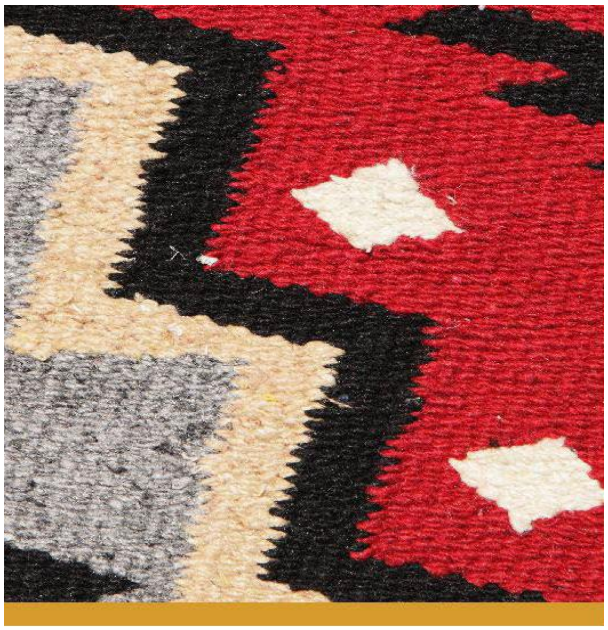

FOREWARD

How this Benchbook was Created

In the first special session of 2020, the Oregon Legislative Assembly unanimously passed the Oregon Indian Child Welfare Act (ORICWA). Shortly thereafter, with the support of the Oregon Judicial Department Juvenile Court Improvement Program and Casey Family Programs, a workgroup convened to draft a guide to the new law.

The workgroup, coordinated by consultant Addie Smith, met over six times to determine the best way to present the new law and to ensure the accuracy of the text. Members spent countless hours reviewing drafts, discussing issues of interpretation, and improving the readability of this Benchbook. A special thanks to Tiffany Keast, Inge Wells, and Megan Hassen for their intensive edits and revisions, as well as Alison Roblin for her copyediting.

The workgroup was reconvened in 2021 to address amendments to the dependency code made by Senate Bill 562 (2021).

We hope you find this Benchbook both approachable and informative in your work with Indian children and their families.

WORK GROUP

KRISTY BARRETT
Sage Legal Center

ADAM BECENTI
Department of Human Services

SHANNON DENNISON
Oregon Department of Justice

LEA ANN EASTON
Dorsay Easton, LLP

ASHLEY K HARDING
Oregon Department of Human Services

MEGAN HASSEN
Oregon Judicial Department

EMILY HAWKINS
Oregon Department of Human Services

CHRISTINE KAMPS
Oregon Department of Human Services

TIFFANY KEAST
Office of Public Defense Services

BRENT LEONHARD
Confederated Tribes of the Umatilla Indian Reservation

SHARY MASON
Oregon Judicial Department

ADRIAN (ADDIE) TOBIN SMITH
Consultant

SHELDON SPOTTED ELK
Casey Family Programs

JACK TROPE
Casey Family Programs

INGE WELLS
Oregon Department of Justice

casey family programs

JCIP

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Chapter 1: Context

Congress passed the Indian Child Welfare Act (ICWA) in 1978 in response to "an alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and…an alarmingly high percentage of such children [being] placed in non-Indian foster and adoptive homes and institutions[.]" 25 USC §1901(4). Congress found that Indian children who grow up in non-Indian homes lose touch with their cultural and spiritual roots. ICWA aims to address these concerns and to ensure that Indian children are only removed from their parents after significant efforts have been made to maintain them in their family and, if removal becomes necessary, to ensure that Indian children are placed in homes that keep them connected to their family, tribe, and culture. In 2016, for the first time since ICWA's passage, the Department of Interior, Bureau of Indian Affairs, promulgated binding federal regulations and released updated guidelines meant to complement ICWA.

In spite of the federal law and new guidance, Oregon Department of Human Services (ODHS) data has continued to show a disproportionate placement of American Indian and Alaska Native (AI/AN) children in foster care.[1] To address this issue and at the request of Oregon tribes the ODHS Tribal Affairs Unit formed an ICWA compliance committee in 2018. That committee was broken into three subcommittees: 1) staff training; 2) case evaluation and review; and 3) state ICWA legislation. In preparation for the 2020 legislative session, ODHS, in partnership with the Legislative Assembly, transitioned the state ICWA legislation work group to a work group hosted by the interim House Committee on the Judiciary. The work group brought together key state agencies, tribal partners, and other relevant stakeholders, including national experts, in a series of meetings. At those meetings, the work group:

- reviewed federal laws, regulations and guidelines related to Indian child welfare as well as corresponding Oregon laws, rules, and policies;
- assessed laws passed by sister states to promote ICWA compliance;
- tracked relevant litigation and case law;
- discussed key data and relevant best practices; and
- drafted a legislative concept (known as "ORICWA").

After reviewing the product of this workgroup, the Oregon State Legislature passed ORICWA during the first special session in 2020. Its policy is to:

- "protect the health and safety of Indian children and the stability and security of Indian tribes and families by promoting practices designed to prevent the removal of Indian children from their families and, if removal is necessary and lawful, to prioritize the

[1] In Oregon in 2019, American Indian and Alaska Native (AI/AN) children were over-represented in the Oregon foster care system: although AI/AN children make up 1.6 percent of the child population, they are 4.5 percent of the children in foster care in Oregon. ODHS, 2019 Child Welfare Data Book available here: https://www.oregon.gov/dhs/CHILDREN/CHILD-ABUSE/Documents/2019%20Child%20Welfare%20Data%20Book.pdf.

placement of an Indian child with the Indian child's extended family and tribal community;"

- "recognize the inherent jurisdiction of Indian tribes to make decisions regarding the custody of Indian children;" and
- "recognize the importance of ensuring that Indian children and Indian families receive appropriate services to obviate the need to remove an Indian child from the Indian child's home and, if removal is necessary and lawful, to effect the child's safe return home."

ORS 419B.600

To fulfill those goals, ORICWA "create[s] additional safeguards for Indian children to address disproportionate rates of removal, to improve the treatment of and services provided to Indian children and Indian families in the child welfare system and to ensure that Indian children who must be removed are placed with Indian families, communities and cultures." ORS 419B.600

This Benchbook provides assistance to Oregon judges applying the Oregon Indian Child Welfare Act (ORICWA), Oregon Laws 2020, ch. 14, the federal Indian Child Welfare Act of 1978 (ICWA or "Act"), 25 USC § 1901 - 1963, the binding federal ICWA regulations, Indian Child Welfare Act, 25 CFR pt. 23 (June 14, 2016), and the nonbinding but often helpful guidance provided by the US Department of the Interior, Bureau of Indian Affairs (BIA) in its Guidelines for State Courts and Agencies In Indian Child Custody Proceedings (December 12, 2016). This Benchbook has 5 Chapters. This chapter, the introduction, provides background and sets the stage for the Benchbook. Chapter 2 covers foundational concepts of ORICWA/ICWA including: the definition of an Indian Child, who qualifies as a parent or Indian custodian, which tribe is the child's tribe and thus a party to ORICWA proceedings, and the definition of the best interest of the Indian child. Chapter 3 describes the common ORICWA/ICWA hearing requirements, including inquiry, notice, active efforts, qualified expert witnesses, and placement preferences. Chapter 4 provides detailed information to help the judge determine whether the state or tribal court has jurisdiction over the matter. Finally, Chapter 5 describes in detail which hearing elements from Chapter 3 apply at each of the common ORS Chapter 419B hearings. For ease of reference, this chapter has hyperlinks throughout that take the reader back to the corresponding foundational concepts and hearing elements described chapters 2 and 3.

A Note about Legal Authorities

ICWA is the federal law that governs child welfare proceedings involving Indian children in state courts across the country. Pursuant to 25 USC § 1921, states may provide more protection to Indian families, and that is what ORICWA sets out to do. Specifically, ORICWA enhances and clarifies the federal law, by embedding it into state law and providing additional guidance to Oregon courts making decisions about Indian children and their families. As with all state laws, it is binding in state courts and governs how Oregon courts and ODHS handle child welfare cases involving Indian children. In addition, the federal government promulgated new binding federal regulations governing state court implementation of ICWA and corresponding non-binding guidance in the 2016 Guidelines.

This guide focuses on ORICWA because, regardless of other authorities, ORICWA is state law passed by Oregon's legislature for the protection of Oregon's Indian children. When in question, both ICWA and its regulations state that in any case where state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian, the court shall apply the higher standard. 25 USC § 1921. Both federal authorities are also clear that the federal

standards are the minimum standards for Indian families and that where a state authority provides higher standards, as ORICWA does, that state authority governs. *Id.* Finally, although the BIA's 2016 Guidelines do not have the authority of state law, the Guidelines may be used to clarify questions not answered by ORICWA, ICWA, or the regulations.

A Note about Terms

This Benchbook use the term "Indian" repeatedly instead of "Native American" or "American Indian/Alaska Native." That is because ORICWA and ICWA use the term "Indian," starting with the state and federal Acts' official titles. For example, in order for the Act and state law to apply, the court must find that there is reason to know that the child is an "Indian child," the term "Indian tribe" has specific legal meaning, and ORICWA and ICWA extend specific rights to "Indian custodians" which is a legal term of art. For consistency, this guide uses the Acts' terminology; Oregon state courts should do the same.

Additionally, throughout this Benchbook, actions are required of ODHS specifically, even though the phrasing of ORICWA/ICWA may be more broad (*e.g.,* "the petitioner," "the individual seeking removal," "the individual seeking protective custody"). Because in the vast majority of ORS Chapter 419B cases the individual that fulfills those roles is ODHS, "ODHS" has been used for simplicity. If, however, another actor takes any of the specified actions, the subsequent actions required of ODHS would be the responsibility of that individual.

A Note about Adoptions

This Benchbook covers ORICWA's application in dependency cases. Following the passage of Oregon Laws 2021, ch. 398, ORICWA and its provisions also apply to adoption cases under ORS Chapter 109. Updates to the Oregon Judicial Department's Family Law Benchbook are underway to address ORICWA's application to adoptions.

Chapter 2: ORICWA Basics

Information included in this chapter is foundational to ORICWA's requirements and relevant to any ORS Chapter 419B proceedings that involve an Indian child. When particular topics defined below are relevant, this Benchbook will hyperlink the reader back to the relevant portion of this chapter for reference.

"Reason to Know" a Child is an "Indian Child"

When the court has reason to know the child in the case is an Indian child, it must proceed as if ORICWA applies.

Definition of Indian child

An "Indian child" is any unmarried person under the age of 18 who is either:

- A member or citizen of an Indian tribe; **or**
- Eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.

ORS 419B.603(5).

Only a tribe can determine whether a child is its member or eligible for membership. ORS 419B.603(9).

An "Indian tribe" is any tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided by the Department of the Interior, including Alaska Native Villages. ORS 419B.603(7). A complete list of recognized tribes is published in the Federal Register each year and is available here: https://www.federalregister.gov/documents/2020/01/30/2020-01707/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of.

When a court has "reason to know" that a child is an "Indian child"

- A finding has already been made that the child is an Indian child or that there is reason to know the child is an Indian child;
- Any individual present in the proceeding informs the court that
    - the child is an Indian child; or
    - information has been discovered indicating that the child is an Indian child;
- The child indicates to the court that the child is an Indian child;
- The court is informed that the domicile or residence of the child, the child's parent or the child's Indian custodian is on a reservation or in an Alaska Native village;
- The court is informed that the child is or has been a ward of a tribal court;
- The court is informed that the child or the child's parent possesses an identification card or other record indicating membership in an Indian tribe;
- Testimony or documents presented to the court indicate in any way that the child may be an Indian child; or
- Any other indicia provided to the court, or within the court's knowledge, indicate that the child is an Indian child.

ORS 419B.636(3).

Practice tip:

"Reason to know" is meant to be a low bar, and the court should order ODHS to follow up on any information indicating that the child or the family of the child has tribal heritage.

Application of ORICWA

ORICWA applies to proceedings throughout ORS Chapter 419B when the child meets ORICWA's definition of "Indian child".

If the court has "reason to know" the child is an Indian child but does not have sufficient evidence to determine whether the child actually meets the definition of "Indian child," the court must:

- Treat the child as an Indian child and apply ORICWA's provisions to the matter; and
- Order ODHS to submit a report, declaration, or testimony on the record demonstrating that it used "due diligence" to identify and work with all of the tribes identified by the sources detailed above to verify whether the child is an "Indian child" as defined by ORICWA.

If the court has "reason to know" the child is an Indian child and there is sufficient evidence to show that the child is an Indian child:

- the court must enter a finding that the child is an "Indian child" and apply ORICWA/ICWA to the case until evidence is presented that indicates the child no longer qualifies as an Indian child under ICWA/ORICWA.

If there was reason to know that the child is an Indian child, but ODHS presents evidence that it has 1) exercised due diligence to contact all possible affiliated tribes; and 2) the child is not an Indian child:

- the court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
- the court should instruct each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child.

If there has never been and continues to be no reason to know that a child is an Indian child:

- the court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
- the court must order each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child.

ORS 419B.636

The Indian Child's Tribe

The "Indian child's tribe" has automatic party status under ORICWA. ORICWA contains provisions to determine which tribe is the "Indian child's tribe" when there are multiple tribes of which the child is or may be a member.

Party Status

The "Indian child's tribe" has automatic party status under ORICWA, but a tribe may withdraw as a party at any time by notifying the court orally or in writing. ORS 419B.875(1)(a)(H); ORS 419B.646(3). If the Indian child is a member of or is eligible for membership in more than one tribe, the court may permit one of the tribes to participate in an advisory capacity or as a party. ORS 419B.875(1)(c).

Which tribe is the "Indian child's tribe"?

- If the Indian child is a member of or is eligible for membership in only one tribe, that tribe is the Indian child's tribe for purposes of party status.
- If the Indian child is a member of one tribe but eligible for membership in other tribes, the tribe of which the Indian child is a member is the Indian child's tribe for purposes of party status.
    - If the Indian child is a member of more than one tribe, or if the Indian child is not a member of any tribe but is eligible for membership in more than one tribe, the "Indian child's tribe" is the tribe designated by agreement between the tribes; **or**, if the tribes are unable to agree on the designation, the tribe designated by the court.

ORS 419B.618(1).

Court Designation of the Indian child's Tribe

When the child is eligible for membership in more than one tribe and it is necessary for the court to designate the tribe (see above), the court must hold a hearing to determine with which tribe the Indian child has the more significant contacts.

In making this determination, the court must consider:

- The preference of the Indian child's parent;
- The duration of the Indian child's current or prior domicile or residence on or near the reservation of each tribe;
- The tribal membership of the Indian child's custodial parent or Indian custodian;
- The interests asserted by each tribe;
- Whether a tribe has previously adjudicated a case involving the Indian child; and
- If the court determines that the Indian child is of sufficient age and capacity to meaningfully self-identify, the self-identification of the Indian child.

ORS 419B.618(2).

After determining which tribe is the "Indian child's tribe," the court may, in its discretion, permit additional tribes to participate in the matter, either as parties or as non-parties in an "advisory capacity." ORS 419B.875(1)(c).

Practice Tip:
"Advisory Capacity" is not defined by ORICWA, and what tribal participation in an "advisory capacity" will consist of is at the discretion of the court.

Best Interest of the Indian Child

In any case where ORICWA applies, when the court must make a determination of the best interest of the child, the court must apply the "best interest of the Indian child" standard as defined in ORICWA.

When making a best interest of the Indian child determination in a proceeding under ORS Chapter 419B, the court must, in consultation with the Indian child's tribe, consider the following:

- The protection of the safety, well-being, development, and stability of the Indian child;
- The prevention of unnecessary out-of-home placement of the Indian child;
- The prioritization of placement of the Indian child in accordance with the placement preferences of ORICWA;
- The value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child's tribe and tribal community; and
- The importance to the Indian child of their tribe's ability to maintain its existence and integrity in promoting the stability and security of Indian children and families.

ORS 419B.612

When, under ORS Chapter 419B, are best interest of the Indian child determinations required?

- When considering who may intervene in a proceeding. ORS 419B.116.
- When issuing a protective custody order. ORS 419B.150.
- At a shelter hearing, when authorizing removal of the child from the home. ORS 419B.185.
- When committing a child to the custody of ODHS and/or reviewing the placement of a child. ORS 419B.337 & ORS 419B.349.
- When placing a child in a guardianship or modifying or vacating a guardianship. ORS 419B.365, ORS 419B.366, & ORS 419B.368.
- At review hearings. ORS 419B.449.
- At permanency hearings. ORS 419B.476.
- In a proceeding to terminate parental rights. ORS 419B.500
- When reinstating parental rights. ORS 419B.532.
- When emancipating a minor. ORS 419B.558.
- For the court to allow a consolidated matter. ORS 419B.806.
- When issuing a child abuse restraining order. ORS 419B.845.
- When making a determination about grandparent visitation. ORS 419B.876.

The Best Interest of the Indian Child *may not* be taken into consideration when making a determination of "good cause" to deny transfer to tribal court. ORS 419B.630(4)(d)(F).

Who Qualifies as a Parent

*A parent does not need to be an Indian or a member of an Indian tribe in order for ORICWA to apply. ORICWA applies to **all** cases involving an Indian child regardless of whether the child's parent (or parents) is a member or citizen of, or is eligible for membership in, an Indian tribe.*

Definition of Parent

- ORICWA defines parent as any of the following:
    - A biological parent of an Indian child.
    - An Indian who has lawfully adopted an Indian child (including tribal adoptions).
    - A father whose parentage has been acknowledged or established.

ORS 419B.603(10).

How can a father acknowledge or establish parentage?

- A father can acknowledge or establish parentage in any of the following ways:
    - Under ORS 109.065.
    - Under tribal law.
    - In accordance with tribal customs.
    - If acknowledged orally or in writing by the man to the court, to ODHS, or to an Oregon licensed adoption agency and confirmed by blood tests as described below.

ORS 419B.609(1).

- Process to establish parentage when acknowledged orally or in writing:
    - If a man acknowledges paternity, ODHS or the adoption agency must notify the court immediately.
    - No later than 30 days after receiving notice of the man's acknowledgment, the court must order blood tests subject to the provisions of ORS 109.252. If the person fails to comply within a reasonable time, the court shall consider the person to have refused to submit to the test for purposes of ORS 109.252.
    - If the blood tests do not confirm the man's paternity as provided in ORS 109.258, or if the man has refused to consent to the blood tests, the man's parentage has not been acknowledged or established for purposes of section (1), above.

ORS 419B.609(2).

Custody

Where "custody" or "continued custody" is used in ORICWA and ICWA, definitions unique to those statutes apply.

Custody

An individual has custody of an Indian child under ORICWA if the individual has physical custody or legal custody of the Indian child under state law, tribal law, or tribal custom. ORS 419B.606(1).

Continued Custody

An Indian child's parent has continued custody if the parent currently has or previously had custody (as defined above) of the child. ORS 419B.606(2).

The following individuals are presumed to have continued custody of a child:

- The Indian child's biological mother.
- A man who is married to the Indian child's biological mother.
- A man whose parentage has been acknowledged or established (as discussed above).

ORS 419B.606(3).

Indian Custodian

Under ORICWA and ICWA, Indian custodians, as defined below, are guaranteed many of the same protections as those individuals who qualify as parents. This definition is intended to account for cultural custodianship.

An "Indian Custodian" is an Indian or a member of a federally recognized tribe who is not the child's parent, but who has "custody" (as defined above) of the Indian child or to whom temporary physical care, custody, and control of the child has been transferred by the Indian child's parents. ORS 419B.603(6).

> ***Practice Tip: Rights of Indian Custodians***
>
> Indian Custodians are guaranteed many of the same protections under ORICWA as parents. When a case involves an Indian Custodian, the court must pay close attention to ensure their rights are protected throughout the proceeding.

Representation

Under ORICWA, all children, and any parent who meets the Public Defense Services Commission (PDSC) guidelines, are entitled to a court-appointed attorney. Tribes may be represented by anyone, regardless of whether they are licensed attorneys. Parents and tribes may be represented by an attorney who is not a member of the Oregon State Bar without that attorney associating with local counsel if the attorney meets the specific standards set by the Oregon State Bar for the purposes of ICWA representation.

Parents and Indian Custodians

If there is reason to know the child is an Indian child, and the parent or Indian custodian is determined to be financially eligible under the policies, procedures, standards, and guidelines of the PDSC, and the parent or Indian custodian requests counsel, the court shall appoint suitable counsel to represent the parent or Indian custodian. ORS 419B.647(1)(b); UTCR 3.170(9). An attorney who is not a member of the Oregon State Bar may appear in any proceeding involving an Indian child on behalf of a parent without associating with local counsel if the attorney establishes, to the satisfaction of the Oregon State Bar, as described below, that they represent the parent and that the child's tribe has affirmed the Indian child's membership or eligibility for membership. ORS 419B.646(2); UTCR 3.170(9).

Children

If there is reason to know the child is an Indian child, the court shall appoint counsel to represent the child, unless already represented. ORS 419B.647(1)(a).

Tribes

A tribe that is a party to a proceeding may be represented by any individual regardless of whether that individual is licensed to practice law. ORS 419B.646(1). An attorney who is not a member of the Oregon State Bar may appear in any proceeding involving an Indian child on behalf of the child's tribe without associating with local counsel if the attorney establishes to the satisfaction of the Oregon State Bar, as described below, that they represent the tribe and that the tribe has affirmed the child's membership or eligibility for membership.

ORS 419B.646(2). UTCR 3.170(9).

Practice Tip: Pro Hac Vice Details

An attorney who is not a member of the Oregon State Bar applying for *pro hac vice* admission on a case is not required to associate with local counsel or pay the *pro hac vice* fee if the applicant establishes to the satisfaction of the Bar that:

- The applicant seeks to appear in an Oregon Court for the limited purpose of participating in a child custody proceeding where ICWA applies;
- The applicant represents an Indian tribe, parent, or Indian custodian; and
- An Indian tribe has affirmed the child's eligibility or membership in the tribe.

UTCR 3.170(9)

OSB Instructions for Out-of-State attorneys in ICWA proceedings are available here: https://www.osbar.org/prohacvice

Right to Examine Documents

All parties have a right to examine documents not excepted by state or federal law. In any ORS Chapter 419B proceeding where ORICWA applies, each party has the right to timely examine all documents held by ODHS that are not otherwise subject to discovery exceptions under ORS 419B.881 or protected from disclosure by other state or federal law.

ORS 419B.648(1).

Chapter 3: ORICWA Hearing Elements

Certain elements are crucial to the application of ORICWA/ICWA at various specified proceedings throughout a dependency or TPR case. These include inquiry, notice, active efforts, qualified expert witnesses, and placement preferences.[2] This section provides detailed descriptions of those elements. When these elements are required at a specific proceeding, Chapter 5: Hearing Requirements will hyperlink the reader back here for reference.

Inquiry

In order to determine whether ORICWA/ICWA applies, the court must inquire whether parties in all cases under 419B have reason to know the child is an Indian child and assess and make a finding about whether ODHS has made a good faith effort to determine whether there is any reason to know a child is an Indian child.

Emergency Inquiry

Before ODHS takes the child into protective custody, it is required to make a good faith effort to determine whether there is reason to know that a child is an Indian child and contact by telephone, electronic mail, facsimile, or other means of immediate communication any tribe of which the child is or may be a member to determine the child's affiliation.

Note: This emergency inquiry is a separate requirement from ODHS' requirements to conduct a full, formal inquiry and to provide formal notice to all parties entitled to notice.

ORS 419B.636.

Court Inquiry

At the commencement of each hearing in a voluntary proceeding, dependency proceeding, or a termination of parental rights proceeding, unless the court previously found that the child is an Indian child, the court must ask the parties, on the record, whether they have reason to know the child is an Indian child.

Court Evaluation of Full ODHS Inquiry

At the beginning stages of a voluntary or dependency proceeding, the court must also assess and make a finding about whether ODHS has made a good faith effort to inquire into whether there is reason to know the child is an Indian child. The court should evaluate whether ODHS has asked the right people whether the child is a member of may be eligible for membership in a federally recognized Indian tribe and followed up with the applicable tribe when necessary. ODHS is required to consult with the following people:

- The child;
- The child's parent or parents;
- Any person having custody of the child or with whom the child resides;
- Extended family members of the child;

[2] An additional crucial element to ORICWA/ICWA is the heightened burden of proof at each hearing in a dependency or termination of parental rights case. These are specified and described in detail for each hearing in Chapter 5.

- Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
- Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

Practice Tip: Due Diligence to Determine Whether a Child is an Indian Child

"Due diligence" on the part of ODHS in investigating whether the child is an Indian child is not defined by ORICWA or ICWA, but the court, in making a determination as to whether ODHS used "due diligence," may wish to consider whether ODHS took the following actions:

- Asking the family about their tribal heritage.
- Asking the family about the child's birthplace, the child's residence/domicile, and whether the child has ever been involved in Tribal Court.
- If any family member is an enrolled tribal member, gathering their enrollment number, ID or any other verification of membership that they may have.
- Collecting information on family heritage, including:
  - maiden, married, former, or alias names of all identified individuals; and
  - date of birth **and** place of birth.
- Working with all known extended family to gather as much family history as possible.
- Working with the family and extended family to completely fill out the ODHS Verification of American Indian/Alaska Native Heritage Form (CF 1270);
  - Completing that form for all possible parents.
- Completing an absent parent search, if necessary.
- Sending information gathered to all relevant tribes if affiliation is unclear (for example, if the child identifies as Paiute, inquiry must be sent to the Big Pine Paiute Tribe of the Owens Valley, Bishop Paiute, and Burns Paiute).
- If the family identifies a tribe not included in the federal register, contacting the ODHS Tribal Affairs unit and/or BIA regional office for assistance (for example, the family may identify as Cayuse, and, although Cayuse is not an affiliation that will show up in a search of federally recognized tribes, the Confederated Tribes of the Umatilla Reservation (which is federally recognized) is comprised of the Cayuse, Umatilla and Walla Walla people).
- Ensuring that the tribe received the ODHS Verification of American Indian/Alaska Native Heritage form.
- Promptly responding to a tribe's request for more information or specific information.
- Following up with those involved, including the tribe or potential tribe, if there is no initial response to inquiries about whether the child is an Indian child.

Court application of ORICWA

If there is "reason to know" the child is an Indian child, the court must apply ORICWA/ICWA to the case unless and until it makes a determination that the child is **not** an Indian child.

If there has never been and continues to be no reason to know that a child is an Indian child the court must order each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child. The model JCIP forms contain the required order.

ORS 419B.636(4)(d); 25 C.F.R. § 23.107.

Practice Tip: Common mistakes the department makes with respect to inquiry and notice

- Failing to ask about tribal heritage, follow up with notice and inquiry, or file notice and inquiry documents with the court.
- Not sending inquiry and notice to the Designated Tribal Agent for Service of ICWA Notice at the tribe.
- Not sending inquiry and notice to all potential tribes (for example, if a child identifies as "Cherokee," notice must be sent to Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians).
- Misunderstanding a parent or child or misspelling a tribe's name, and then making an improper determination that it is not a federally recognized tribe or sending notice to the wrong tribe.
- Not sending enough information in the inquiry and notice documents to a tribe for it to make a determination of the child's eligibility for membership.
    - Not collecting additional information after a tribe has responded that they require more information to make a determination of the child's eligibility for membership.
    - Not working closely with extended relatives and trusted adults in the child's life to gather this information.

Notice

When there is reason to know a child is an Indian child, before any designated hearings (defined below/as set forth in chapter 5), ODHS must send notice of the proceeding to any tribe the child may be a member of or eligible for membership in, the child's parent(s), and, if applicable, the child's Indian Custodian (if ODHS cannot determine the identity or location of any of those parties, it must send the notice to a Bureau of Indian Affairs regional office). ORICWA provides very specific requirements for what each notice must contain.

Emergency Notification (Protective Custody Order and Shelter Hearing)

If there is reason to know that a child is an Indian child and the nature of the emergency allows, ODHS must provide emergency notification of the child's removal to any tribe of which the child is or may be a member or eligible for membership. Notification must be by telephone, electronic mail, facsimile, or other means of immediate communication, and must include the basis for the child's removal; the time, date, and place of the initial hearing; and a statement that the tribe, as a party to the proceeding under ORS 419B.875, has the right to participate in the proceeding.

Note: This requirement does not absolve ODHS from fulfilling the full formal inquiry and notice requirements described below. ORS 419B.639.

When is Notice required under ORICWA?

- When an Indian child is removed from a parent or Indian custodian with or without a Protective Custody Order (requiring a shelter hearing) (Emergency Notification)
- Shelter Hearing (Emergency Notification)
- Jurisdiction Trial
- Guardianship Hearing
- Termination of Parental Rights Trial

Notice

In all non-emergency proceedings where notice is required (as set forth in chapter 5) if there is reason to know a child is an Indian child, the party providing notice must:

- Promptly send notice by registered or certified mail, with return receipt requested to:
  - Each tribe of which the child may be a member or eligible for membership;
  - The child's parents and/or the child's Indian custodian; and
  - If the identification or location of the parent or Indian Custodian cannot be ascertained, the appropriate BIA Regional Director listed here: https://www.bia.gov/bia/ois/dhs/icwa/agents-listing/
- File a copy of each notice sent with the court, together with any return receipts or other proof of service.

ORS 419B.639(3).

The court cannot convene the noticed hearing until at least 10 days after the last party required to be notified is notified, unless the noticed hearing is to review the child's removal and potential return to the parent or Indian custodian. Upon request, the court shall grant the Indian child's parent, Indian custodian, or tribe a continuance of the noticed hearing of up to 20 additional days (for up to a total of 30 days) from the date upon which notice is received by the last individual notified.

ORS 419B.639(5).

Practice Tip: Designated Tribal Agent for Service of ICWA Notice

Each year, the BIA collects information from each tribe on who will serve as its Designated Tribal Agent for Service of ICWA Notice. To comply with the ORICWA inquiry and notice requirements, ODHS must send the notice to the appropriate designated individual.

- A complete list is available in the CFR, here: https://www.federalregister.gov/documents/2019/05/09/2019-09611/indian-child-welfare-act-designated-tribal-agents-for-service-of-notice
- A searchable database is available here: https://www.bia.gov/bia/ois/dhs/icwa

ORS 419B.639(2)(b).

Active Efforts

If there is reason to know a child is an Indian child, "active efforts" to reunify the family replace the "reasonable efforts" requirement of ORS Chapter 419B; thus, at various hearings throughout the case, ODHS must prove that it has either provided active efforts to prevent the Indian child's removal or has provided active efforts to reunite the Indian child with their family. For a finding of active efforts to be made, the efforts must be documented in detail in writing and on the record.

Purpose

Active efforts are, depending on the type of hearing, either intended to maintain an Indian child with the Indian child's family, or intended to reunite an Indian child with the Indian child's family. ORS 419B.645(1).

When must the court assess whether active efforts to reunify have been provided?

- Shelter Hearing
- Disposition Hearing
- Review Hearings
- Permanency Hearing
- Guardianship Hearing
- Termination of Parental Rights Trial

Note: When an active efforts finding is required at a hearing, this Benchbook provides the specifics relative to that hearing (see Chapter 5: Hearing Requirements). This section provides an overall definition of active efforts to aid in those individual determinations.

Requirements

"Active efforts" is a higher standard than "reasonable efforts," and the efforts made must be affirmative, active, thorough, and timely.

Active efforts must:

- Include assisting the Indian child's parent, parents or Indian custodian through the steps of a case plan and assisting with accessing or developing the resources necessary to satisfy the case plan;
- Include providing assistance in a manner consistent with the prevailing social and cultural standards and way of life of the Indian child's tribe;
- Be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and tribe; and
- Be tailored to the facts and circumstances of the case.

ORS 419B.645(4).

Documentation and Inclusion in Orders and Judgments

ODHS's efforts must be documented in detail in writing and on the record, and the court must include in its judgments and orders its determination of whether ODHS made "active efforts" and what those efforts consisted of. ORS 419B.645(4)(a).

Practice Tip: Active Efforts Examples

- Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on reunification as the most desirable goal;
- Identifying appropriate services and helping the Indian child's parents overcome barriers to reunification, including actively assisting the parents in obtaining the identified services;
- Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, resolution of placement issues, reviews, or other case management related meetings;
- Conducting or causing to be conducted a diligent search for the Indian child's extended family members, contacting and consulting with the Indian child's extended family members and adult relatives to provide family structure and support for the Indian child and the Indian child's parents;
- Offering and employing culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the Indian child's tribe;
- Taking steps to keep the Indian child and the Indian child's siblings together whenever possible;
- Supporting regular visits with the Indian child's parent or Indian custodian in the most natural setting possible, as well as trial home visits during any period of removal, consistent with the need to ensure the health, safety, and welfare of the Indian child;
- Identifying community resources, including housing, financial assistance, employment training, transportation, mental health, health care, substance abuse prevention and treatment, parent training, transportation, and peer support services; and actively assisting the Indian child's parents or, when appropriate, the Indian child's extended family members, in utilizing and accessing those resources;
- Monitoring progress and participation of the Indian child's parents, Indian custodian, or extended family members in the services as described above;
- Considering alternative options to address the needs of the Indian child's parents and, where appropriate, the Indian child's extended family members, if the services as described in this subsection are not available;
- Providing post-reunification services and monitoring for the duration of the Court's jurisdiction; and
- Any other efforts that are appropriate to the Indian child's circumstances.

Note: The Nine federally recognized Tribes in Oregon and OJD put together an Active Efforts Principles and Expectations Guide that offers insight into this requirement of ORICWA. It was last revised in 2010, which was before the passage of ORICWA (this should be taken into account when using this document): https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting7_042116/Indian_Child_Welfare_Act/Active_Efforts_Principles_and_Expectations.pdf

Qualified Expert Witness

When a qualified expert witness is required, an individual identified by the tribe must testify as to whether the child's "continued custody" by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. If the tribe does not provide an individual to testify, a person who has substantial experience in the delivery of services to Indian families and who has substantial knowledge of the cultural standards and child rearing practices within the Indian child's tribe, or a person who has substantial experience in the delivery of services to Indian families and who has substantial knowledge of the cultural standards and child rearing practices within tribes with cultural similarities to the child's tribe, may testify as a qualified expert witness, subject to a determination by the court that the person is qualified to so testify. No ODHS employee may serve as a qualified expert witness.

When is a Qualified Expert Witness required under ORICWA?

- Jurisdiction Hearing
- At any hearing, post jurisdiction (except disposition), at which the court places the child in substitute care
- Guardianship Hearing
- Termination of Parental Rights Trial

Criteria for a Qualified Expert Witness

A person is a qualified expert witness if the Indian child's tribe has designated the person as being qualified to testify as to their prevailing social and cultural standards.

If the tribe has not designated such a person, the following individuals, in order of priority, may testify as a qualified expert witness:

- A member of the Indian child's tribe or another person of the tribe's choice who is recognized by the tribe as knowledgeable about tribal customs regarding family organization or child rearing practices;
- A person having substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe; or
- Any person having substantial experience in the delivery of child and family services to Indians and knowledge of prevailing social and cultural standards and child rearing practices in Indian tribes with cultural similarities to the child's tribe.

ORS 419B.642(3), (4).

Note: No petitioning party, employee of the petitioning party, or employee of ODHS may serve as a qualified expert witness. ORS 419B.642(6).

ODHS must file a declaration with the court describing the efforts the petitioner made to identify a qualified expert witness. Those efforts must include contacting the Indian child's tribe and requesting that the tribe identify one or more individuals meeting the required criteria, and if necessary, requesting the assistance of the BIA in locating individuals who meet the required criteria. ORS 419B.642(1).

Required Testimony

When a qualified expert witness is required, at least one person designated as a qualified expert witness must testify regarding:

- Whether the Indian child's continued custody by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; and
- The prevailing social and cultural standards and child rearing practices of the Indian child's tribe.

ORS 419B.642(2).

In addition to testimony from a qualified expert witness, the court may hear supplemental testimony from other professionals having substantial education and experience in the area of the professional's specialty on these topics to support the necessary determinations. ORS 419B.642(5).

Practice Tip: Locating a QEW

The Tribal Affairs Office at ODHS has a process for locating appropriate QEWs for an ORICWA/ICWA case. The contact for that unit is:
https://www.oregon.gov/dhs/ABOUTDHS/TRIBES/Pages/Contacts.aspx

Placement Preferences

When an Indian child is placed outside the home, the court must ensure that the placement is in accordance with the placement preferences designated by the child's tribe. If the tribe does not have such preferences, ORICWA and ICWA provide placement preferences that must be followed. An Indian child can be placed outside the placement preferences only if a party establishes good cause to deviate from those preferences. What constitutes good cause, and limitations on good cause, are specified by ORICWA.

Substitute Care Placement Requirements and Preferences Prior to TPR or Guardianship/Adoption

A child who is being placed in substitute care must be placed in the least restrictive setting that:

- Most closely approximates a family, taking into consideration sibling attachment;
- Allows the Indian child's special needs, if any, to be met;
- Is in reasonable proximity to the Indian child's home, extended family, or siblings; and
- Is in accordance with the order of preference established by the Indian child's tribe.

If the Indian child's tribe has not established placement preferences, the child must be placed according to the following order of preference:

- A member of the Indian child's extended family (defined below);
- A foster home licensed, approved or specified by the Indian child's tribe;
- A foster home licensed or approved by a licensing authority in this state and in which one or more of the licensed or approved foster parents is an Indian; or
- An institution for children that has a program suitable to meet the Indian child's needs and is approved by an Indian tribe or operated by an Indian organization.

ORS 419B.654(1).

Guardianship or Adoption or After TPR

An Indian child being placed in a guardianship or in an adoptive placement, or following the termination of parental rights, must be placed in accordance with the order of preference established by the Indian child's tribe.

If the Indian child's tribe has not established placement preferences, absent a good cause finding to deviate from the placement preferences, then the child must be placed:

- With a member of the Indian child's extended family;
- With other members of the Indian child's tribe; or
- With other Indian families.

ORS 419B.654(2); 25 USC §1915.

Practice Tip

When state and federal protections for Indian children differ, the higher standard applies. 25 U.S.C. §1921. Children in a guardianship plan or whose parent's rights have been terminated but are no longer under a plan of adoption will be subject to a higher standard under Oregon state law than federal law.

Definition of Extended Family

Extended family as used in ORICWA is defined by the law or custom of the Indian child's tribe. If there is no tribal law or custom definition available, "extended family" means: A person over 18 who is the Indian child's grandparent, aunt, uncle, brother, brother-in-law, sister, sister-in-law, niece, nephew, first cousin, second cousin, or stepparent. ORS 419B.603(3).

Practice Tip

When is review of placement in accordance with ORICWA placement preferences required?

- Shelter Hearing
- Dispositional Hearing
- Review Hearing
- Permanency Hearing
- Guardianship Hearing
- Adoption Hearing under ORS 419B.529

Placement Outside of the Placement Preferences

A party may move the court to make a placement contrary to the placement preferences. The motion must detail the facts or circumstances establishing good cause for such placement (if any party objects to the motion, the court must hold an evidentiary hearing). ORS 419B.654 (3)(a)–(b).

The court must then determine whether the moving party has demonstrated by clear and convincing evidence that "good cause" exists to depart from the placement preferences. The court must issue a written order of its decision on the motion.

A good cause finding may be based on:

- The preferences of the Indian child;

- The presence of a sibling attachment that cannot be maintained through placement consistent with the placement preferences;
- Any extraordinary physical, mental or emotional needs of the Indian child that require specialized treatment services if, despite active efforts, those services are unavailable in the community with families who meet the placement preferences; or
- Whether, despite a diligent search, a placement meeting the placement preferences is unavailable, as determined by the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

A good cause finding may not be based on:

- The socioeconomic conditions of the Indian child's tribe;
- Any perception of the tribal social services or judicial systems;
- The distance between a placement located on or near a reservation and the Indian child's parent when that placement meets the placement preferences under this section;
- The ordinary bonding or attachment between the Indian child and a nonpreferred placement arising from time spent in the nonpreferred placement.

The court must give weight to a parent's request for anonymity if the placement is an adoptive placement to which the parent has consented. Regardless of this, the inquiry and notice requirements are mandatory. If a parent has reviewed the placement options for their child that are in compliance with the placement preferences and has a preference outside those options, the Court may consider but not rely solely upon that recommendation when making a good cause determination.

ORS 419B.654.

Placements Contrary to the Placement Preferences

If any party asserts *or the court has reason to believe* a child has been placed contrary to the placement preferences provided above without good cause, the court must decide whether there has been a violation. A motion may be made orally on the record or in writing. ORS 419B.654(4).

The court must vacate an order or judgment if the court determines the order is in violation of the placement preference requirements and the court determines it is appropriate to vacate the order or judgment.

If the vacated order or judgment resulted in the removal or placement of the Indian child, the court shall order the child immediately returned to the Indian child's parent or Indian custodian and the court's order must include a transition plan for the physical custody of the child, which may include protective supervision under ORS 419B.331. If the state or any other party affirmatively asks the court to reconsider the issues under the vacated order or judgment, the court's findings or determinations must be re-adjudicated.

ORS 419B.651(2).

Chapter 4: State vs. Tribal Jurisdiction

Under ORICWA, the juvenile court has temporary exclusive jurisdiction to order protective custody or enter a shelter order. Much like the UCCJEA, however, each time the court has a case involving an Indian child, it must analyze whether the state court has jurisdiction or whether there is tribal jurisdiction pursuant to ORICWA. This analysis turns on: the child's domicile, whether the child is a ward of a tribal court, which tribe the child is a member of or eligible for membership in, whether that tribe is subject to Public Law 83-280, and whether that tribe has an agreement with the state granting it default jurisdiction. Much like the UCCJEA, if the state court declines jurisdiction in favor of transfer to tribal court, it should coordinate with the tribal court to facilitate that court's assumption of jurisdiction.

Determining Jurisdiction

Temporary Exclusive Jurisdiction

The juvenile court has "temporary exclusive jurisdiction" over an Indian child who is taken into protective custody under ORS 419B.150 or 419B.152. ORS 419B.627(4).

Assessing Jurisdiction

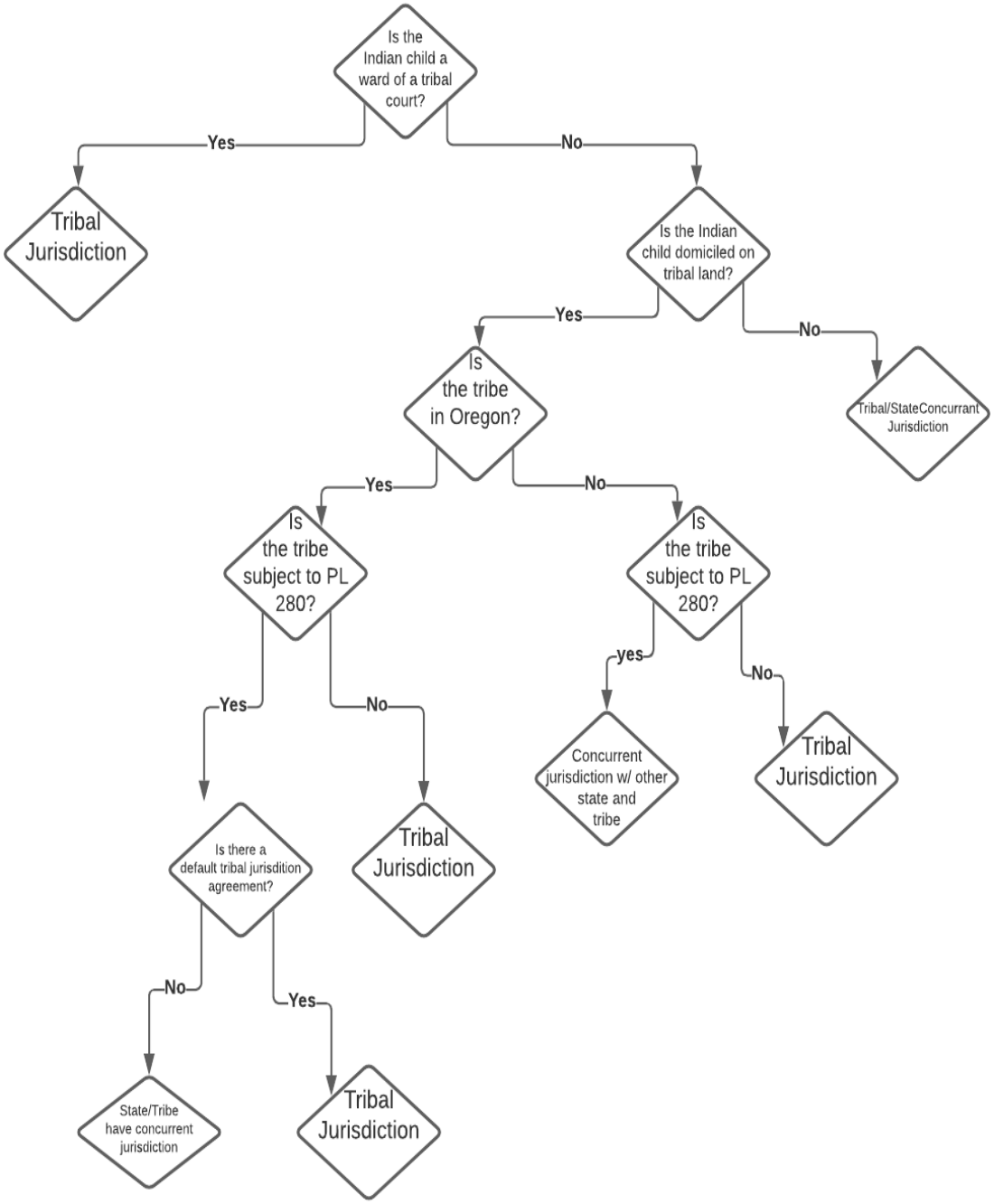
The juvenile court must determine residence and domicile of the child and whether the child is a ward of the tribal court. This information should be provided in the UCCJEA allegations provided in the petition and also in the ODHS report for the shelter hearing. If insufficient information is provided by the parties, the court must communicate with the tribal court to the extent necessary to make the determinations. ORS 419B.621; ORS 419B.627

Under ORICWA, a person's domicile is the place the person regards as home, where the person intends to remain, or to which, if absent, the person intends to return; and an Indian child's domicile is, in order of priority, the domicile of:

- The Indian child's parents or, if the Indian child's parents do not have the same domicile, the Indian child's parent who has physical custody of the Indian child;
- The Indian child's Indian custodian; or
- The Indian child's guardian.

ORS 419B.622

After determining the Indian child's domicile and whether they have been a ward of tribal court, the court must perform a jurisdictional analysis. A jurisdictional flow chart is provided below to assist in that analysis:



Default Agreements

An Indian tribe subject to Public Law 83-280 may limit the juvenile court's exercise of jurisdiction by entering into a tribal-state agreement providing it with default jurisdiction. This Benchbook refers to these as "default agreements." ORS 419B.627, ORS 419B.624(3).

Practice Tip: What is Public Law 280 and why does it affect jurisdiction?

Typically, tribal land is under the concurrent jurisdiction of the federal government and the tribe. Under Public Law 83-280 (commonly referred to as Public Law 280 or PL 280), Congress transferred extensive criminal and civil jurisdiction on tribal land from the federal government to state governments in six states (five states initially - California, Minnesota, Nebraska, Oregon, and Wisconsin; and then Alaska upon statehood). This significantly changed the division of legal authority among tribal, federal, and state governments. Public Law 280 also permitted the other states to acquire jurisdiction at their option. As related to child welfare, under Public Law 280, the state of Oregon has civil jurisdiction that is concurrent with the tribe over all tribal land established before 1968, except the Warm Springs Reservation, which was excluded from this legislation and therefore maintains exclusive jurisdiction, and the Burns Paiute Reservation. *See also, Doe v. Mann (Mann II)*, 415 F3d 1038 (9th Cir 2005), for more information on the role of PL 280 in ICWA cases. (Notably, the 9th Circuit is the only circuit to assess the issue of ICWA jurisdiction in PL 280 states).

What to do if the Tribal Court has Jurisdiction

If the tribal court has jurisdiction (because the child is domiciled on a reservation, is a ward of a tribal court, or the tribe has a tribal-state agreement that provides the tribal court with default jurisdiction), the juvenile court must coordinate with the tribal court to facilitate the tribal court's assumption of jurisdiction. In doing so, the juvenile court must:

- Create records of any communications under this subsection;
- Notify the Indian child's parent, Indian custodian, or tribe in advance of each communication;
- Allow the Indian child's parent, Indian custodian, or tribe to participate in any communications; and
    - If the person is unable to participate in a communication, provide the person with an opportunity to present facts and legal arguments supporting the person's position before the juvenile court makes a decision regarding jurisdiction; and
- Provide the Indian child's parent, Indian custodian, or tribe with access to the record of the communication.

Note that communications relating to calendars, court records and similar matters may occur without informing the parties or creating a record of the communication. OJD has put together a contact list for the tribal courts of Oregon's nine federally recognized tribes. It is available here: https://www.courts.oregon.gov/programs/jcip/Documents/ICWA-Tribal_Contact_Info.pdf.

ORS 419B.627(3)(c).

Transfer Hearings

Under ORICWA/ICWA, even when the state court has concurrent jurisdiction with the tribal court, the parent, Indian custodian, or tribe may move to transfer the case to tribal court. This request must be granted unless the tribe declines jurisdiction, a parent objects, or the state court, after a contested hearing, finds by clear and convincing evidence that there is good cause

not to transfer. After transfer has been ordered, the court must follow certain steps to ensure the case's smooth transition to tribal court.

Transfer to tribal court may occur at any time during the course of the dependency, guardianship, termination of parental rights, or adoption proceeding. ORS 419B.630(1).

In any case where there is reason to know the child is an Indian child, if the parent, Indian custodian or tribe files a motion to transfer:

- The juvenile court shall promptly contact the Indian child's tribe and request a timely response as to whether they intend to decline jurisdiction.
- Transfer of the proceeding is inappropriate if:
    - The tribe declines jurisdiction;
    - A parent has objected (unless the objecting parent dies or their parental rights have been terminated); or
    - The court, after the hearing described below, finds good cause to deny the transfer.

ORS 419B.630(2), (3).

Good Cause Hearing

The juvenile court may deny a motion to transfer based on good cause only after conducting a hearing. The party objecting to transfer has the burden to prove good cause to deny the transfer by clear and convincing evidence.

When making a determination of good cause, the court may NOT consider:

- Whether the proceeding is at an advanced stage;
- Whether there has been a prior proceeding involving the Indian child in which a transfer motion was not filed;
- Whether the transfer could affect the placement of the Indian child;
- The Indian child's cultural connections with the tribe or the tribe's reservation;
- The socioeconomic conditions of the Indian child's tribe or any negative perception of tribal or BIA social services or judicial systems; or
- Whether the transfer serves the "best interests of the Indian child."

If the court decides to deny the transfer based on good cause, the court must issue a written order explaining the reasons for denying the motion to transfer.

ORS 419B.630(4), (6).

Transfer Requirements

After the court grants a motion to transfer, the court must:

- Notify the tribal court of the pending dismissal of the dependency or TPR petition;
- Transfer all information, including but not limited to pleadings and records, to the tribal court;
- Order ODHS to:
    - Transfer the case and child to tribal custody with the minimum possible disruption of services to the child, and

    - Provide the Indian child's tribe with documentation related to the Indian child's eligibility for state and federal assistance and information about the child's social history, treatment diagnosis, and services provided, in addition to all other case and service-related data; and
- Dismiss the state court proceeding upon confirmation from the tribal court that it received the transferred information.

ORS 419B.633.

Chapter 5: Hearings Guide

This chapter provides a guide to the application of ORICWA/ICWA at each key dependency hearing in 419B. Foundational elements from Chapter 2 and hearing elements from Chapter 3 are referenced throughout this chapter in blue. If you click on a word or phrase in red you will be taken back to the section of Chapters 2 and 3 that provides detailed information about how to correctly implement that provision.

Note: This Benchbook is meant to supplement, but not replace, the full JCIP dependency Benchbook, which is available here:
https://www.Courts.oregon.gov/programs/jcip/Pages/JuvDepBenchbook.aspx

Remote Appearances at Hearings

In dependency cases subject to ORICWA, when a party moves to provide testimony remotely or to have a witness provide remote location testimony, the court must make a determination under ORS 45.400 as to whether to allow it. If the moving party is not providing testimony but would like to participate remotely and facilities are available to make that possible, the court **must** allow the moving party to participate remotely.

ORS 419B.918(4)(b), (c).

A Note on the Role of the Indian Child's Tribe

At each hearing where the court has determined that ORICWA applies (because the child is, or there is "reason to know" the child is, an Indian child) the Indian child's tribe is a party to the case under ORS 419B.875. The tribe has the rights in ORS 419B.875(2) of a legal party, including the right to notice of the proceeding, to receive discovery, and to fully participate in the hearing.

The tribe may be represented by any individual regardless of whether that individual is licensed to practice law and unique *pro hac vice* rules apply in ORICWA/ICWA proceedings. ORS 419B.646(1). The court may also permit other tribes affiliated with the child to participate in the proceeding, either as parties or in an advisory capacity. ORS 419B.875(1)(c). For more information, review the Chapter 2 sections on The Indian Child's Tribe, Representation, and Right to Review Documents, as well as the Chapter 3 section on Notice.

Quick Reference

The chart below provides an overview of which ORICWA/ICWA hearing elements apply at each of the key ORS Chapter 419B proceedings.

At a shelter hearing or when a protective custody order is requested, the court must determine whether ORICWA applies to the case (because the child is, or there is "reason to know" the child is, an Indian child); thus, the following requirements apply:

Protective Custody Order (no hearing required)	• Emergency Inquiry by ODHS • Review of ODHS inquiry • Emergency Notification by ODHS

	• If ORICWA applies: ○ ORICWA Standard for Protective Custody

Shelter Hearing	• Emergency Inquiry by ODHS
	• Emergency Notification by ODHS
	• Court Inquiry
	• If ORICWA applies:
	  ○ ORICWA Standard for Removal
	  ○ Active Efforts
	  ○ Placement Preferences
	  ○ Best interests of the Indian child
	• State vs. tribal jurisdiction (consideration not a requirement)

At subsequent hearings, if the court has determined that ORICWA applies (because the child is, or there is "reason to know" the child is, an Indian child), the following ORICWA elements apply:

Pre-trial Hearing(s)	• Court Inquiry
	• State vs. tribal jurisdiction
	• If taking jurisdiction based on admissions:
	  ○ Proof by clear and convincing evidence
	  ○ ORICWA Standard for Jurisdiction
	  ○ Qualified Expert Witness
	  ○ Active Efforts (if entering a dispositional order)

Settlement Conference (Optional)	• Court Inquiry
	• Settlement conference information to tribe by Court
	• If taking jurisdiction based on admissions:
	  ○ Proof by clear and convincing evidence
	  ○ ORICWA Standard for Jurisdiction
	  ○ Qualified Expert Witness
	  ○ Active Efforts (if entering a dispositional order)

Jurisdiction Hearing	• Court Inquiry • Notice by ODHS (+ 10 days & 20 days if requested) • Proof by clear and convincing evidence • ORICWA Standard for Jurisdiction • Qualified Expert Witness
Disposition Hearing	• Court Inquiry • Active Efforts • Placement Preferences
Review Hearing	• Court Inquiry • Proof by clear and convincing evidence • ORICWA Review Hearing Standards • Active Efforts • Placement Preferences
Permanency Hearing	• Court Inquiry • Proof by clear and convincing evidence • ORICWA Standards to Change the Permanency Plan

	• Active Efforts • Placement Preferences
Guardianship Hearing (ORS 419B.365 - permanent)	• Court Inquiry • Notice by ODHS • Proof by beyond a reasonable doubt • ORICWA .365 Guardianship Standard • Best Interest of the Indian Child • Qualified Expert Witness • Active Efforts • Placement Preferences
Guardianship Hearing (ORS 419B.366 - durable)	• Court Inquiry • Notice by ODHS • Proof by clear and convincing evidence • ORICWA .366 Guardianship Standard • Best Interest of the Indian Child • Qualified Expert Witness • Active Efforts • Placement Preferences
Termination of Parental Rights (TPR)	• Court Inquiry • Notice by ODHS • Proof by beyond a reasonable doubt • ORICWA TPR Standard • Qualified Expert Witness • Active Efforts
Adoption	• Refer to Adoption Chapter of Family Law Benchbook

Voluntary Placement Agreements

A child placed in the care of ODHS for purposes of a voluntary out of home placement is subject to ORICWA protections, including the obligation of ODHS to inquire about whether the child is an Indian child. ORS 418.312(3)(a)

Court Approval of Placement Agreement

If there is reason to know the child is an Indian child, ODHS must request a hearing from the court for review and approval of the placement. At the hearing, the court must explain to the parent or Indian custodian, on the record in the parent or Indian custodian's language, the terms and consequences of the voluntary placement agreement, including:

- The voluntary placement agreement may be revoked by the parent at any time and the child must be returned to the parent;
- The court will review whether the placement remains in the child's best interests if the child remains in care after six months and a permanency hearing if the child remains in care more than 12 months;
- If ODHS files a separate dependency petition, an attorney would be appointed for both the parent and child, the agency would have to make active efforts towards reunification, and if reunification was not possible and a judge finds adoption is the most appropriate

plan, a petition to terminate parental rights could be filed. Parental rights could only be terminated after a trial in which ODHS proves its case beyond a reasonable doubt, which is a high standard to meet.

The parent or Indian custodian must execute the voluntary placement agreement before the court, and then file the agreement with the court.

The court must certify that it provided the explanation consistent with the requirements in ORS 418.312(3)(c) and that the parent or Indian custodian fully understood the explanation.

ORS 418.312(3).

Protective Custody Orders

In Oregon, a child can be removed with or without a protective custody order (PCO). ORS 419B.150.

Protective Custody Orders Snapshot:

- Preliminary Matters
  - Application of ORICWA/ICWA
- Legal Issues and Written Findings
  - Emergency Inquiry and Notification by ODHS
  - ORICWA Standard for Authorizing a Protective Custody Order

Preliminary Matters

Application of ORICWA/ICWA

When ODHS requests a protective custody order, the court must determine whether there is reason to know that the child is an Indian child. If the court has reason to know the child is an Indian child, ORICWA must be applied to the proceeding. ORS 419B.150(3). For more information, review the Chapter 2 sections on 'Reason to Know' the a child is an 'Indian Child' and Application of ORICWA.

Legal Issues and Findings

Emergency Inquiry and Notification by ODHS

The court can issue a PCO only if ODHS has complied with the emergency inquiry and notification provisions of ORICWA. Therefore, the court must assess and make a finding about whether:

- ODHS made a good faith effort to inquire into whether there is reason to know that the child is an Indian child by:
  - Asking any family members, witnesses, or others involved in the removal including, if possible, the child, whether there is any indication that the child may be a member of, or eligible for membership in, an Indian tribe.
  - Contacting by telephone, electronic mail, facsimile, or other means of immediate communication any tribe of which the child is or may be a member to determine the child's affiliation.
- If the nature of the emergency allowed, ODHS contacted, by telephone, electronic mail, facsimile, or other means of immediate communication, any tribe with which the child may be affiliated, in order to provide notice to the tribe of:

- the basis for the child's removal;
- the date, time, and place of the shelter hearing; and
- the tribe's right to participate in the shelter hearing as a party.

ORS 419B.150(7)(a), (c); ORS 419B.639(1).

ORICWA Standard for Authorizing a Protective Custody Order (PCO)
To issue a PCO, the court must determine that:

- protective custody is necessary and the least restrictive means available to "to prevent imminent physical damage or harm to the child"; and
- protective custody is in the best interest of the Indian child (as that term is specifically defined by ORICWA).

ORS 419B.150(7)(d), (e); ICWA 25 USC § 1922.

Practice Tip:

Contents of a Declaration or Statement Requesting a Protective Custody Order

A person requesting a PCO must submit a declaration or statement based on information and belief, or a statement under oath, that sets forth with particularity:

- Why protective custody is necessary and the least restrictive means available to prevent imminent physical damage to the child; and
- Why protective custody is in the best interest of the Indian Child.

ORS 419B.150(5).

Emergency Proceeding (Shelter Hearing Due to an Emergency Removal)

A shelter hearing must occur within 24 hours of, or the next business day following, a child's removal from the home, excluding Saturdays, Sundays and holidays, to determine whether removal was or remains appropriate and whether efforts were provided to prevent removal.

Emergency Proceeding/Shelter Hearing Snapshot:

- Preliminary Matters
  - Application of ORICWA/ICWA
  - Identify Parents and/or Indian Custodian
  - Appoint Counsel
  - Identifying Tribes with which the Child may be Affiliated
- Legal Issues and Written Findings
  - Emergency Inquiry and Notification
  - Residence, Domicile, Wardship, and State vs. Tribal Jurisdiction
  - Standard and Burden of Proof
  - Standard for Removal
  - Active Efforts
  - Placement Preferences
- Timing and Setting the Next Court Dates

- Setting an Emergency Hearing within 30 Days
- Setting the Jurisdiction Hearing Date(s): Within 30 Days/Within 60 Days

Note: Courts in Oregon often use the shelter hearing docket for multiple purposes. If a hearing is scheduled on the shelter hearing docket but the court will be handling pretrial matters, taking admissions, or adjudicating any portion of the petition, the pre-trial/settlement conference or jurisdiction trial sections of this chapter apply.

Preliminary Matters

Application of ORICWA/ICWA

At a shelter hearing, unless the court has previously found that the child is an Indian child, the court must ask all persons present whether there is reason to know that the child is an Indian child. If the court has reason to know the child is an Indian child, ORICWA/ICWA must be applied to the proceeding. ORS 419B.185(2), (5).

Identify Parents and/or Indian Custodian

The court must use the unique definition of parent to determine those individuals that will be protected by ORICWA as a "parent" in the case. The court must also determine whether the child has an "Indian Custodian." ORS 419B.603(6), (10).

Appoint Counsel

Current recommended practice in Oregon is to appoint counsel for the child, each parent, and the Indian custodian prior to the shelter hearing to allow adequate time to prepare. Pursuant to ORICWA, the court must appoint counsel for the child and, if requested, for qualifying parents and Indian custodians. ORS 419B.647. For more information, review the Chapter 2 section on Representation.

Identifying Tribes with which the Child may be Affiliated

- At the shelter hearing, the court must identify all tribes with which the child is affiliated.
- "The Indian child's tribe" is a specific designation under ORICWA/ICWA. This tribe has automatic party status. When there are multiple tribes of which the child is or may be a member, ORICWA creates a series of rules to determine which tribe is "the Indian child's tribe;" these are described in detail in Chapter 2. The court also has discretion to make other affiliated tribes parties to the case or to allow them to participate in an advisory capacity or as a party. ORS 419B.875(1)(a)(H).
- If there is sufficient information at the shelter hearing to determine which tribe is "the Indian child's tribe" and/or to designate the role of any additional interested tribes, then the court should do so. ORS 419B.618.

Practice Tip: Shelter Hearing Court Report

ODHS must include a declaration documenting the person's efforts to determine whether the person has reason to know the child is an Indian child and the results of those efforts. When there is reason to know a child is an Indian child, the ODHS shelter hearing report must, in addition to the standard requirements, include the following:

- Name and address of the Indian child's parents, and, if any, Indian custodian
  - Efforts made to locate and contact parents, and, if any, Indian custodian
- Possible tribal affiliations of the child and/or parents
- Confirmation that emergency notification was provided to any possible affiliated tribes
- Residence and/or domicile of the child
  - If on a reservation or in a Native Alaska Village, the affiliated tribe
  - Efforts made to contact that tribe for jurisdictional purposes
- Statement of efforts made to assist the family to ensure that the child may remain in or safely be returned to the custody of the parents or, if any, Indian custodian
- Why removal is in the "best interest of the Indian child," as that phrase is defined by ORICWA
- Why removal is necessary to prevent imminent physical harm to the child

ORS 419B.171.

Legal Issues and Findings

Emergency Inquiry and Notification

- The court can issue a shelter order only if ODHS has provided information showing that it has complied with the emergency inquiry provision of ORICWA. The court must assess and make a finding whether:
  - ODHS made a good faith effort to inquire as to whether there is reason to know that the child is an Indian child by, at minimum:
    - Asking any family members, witnesses, or others involved in the removal including, if possible, the child, whether there is any indication that the child may be a member of, or eligible for membership in, an Indian tribe.

ORS 419B.636(4)(a), ORS 419B.185(5).

- The court must also make written findings that ODHS has complied with the emergency notice provisions of ORICWA, including:
  - If the nature of the emergency allowed, ODHS contacted by telephone, electronic mail, facsimile, or other means of immediate communication, any tribe with which the child may be affiliated to provide notice to the tribe of:
    - the basis for the child's removal;
    - the date, time, and place of the shelter hearing; and
    - the tribe's right to participate in the shelter hearing as a party.

ORS 419B.639(1), ORS 419B.185(5)(a)(A).

Residence, Domicile, Wardship, and State vs. Tribal Jurisdiction

- The juvenile court has temporary exclusive jurisdiction for the purposes of a shelter hearing in all ORICWA cases.
- If the necessary information is available, the court should:
    - Make determinations as to the child's residence and domicile, and whether they are currently a ward of a tribal court.
    - Determine whether the juvenile court or instead the tribal court, has jurisdictional authority to adjudicate the petition. A guide on how to determine which government has jurisdiction over the case is provided in Chapter 4.
    - If the juvenile court does not have jurisdictional authority to adjudicate the petition, it must ensure the smooth transition of the case to tribal court pursuant to the requirements of ORICWA, described in detail in Chapter 4.

ORS 419B.621; ORS 419B.627.

For more information, review the Chapter 4 section on Jurisdiction.

Standard and Burden of Proof

The standard of proof is preponderance of the evidence, and the burden is on ODHS to prove that removal is necessary. ORS 419B.185(5)(a), (5)(b)(B); ICWA 25 USC § 1922.

Standard for Removal

The court can order removal of the child only if it finds by a preponderance of the evidence that:

- ODHS satisfied the inquiry and notice requirements;
- removal "is necessary to prevent imminent physical damage or harm to the child"; and
- removal is in the best interest of the Indian child (as that phrase is defined in ORICWA).

If the court orders the child's removal, it must also order ODHS to immediately notify the court if the circumstances necessitating the removal of the Indian child cease to exist; at that point, the court must hold another shelter hearing to determine whether protective custody remains necessary.

ORS 419B.185(5)(c); 25 USC § 1922. For more information, see the Chapter 2 section on Best Interest of the Indian Child.

Active Efforts

The court must determine whether:

- ODHS has made active efforts to prevent or eliminate the need for removal of the child from the home and to make it possible for the child to safely return home.
    - ORICWA provides a very specific definition for active efforts and sets a high bar for ODHS, which is described in detail in Chapter 3 and should guide this determination.
    - The court may consider ODHS to have made active efforts if no services were provided but the Court concludes that services would not have eliminated the need for protective custody.

The court must include a brief description of the preventative and reunification efforts made by ODHS in its order.

ORS 419B.185(3); ORS 419B.645.

For more information, see the Chapter 3 section on Active Efforts.

Placement Preferences
If the child has been removed from the home or continued in out-of-home care, the court must make written findings as to whether the child has been placed according to the ORICWA placement preferences including whether:

- ODHS made diligent efforts to place the child in the least restrictive setting that:
  - most closely approximates a family, taking into consideration sibling attachment;
  - allows the Indian child's special needs, if any, to be met;
  - is in reasonable proximity to the Indian child's home, extended family, or siblings; and
  - is in accordance with the order of preference established by the Indian child's tribe, or, if the Indian child's tribe has not established an order of placement preference, in the following order of preference:
    - With a member of the Indian child's extended family;
    - In a foster home licensed, approved, or specified by the Indian child's tribe;
    - In a foster home licensed or approved by a licensing authority in this state and in which one or more of the licensed or approved foster parents is an Indian; or
    - In an institution for children that has a program suitable to meet the Indian child's needs and is approved by an Indian tribe or operated by an Indian organization.
- The court's order must include a written description of the diligent efforts provided by ODHS.

ORS 419B.185(3)(e); 419B.192(5). For more information, review the Chapter 3 section on Placement Preferences.

Practice Tip:

Leaving an Indian child in the Physical Custody of their Parent or Crafting a Family Plan

The goals of ORICWA and ICWA are to prevent the unnecessary removal of Indian children from their families, community, and culture. The court should authorize removal only when necessary, and should encourage ODHS to craft thoughtful and creative safety plans and talk with the family and extended family to determine if there are any possible family plans that can be put in place to keep the child safely in the home and/or with family.

At the shelter hearing, the court can make an order for temporary custody under ORS 419B.809(5) but leave the child in the physical custody of the parent(s) and/or Indian custodian. In that instance, there is no ORICWA-specific finding, but ODHS should be reminded that they are obligated to provide active efforts to prevent the removal of the child.

Timing and Setting Next Court Dates

Continuing the Protective Custody Order(Child Placed out of Home)
It is recommended that the court automatically schedule a second emergency hearing to occur no more than 30 days after the first shelter/emergency hearing when the court places the child

in protective custody (out of home). The court must immediately terminate protective custody if the court finds protective custody is no longer necessary to prevent imminent physical damage or harm. ORS 419B.185(5)(c)(C).
To continue the protective custody order beyond 30 days, the court must find:

- restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
- the court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; **and**
- It has not been possible to initiate a child custody proceeding as defined in 25 CFR §23.2. 25 CFR §23.113(e).

Jurisdictional trial within 30 or 60 days

Child placed out of home
If the court finds that protective custody is necessary to prevent imminent physical damage or harm to the child at the shelter/emergency hearing, the court must hold a jurisdictional hearing and enter a dispositional order within 30 days unless the court finds that:

- the child has been returned or the court orders the child to be returned to the child's parent or Indian custodian;
- the court continues the protective order regarding the child for more than 30 days pursuant to ORS 419B.185(5)(d)[3]; or
- the court grants the child's parent, Indian custodian or tribe an extension of time to prepare for the hearing under ORS 419B.639(5) (court may grant up to 20 additional days from date notice was received by parent, Indian custodian or tribe). ORS 419B.305(3).

Child remains at home

If the child remains in the physical custody of their parent, the jurisdictional trial or hearing must begin no later than 60 days after the petition was filed. The court may set out the hearing beyond the 60 days for good cause (written order with factual findings required), although this is not recommended. ORS 419B.305(1)

- In either circumstance, the jurisdictional trial cannot be set for a date less than 10 days after the last tribe, parent, or Indian custodian receives notice. However, upon request, the court must grant the Indian child's parent, Indian custodian, or tribe up to 20 additional days from the date upon which notice was received by the last individual who receives notice if they so request.

ORS 419B.639(5); 25 CFR § 23.113.

Pre-trial Hearings

At the first appearance as directed by the summons, the parent or Indian custodian may admit or deny the allegations in the petition. A parent who initially denies the allegations may enter admissions at any subsequent pre-trial hearings (or optional settlement conferences, if offered by the court at its discretion).

[3] Note that the court may only continue a protective custody order under ORS 419B.185(3)(d) to the extent it is also allowed under 25 CFR §23.113(e), set out above under "Continuing the Protective Custody Order".

While all cases (child placed in home and out of home) will benefit from a pre-trial hearing, only those cases involving a child placed out of home will require a second emergency/shelter hearing, discussed in the previous section. For out of home cases, these two hearings can be scheduled back to back, provided they can occur within 30 days of the protective custody order, while still allowing time to provide the required ICWA/ORICWA notice to the tribe and parents.

Pre-trial Hearings Snapshot:

- Application of ORICWA
- State vs. Tribal Jurisdiction
- Admissions, and Taking Jurisdiction at the Pre-trial Hearing
    - Inquiry and Notice
    - Colloquy
    - Qualified Expert Witness

Application of ORICWA

If a finding has not yet been made that the child is an Indian child the court must ask, on the record, each individual present whether they know or have reason to know the child is an Indian child.

If a finding has not yet been made that the child is an Indian child, the court should also attempt to determine whether the child is an Indian child and ICWA applies.

- If there is sufficient evidence to show that the child is an Indian child:
    - the court must enter a finding that ORICWA/ICWA applies to the case.
- If there is reason to know that the child is an Indian child:
    - the court must enter a finding that ORICWA/ICWA be applied unless and until the child is determined to not be an Indian child; and
    - the court must order ODHS to use due diligence to identify and work with all of the tribes identified to verify whether the child is an Indian child and prepare a report, declaration, or testimony for presentation to the Court at the adjudicatory hearing.
- If at a previous hearing it was established that there was reason to know that the child was an Indian child, but ODHS presents evidence that they have 1) exercised due diligence to contact all possible affiliated tribes; and 2) the child is not an Indian child:
    - the court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
    - the court should instruct each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child.
- If there has never been and continues to be no reason to know that a child is an Indian child:
    - the court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
    - the court must order each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child.

ORS 419B.636. For more information, review the Chapter 2 section on Reason to Know the child is an Indian Child.

State vs. Tribal Jurisdiction

Before ruling on whether the child is within the court's dependency jurisdiction under ORS 419B.100(1), the court must determine the child's domicile, whether the child is a ward of a tribal court, and whether it, or instead a tribal court, has jurisdiction over the matter. ORS 419B.621; ORS 419B.627; ORS 419B.310(4). For more information, review the Chapter 4 section on Jurisdiction.

Admissions, and Taking Jurisdiction at the Pre-trial Hearing

Inquiry and Notice

Before the court accepts an admission, the court must ensure that inquiry has occurred. If there is reason to know the child is an Indian child, the court must also determine whether notice has been provided and notice timelines have been followed.

The court must therefore assess and make a finding whether ODHS:

- has made a good faith effort to inquire into whether there is reason to know the child is an Indian child, by, at the least, consulting with:
  - The child;
  - The child's parent or parents;
  - Any person having custody of the child or with whom the child resides;
  - Extended family members of the child;
  - Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
  - Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORS 419B.636. For more information, review the Chapter 3 section on Inquiry.

If there is reason to know the child is an Indian child under ORICWA/ICWA, the court must assess whether ODHS:

- promptly sent notice of the child custody proceeding by registered or certified mail, with return receipt requested, to:
  - Each tribe of which the child may be a member or eligible for membership; and
  - The child's parents and/or the child's Indian custodian; or
  - The appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian, or tribe cannot be ascertained.
- filed an original or a copy of each notice sent with the court, together with any return receipts or other proof of service; and the notice includes those elements described in the Chapter 3 section on Notice.
- sent copies of the notices to the appropriate BIA Regional Director, by registered or certified mail, with return receipt requested, or by personal delivery.

ORS 419B.639; ORS 419B.305(3)(b). For more information, review the Chapter 3 section on Notice.

Colloquy

The requirements of ORICWA must be considered in the court's colloquy with the parent or Indian Custodian entering admissions. Here is a sample colloquy that incorporates the jurisdictional standard from ORICWA:

- ODHS has filed a petition that describes what it thinks is going on with your child and asks me to take jurisdiction over your child.
- If I take jurisdiction, I could give legal custody of your child to ODHS and allow them to place your child in foster care. ODHS would have the authority to decide where your child lives. ODHS would also control when you would be able to visit your child. I could require you to participate in services and take specific actions with the goal of reunifying you with your child.
- It is my understanding that your child is a member of a tribe or eligible for membership in a tribe, or we have reason to know that your child is a member of a tribe or eligible for membership in a tribe. Is that correct?
    - If so, that means that the Oregon Indian Child Welfare Act applies to your case. That is a law that provides additional protections to Native families in the child welfare system.
- Have you read the petition and talked to your attorney about it and the protections of the Oregon Indian Child Welfare Act?
- You have the right to a trial. At the trial, ODHS would try to prove what they've said in the petition and that if you continued to have custody of your child it would likely result in serious emotional or physical damage to the child. They would also have to prove that they worked with you and tried to help you parent your children, but that those services were unsuccessful. They would put on evidence and call witnesses. You, with your lawyer, would have the chance to challenge that evidence, meaning you would have the right to question ODHS's witnesses, call your own witnesses, speak for yourself, and present other evidence about the allegations.
- At the trial, only if I find that ODHS has proven what the petition says, that continued custody of your child with you would likely result in serious emotional or physical damage to the child, and that ODHS has provided services to help prevent the court from taking custody, would I take jurisdiction and have the authority over you and your child that I've just described.
- Although you have the right to a trial, you don't have to have a trial. You may waive your right to trial and admit to what ODHS is saying in the petition if that's what you want to do. But if you do admit, then I may take jurisdiction over the child.
- Your lawyer tells me you want to make an admission today, is that true? Do you understand that if you admit you will not have a trial—that you are giving up that right—and I will take jurisdiction and have authority over you and your child?
    - If yes, read the allegation and ask the parent if it is true.

Qualified Expert Witness

If the court is accepting an admission, it must also accept testimony or a declaration from a qualified expert witness that describes the prevailing social and cultural standards and child rearing practices of the Indian child's tribe and supports the court's finding that the Indian child's continued custody by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. ORS 419B.642; ORS 419B.310(3)(b)(A).

Settlement Conferences (Optional)

A settlement conference is a hearing held for the purpose of discussion and settlement of the case. A parent who initially denies the allegations may enter admissions at the conclusion of a settlement conference.

Settlement Conference Snapshot

- Explanation of the Settlement Conference Process
- Admissions, and Taking Jurisdiction at the Pre-trial Hearing
    - Inquiry and Notice
    - Colloquy
    - Qualified Expert Witness

Explanation of the Settlement Conference Process

Before a settlement conference may be held, *the court* must provide notice to the Indian child's tribe that includes: a description of the settlement process; the procedure used to schedule the settlement conference; and the date the next hearing will occur if settlement is not reached. ORS 419B.890(4).

Admissions, and Taking Jurisdiction at the Pre-trial Hearing

Inquiry and Notice

Before the court accepts an admission, the court must ensure that inquiry has occurred. If there is reason to know the child is an Indian child, the court must also determine whether notice has been provided and notice timelines have been followed.

The court must therefore assess and make a finding (unless it was previously made) about whether ODHS has made a good faith effort to inquire into whether there is reason to know the child is an Indian child, by, at the least, consulting with:

- The child;
- The child's parent or parents;
- Any person having custody of the child or with whom the child resides;
- Extended family members of the child;
- Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
- Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORS 419B.636, 419B.305(2). For more information review the Chapter 3 section on Inquiry.

If there is reason to know the child is an Indian child under ORICWA/ICWA, the court must assess whether ODHS:

- promptly sent notice of the child custody proceeding by registered or certified mail, with return receipt requested, to:
    - Each tribe of which the child may be a member or eligible for membership; and
    - The child's parents and/or the child's Indian custodian; or
    - The appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian, or tribe cannot be ascertained.
- filed an original or a copy of each notice sent with the court, together with any return receipts or other proof of service; and the notice includes those elements described in the Chapter 3 section on Notice.
- sent copies of the notices to the appropriate BIA Regional Director, by registered or certified mail, with return receipt requested, or by personal delivery.

ORS 419B.639(2), (3).

For more information review Chapter 3 Notice.

Colloquy

The requirements of ORICWA must be considered in the court's colloquy with the parent or Indian Custodian entering admissions. Here is a sample colloquy that incorporates the jurisdictional standard from ORICWA:

- ODHS has filed a petition that describes what it thinks is going on with your child and asks me to take jurisdiction over your child.
- If I take jurisdiction, I could give legal custody of your child to ODHS and allow them to place your child in foster care. ODHS would have the authority to decide where your child lives. ODHS would also control when you would be able to visit your child. I could require you to participate in services and take specific actions with the goal of reunifying you with your child.
- It is my understanding that your child is a member of a tribe or eligible for membership in a tribe, or we have reason to know that your child is a member of a tribe or eligible for membership in a tribe. Is that correct?
    - If so, that means that the Oregon Indian Child Welfare Act applies to your case. That is a law that provides additional protections to Native families in the child welfare system.
- Have you read the petition and talked to your attorney about it and the protections of the Oregon Indian Child Welfare Act?
- You have the right to a trial. At the trial, ODHS would try to prove what they've said in the petition and that if you continued to have custody of your child it would likely result in serious emotional or physical damage to the child. They would also have to prove that they worked with you and tried to help you parent your children, but that those services were unsuccessful. They would put on evidence and call witnesses. You, with your lawyer, would have the chance to challenge that evidence, meaning you would have the right to question ODHS's witnesses, call your own witnesses, speak for yourself, and present other evidence about the allegations.
- At the trial, only if I find that ODHS has proven what the petition says, that continued custody of your child with you would likely result in serious emotional or physical damage to the child, and that ODHS has provided services to help prevent the Court from taking custody, would I take jurisdiction and have the authority over you and your child that I've just described.
- Although you have the right to a trial, you don't have to have a trial. You may waive your right to trial and admit to what ODHS is saying in the petition if that's what you want to do. But if you do admit, then I may take jurisdiction over the child.
- Your lawyer tells me you want to make an admission today, is that true? Do you understand that if you admit you will not have a trial—that you are giving up that right—and I will take jurisdiction and have authority over you and your child?
    - If yes, read the allegation and ask the parent if it is true.

Qualified Expert Witness

If the court is accepting an admission, it must also accept testimony or a declaration from a qualified expert witness that describes the prevailing social and cultural standards and child rearing practices of the Indian child's tribe and supports the court's finding that the Indian child's continued custody by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. ORS 419B.642, ORS 419B.310(3)(b)(A).

Jurisdiction Hearing

The purpose of the jurisdiction hearing is to determine if the legal standards for dependency jurisdiction under ORS 419B.100 and ORICWA have been met.

Jurisdiction Hearing Snapshot:

- Legal Issues and Written Findings
    - If not yet determined, Application of ORICWA
    - If not yet determined, State vs. Tribal Jurisdiction
    - Notice and Inquiry
    - Standard of Proof
    - ORICWA Standards for Jurisdiction
    - Qualified Expert Witness

Legal Issues and Findings

Application of ORICWA
If a finding has not yet been made that the child is an Indian child the court must ask, on the record, each individual present whether they know or have reason to know the child is an Indian child.

If a finding has not yet been made that the child is an Indian child, the court should also attempt to determine whether the child is an Indian child and ICWA applies.

- If there is sufficient evidence to show that the child is an Indian child:
    - the court must enter a finding that ORICWA/ICWA applies to the case.
- If there is reason to know that the child is an Indian child:
    - the court must enter a finding that ORICWA/ICWA be applied unless and until the child is determined to not be an Indian child; and
    - the court must order ODHS to use due diligence to identify and work with all of the tribes identified to verify whether the child is an Indian child and prepare a report, declaration, or testimony for presentation to the court at the adjudicatory hearing.
- If at a previous hearing it was established that there was reason to know that the child was an Indian child, but ODHS presents evidence that they have 1) exercised due diligence to contact all possible affiliated tribes; and 2) the child is not an Indian child:
    - the court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
    - the court should instruct each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child.
- If there has never been and continues to be no reason to know that a child is an Indian child:
    - the court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
    - the court must instruct each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child.

ORS 419B.636, 419B.310(4). For more information review the Chapter 2 section on Reason to Know a Child is an Indian Child.

State vs. Tribal Jurisdiction
Before ruling on whether the child is within the court's dependency jurisdiction under ORS 419B.100(1), the court must determine the child's domicile, whether the child is a ward of a tribal court, and whether it, or instead a tribal court, has jurisdiction over the matter. ORS 419B.621; ORS 419B.310(4). For more information, review the Chapter 4 section on Jurisdiction.

Notice and Inquiry
The court may not hold a jurisdictional hearing unless it has made a finding that ODHS:

- has made a good faith effort to inquire into whether there is reason to know the child is an Indian child, by, at the least, consulting with:
    - The child;
    - The child's parent or parents;
    - Any person having custody of the child or with whom the child resides;
    - Extended family members of the child;
    - Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
    - Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORS 419B.636(2). For more information, review the section of Chapter 3 on Inquiry.

If there is reason to know the child is an Indian child under ORICWA/ICWA, ***the court may not hold a jurisdictional hearing unless ODHS***:

- promptly sent notice of the proceeding by registered or certified mail, with return receipt requested, to:
    - Each tribe of which the child may be a member or eligible for membership; and
    - The child's parents and/or the child's Indian custodian; or
    - The appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian, or tribe cannot be ascertained.
- filed an original or a copy of each notice sent with the court, together with any return receipts or other proof of service; and the notice includes those elements described in the Chapter 3 section on notice.
- sent copies of the notices to the appropriate BIA Regional Director, by registered or certified mail, with return receipt requested, or by personal delivery.

ORS 419B.639(2), (3). For more information, review the section of Chapter 3 on Notice.

Standard of Proof
The standard of proof is clear and convincing evidence. The burden of proof is on the party asserting that the child is within the court's jurisdiction under ORS 419B.100(1). ORS 419B.310(3)(a)(B).

ORICWA Standards for Jurisdiction
In addition to the requirements under ORS 419B.100, the court must find the following to establish jurisdiction over an Indian child:

- Due to the pled and proven or admitted circumstances of the child, continued custody of the child by the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the Indian child (supported by the testimony or declaration of a Qualified Expert Witness, as discussed below); and
- There is a causal relationship between the particular conditions in the Indian child's home and the likelihood that the Indian child's continued custody by the child's parent or Indian custodian will result in serious emotional or physical damage to the Indian child. Evidence that shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not, by itself, establish a causal relationship.

ORS 419B.310(3)(b).

Qualified Expert Witness
To rule that the child is within the court's dependency jurisdiction under ORS 419B.100(1), ODHS must present Qualified Expert Witness who must testify regarding:

- Whether the Indian child's continued custody by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; and
- The prevailing social and cultural standards and child rearing practices of the Indian child's tribe.

ORS 419B.642; ORS 419B.310(3)(b)(A). For more information and for who may, and may not, serve as a Qualified Expert Witness, see the Chapter 3 section on Qualified Expert Witnesses.

Disposition

Once the court has ruled that it has jurisdiction over the child under ORS 419B.100, it is required to address the disposition of the case.

Disposition Snapshot:

- Legal Issues and Written Findings
    - Enrollment
    - Active Efforts
    - Placement Preferences
        - Placement Outside of the Preferences

Legal Issues and Written Findings

Enrollment
Unless the parents object, ODHS must assist the family with enrolling the child in the child's tribe. ORS 419B.615. The court should remind ODHS of this obligation and determine whether either parent objects.

Active Efforts
The court must make written findings and a written determination as to whether ODHS provided active efforts to prevent or eliminate the need for removal and to reunify the family, including a brief description of those efforts.

- The court must determine whether ODHS has made active efforts to prevent or eliminate the removal of the child from the home and to make it possible for the child to safely return home.
    - The court must rule that ODHS made active efforts if it finds the first contact with the family occurred during an emergency in which the child could not remain at home without being "in jeopardy" even with services provided.
    - The court may rule that ODHS did not make active efforts to prevent removal but continue that removal if it finds that prevention or reunification efforts could not permit the child to remain at home without being in jeopardy.
- A court in an ICWA/ORICWA case cannot relieve ODHS from making reunification efforts in an aggravated circumstances case under ORS 419B.340(5).

ORS 419B.645; ORS 419B.340(1)-(4). For more information, review the Chapter 3 section on Active Efforts.

Placement Preferences

The court may place the child in the legal custody of ODHS for care, placement, and supervision. When doing so, the court must review the child's placement for compliance with ORICWA placement preferences and make any necessary orders to correct deficiencies. The court must determine whether ODHS has or will place the child in a home that:

- most closely approximates a family, taking into consideration sibling attachment;
- allows the Indian child's special needs, if any, to be met; and
- is in reasonable proximity to the Indian child's home, extended family, or siblings; AND
- is in accordance with the order of preference established by the Indian child's tribe; OR, if the tribe does not have an established order of preference, in the following order of preference:
    - With a member of the Indian child's extended family;
    - In a foster home licensed, approved, or specified by the Indian child's tribe;
    - In a foster home licensed or approved by a licensing authority in this state and in which one or more of the licensed or approved foster parents is an Indian; or
    - In an institution for children that has a program suitable to meet the Indian child's needs and is approved by an Indian tribe or operated by an Indian organization.

ORS 419B.654; ORS 419B.325(3). For more information, review the Chapter 3 section on Placement Preferences.

Placement Outside of the Preferences

Good cause finding

A party may move the court for authority to make a placement contrary to the placement preferences. The Court may make such an order only if it determines, and issues a written order memorializing, that good cause exists to depart from the placement preferences.

- If there are objections to the motion, the Court must hold a hearing.
- The standard of proof is **clear and convincing evidence, and the burden of proof is on the party requesting the exception to the placement preferences.**
- ORICWA specifies what may not be considered good cause. These factors are described in detail in the chapter 3 section on Placement Preferences.

ORS 419B.654(3). For more information, review the Chapter 3 section on Placement Preferences.

Violation of placement preferences
If any party asserts *or the court has reason to believe* a child has been placed contrary to the placement preferences provided above, the court must make a determination about whether there has been a violation of the placement preference requirements. ORS 419B.654(4). If it finds a violation, the court must determine whether it is appropriate to vacate the order or judgment authorizing the placement. If the child is placed out of home, the court shall order the child immediately returned to the parent or Indian custodian, and must include a transition plan for the physical custody of the child, which may include protective supervision under ORS 419B.331.

ORS 419B.651(2).

Review Hearing

When ODHS has been granted legal custody or guardianship of the child pursuant to a court order, it is required to provide regular court reports. Upon receiving such a report, the court may hold a review hearing (under ORS 419B.449), but it ***must*** *hold such a hearing if requested by a party.*

The purpose of these hearings is to: determine whether the court should continue jurisdiction and wardship of the child and/or order modifications in the care, placement, and supervision of the child; review the progress of the family and ODHS's efforts to provide services to make reunification as safe as possible within a reasonable time; consider whether the services to the child are adequate to ensure their health, safety, and well-being; and review the development of the concurrent plan.

Review Hearing Snapshot

- Legal Issues and Written Findings
    - Continuing In-Home Placement
    - Removing the Indian Child
    - Continuing Out-of-Home Placement
    - Placement Preferences
        - Concurrent Planning

Legal Issues and Written Findings

Continuing In-Home Placement
If the child is in the legal custody of ODHS but the physical custody of the parent at the time of the review hearing, to continue that arrangement, the court must determine that doing so is necessary and in the best interest of the Indian child. ORS 419B.612; ORS 419B.449(4). For more information, see the Chapter 2 section on Best Interest of the Indian child.

Removing the Indian Child
If the child is in the legal custody of ODHS but in the physical custody of their parent, the court can only order removal and placement in foster care at a review hearing after making the inquiry notice and findings required under ORS 419B.305 and 419B.310:

- Formal inquiry and notice for the child custody proceeding have occurred (and the hearing date is in compliance with the notice timelines);
- Testimony of a Qualified Expert Witness has been taken and the court finds the child's continued custody by the parent or Indian custodian will result in serious emotional or physical damage to the child; and
- ODHS provided active efforts to prevent removal.

ORS 419B.449(5), (7). For more information, see the Chapter 3 sections on Inquiry, Notice, Qualified Expert Witnesses, and Active Efforts.

Continuing Out-of-Home Placement

To continue a child's out-of-home placement, the court must also make a ruling as to whether ODHS has made active efforts to reunify the family. ORS 419B.449(7). Note that an active efforts finding is required even after the child's permanency plan has changed from reunification.

- Unless the court finds that returning the child will cause substantial and immediate danger or threat of danger to the child, if the court finds that active efforts have not been made, the court must return the child to their parents.

If the court finds that active efforts have not been made, the court must (1) determine the period of time that ODHS failed to provide active efforts, and (2) order ODHS to provide those services necessary to fulfill the "active efforts" requirement.

ORS 419B.449(7)(b), (c).

Practice Tip:

Review Hearings when the Permanency Plan is no longer Reunification

Under ORICWA, ODHS is not relieved of the requirement to provide active efforts to reunify the family when the permanency plan in no longer reunification. ODHS therefore has to continue active efforts to reunify, even as ODHS must also employ reasonable efforts to achieve permanency. ORS 419B.449(7).

Placement Preferences

If the child has not been placed in line with ORICWA placement preferences, the court must assess whether ODHS has made "diligent efforts" to try to place the child in line with them or whether an order finding good cause to deviate from the placement preferences has been issued. ORS 419B.654; 419B.449(3)(b). For more information, see the Chapter 3 section on Placement Preferences.

Concurrent Planning

- In addition to the placement preference findings required above, the court should inquire as to:
  - Whether any potential long-term placement resources in the child's life fulfill ORICWA's guardianship and adoptive placement preferences; and
  - Whether ODHS has made diligent efforts to ensure that any concurrent plan placement resources are in line with ORICWA's guardianship and adoptive placement preferences.

ORS 419B.449(6); ORS 419B.654. For more information see the Chapter 3 section on Placement Preferences.

In addition, if the court finds that active efforts were not provided, the court must:

- order ODHS to continue the child's placement according to the ORICWA placement preferences; and
- order ODHS to continue to foster relationships with any individuals identified by ODHS as long-term placement resources meeting the placement preferences.

ORS 419B.449(7)(c)(C), (D). For more information see the Chapter 3 section on Placement Preferences.

Permanency Hearing

The purpose of the permanency hearing is to determine the appropriate permanency plan for the child. Permanency plans may include: Reunification, Adoption, Tribal Customary Adoption, Permanent Guardianship (ORS 419B.365), Guardianship (ORS 419B.366), Placement with a Fit and Willing Relative or Another Planned Permanent Living Arrangement (APPLA; for children age 16 and up). For further discussion regarding permanency plan options and the standards and timelines for changing the plan, please refer to the permanency hearing chapter in the Juvenile Dependency Benchbook.

Permanency Hearing Snapshot

- Legal Issues and Written Findings
  - Standard of Proof
  - Findings Required when Plan is Reunification
  - Changing the Plan Away from Reunification
  - Findings Required when Plan is not Reunification
  - Placement Preferences
  - Concurrent Planning

Legal Issues and Written Findings

Standard of Proof
The standard of proof to change the permanency plan when ORICWA applies is clear and convincing evidence.

Findings Required When Plan is Reunification
In determining whether a permanency plan of reunification should be maintained, the court must make findings as to whether:

- ODHS has made active efforts to make it possible for the ward to safely return home;
- the parent has made sufficient progress to make it possible for the ward to safely return home.

The court must include a brief description of the active efforts made by the department. ORS 419B.476 (2)(a) & (5). For more information, see the Chapter 3 section on Active Efforts.

Finding that ODHS Did Not Make Active Efforts

If the court finds that ODHS has not made active efforts, it **may not** change the plan away from reunification, and:

- It must designate the period of time during which active efforts were not made.
- The court may not set a date for a subsequent permanency hearing until ODHS has had the opportunity to provide active efforts for the same number of days ODHS previously failed to provide such efforts, except as otherwise required by ORS 419B.470.

ORS 419B.476(7)

The court may consider whether further efforts will make it possible to reunify the family within a reasonable time. If the court answers that question in the affirmative, the court may:

- Order the parent to participate in specific services for a specific period of time and make specific progress within that period of time.
- Order ODHS to expand the case plan and provide a case progress report within 10 days after the permanency hearing.

ORS 419B.476(4).

Note: In an ORICWA/ICWA case, the court may not relieve ODHS of the requirement to provide reunification efforts due to aggravated circumstances. ORS 419B.340(5) (the provision related to aggravated circumstances only discusses reasonable efforts.)

Changing the Plan Away from Reunification (ORS 419B.476(5)(k))

To change the permanency plan away from reunification, the court must determine that:

- ODHS made active efforts to make it possible for the Indian child to return home, including a brief description of the active efforts made by the department, and;
- despite the active efforts made, the parent has not made sufficient progress for the child to safely return home; and
- despite the active efforts made, continued removal of the Indian child is necessary to prevent serious emotional or physical damage to the child.

Note that if the court finds a parent has not made sufficient progress, the plan of reunification can be maintained if the court finds further efforts will make it possible for the child to safely return home within a reasonable time. ORS 419B.476(5)(c).

The court must include in its permanency judgment a brief description of the active efforts made by the department. ORS 419B.476(2)(a), (5). For more information, see Chapter 3 section on Active Efforts.

Findings Required when Plan not Reunification

The court must determine whether ODHS has made reasonable efforts to achieve the permanency plan that is in place. The court must include a brief description of the reasonable efforts to finalize the permanent placement made by the department. ORS 419B.476(2)(a), (5). Also, while not a required finding in a permanency hearing, remember that, for cases filed on or after 1/1/21, ODHS must continue to provide active efforts to reunify the family during this time period as well. ORS 419B.449(7).

The court must also make a finding whether tribal customary adoption is an appropriate permanent placement for the child if reunification is unsuccessful. ODHS has an obligation to consult with the tribe before the hearing, and the court should consult with the tribe (if available) at the hearing. ORS 419B.476(2)(e).

If the court determines tribal customary adoption is appropriate, and the Indian child's tribe consents, the court shall request that the tribe file with the court a tribal customary adoption judgment no less than 20 days prior to the date set by the court for a hearing. The court may grant an extension not to exceed 60 days. ORS 419B.476(7)(d).

Practice Tip: Changing Permanency Plan to Adoption

Before the court may change the plan to adoption, the court must determine whether any of the factors that preclude the filing of a petition termination of parental rights petition outlined in ORS 419B.498(2) exist (the burden of proof is on the party contending any of the factors exist). If they do, the court cannot change the plan to adoption but may order another plan, such as tribal customary adoption, guardianship, placement with a fit and willing relative, or APPLA. If the court changes the plan to tribal customary adoption, guardianship, placement with a fit and willing relative, or APPLA, the court should make findings on the record about why that plan is more appropriate than other permanent placement options. In making these determinations the court may wish to consider:

- Which plan will best support a placement in line with the placement preferences of ORICWA (for example, some placements may be unwilling to adopt but willing to serve as guardians);
- Whether ODHS has engaged in diligent efforts to find a compliant ORICWA placement preference;
- The position of the tribe;
- Testimony concerning the culture and traditional child rearing practices of the tribe (for example, many tribes do not believe in terminating parental rights);
- Whether the court has found at any stage of the case that ODHS has not provided active efforts.

Placement Preferences

ORICWA requires the court to "follow the placement preferences [of ORICWA]" at the permanency hearing. ORS 419B.476(7)(a)

If the court determines that the permanency plan should be something other than to reunify the family, and the placement is known, the court must determine whether the permanent placement is in line with the applicable placement preferences. For details on the applicable placement preferences for APPLA placements (substitute care), guardianships, and adoptions, and for the requirements that must be followed to place an Indian child outside the placement preferences, see the Chapter 3 section on Placement Preferences.

The court may wish to advise the parties that compliance with the appropriate ORICWA placement preferences must be shown at any subsequent guardianship or TPR/adoption proceeding.

Concurrent Planning

- In addition to the placement preference findings required above, the court should inquire into whether any potential long-term placement resources in the child's life fulfill the appropriate placement preferences.
- If no placements in line with the ORICWA placement preferences have been identified, the court may consider ordering ODHS to continue to foster relationships with any individuals identified by ODHS as long-term placements in line with the ORICWA placement preferences.
- If no long-term placements in line with the ORICWA placement preferences are available, the court may consider ordering ODHS to engage in diligent efforts to locate a placement in line with the ORICWA placement preferences.

ORS 419B.654; ORS 419B.476(4)(e).

Permanent Guardianship Hearing (ORS 419B.365)

Having changed the child's permanency plan to guardianship, the court, under ORS 419B.365, may, upon petition by a party and after a hearing, order a permanent guardianship when the child cannot safely return home within a reasonable time and the court has determined that adoption is not an appropriate permanency plan. Once ordered, the parent(s) may not petition the court to vacate a permanent guardianship order.

Permanent Guardianship Hearing (.365) Snapshot

- Preliminary Matters
  - Mediation
- Legal Issues and Written Findings
  - Inquiry and Notice
  - Standard and Burden of Proof
  - ORS 419B.365 Guardianship Standard
  - Active Efforts
  - Placement Preferences
    - Placement Outside the Placement Preferences
  - Cultural Connection Agreements

Preliminary Matters

Mediation
Before ordering a permanent guardianship, the court must first offer the parties an opportunity to participate in mediation under ORS 419B.517 and an opportunity, if requested by the tribe, to put in place a cultural agreement between the child's tribe and the proposed guardian. ORS 419B.365(5)(a)(A), (B); ORS 419B.367(2).

Legal Issues and Written Findings

Inquiry and Notice
The court may not hold a hearing on the petition for permanent guardianship unless it has made a finding that ODHS:

- has made a good faith effort to inquire as to whether there is reason to know the child is an Indian child, by, at the least, consulting with:

- The child;
- The child's parent or parents;
- Any person having custody of the child or with whom the child resides;
- Extended family members of the child;
- Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
- Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORS 419B.636; ICWA 25 USC § 1903(1)(i) & 1912(a). For more information, see the Chapter 3 section on Inquiry.

If there is reason to know the child is an Indian child under ORICWA/ICWA, the court may not hold a hearing on the petition unless ODHS:

- promptly sent notice of the child custody proceeding by registered or certified mail, with return receipt requested, to:
  - Each tribe of which the child may be a member or eligible for membership; and
  - The child's parents and/or the child's Indian custodian; or
  - Appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian or tribe cannot be ascertained.
- filed an original or a copy of each notice sent with the court, together with any return receipts or other proof of service.
- sent copies of the notices to the appropriate Regional Director, by registered or certified mail with return receipt requested or by personal delivery.
- at least 10 days has passed after the later of receipt of the notice by the parent, Indian custodian or tribe, or if applicable, the United States Bureau of Indian Affairs or up to 20 additional days from the date on which notice was received by the parent, Indian custodian or tribe to prepare for participation in the hearing.

ORS 419B.639(2), (3), (5); ICWA 25 USC §§ 1903(1)(i) & 1912(a). For more information, see the Chapter 3 section on Notice.

Standard and Burden of Proof

The standard of proof is beyond a reasonable doubt, and the burden of proof is on the party petitioning the court to establish the guardianship. ORS 419B.365(5)(a)(C)(i).

Guardianship Standard

To order a permanent guardianship, the court must determine that:

- A statutory basis for termination of parental rights has been proven (ORS 419B.502 to 419B.510);
- Based on testimony by a Qualified Expert Witness that the Indian child's continued custody by their parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and
- There is a causal relationship between the particular conditions in the Indian child's home and the likelihood that the Indian child's continued custody by the child's parent or custody by the child's Indian custodian will result in serious emotional or physical damage to the Indian child. Evidence that shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing,

substance abuse, or nonconforming social behavior does not, by itself, establish a causal relationship;
- It is in the best interest of the Indian child that the parent never have physical custody of the child but that other parental rights and duties should not be terminated.
- ODHS provided active efforts to reunify the child with their parent(s); and those efforts did not eliminate the necessity for guardianship because continued custody is likely to result in serious emotional or physical damage to the Indian child; **and**
- The child's placement complies with the ORICWA placement preferences as described below.

ORS 419B.365. For more information, see the Chapter 3 section on Best Interest of the Indian Child and Active Efforts.

Placement Preferences

The court must find that the guardianship placement is in accordance with the ORICWA placement preferences. This means that the child must be placed in the order of preference established by the Indian child's tribe.

If the Indian child's tribe has not established applicable placement preferences, the Indian child must be placed in the following order of preference:
- With a member of the Indian child's extended family;
- With other members of the Indian child's tribe; or
- With other Indian families.

ORS 419B.365(5)(a)(C)(iii). For more information, see the Chapter 3 section on Placement Preferences.

Placement Outside the Placement Preferences

A party may move the court for authority to make a guardianship placement contrary to the placement preferences. The court may make such an order only if it determines, and issues a written order memorializing, that good cause exists to depart from the placement preferences.

- If there are objections to the motion, the court must hold a hearing.
- The standard of proof is **clear and convincing evidence, and the burden of proof is on the party requesting the exception to the placement preferences.**
- ORICWA specifies what may not be considered good cause. These are described in detail in the chapter 3 section on Placement Preferences.

ORS 419B.654; ORS 419B.365(5)(a)(C)(iii))**.** For more information, see the Chapter 3 section on Placement Preferences.

Cultural Connection Agreements

If an agreement to maintain the child's connection with the tribe has been negotiated between the Indian child's tribe and the proposed guardian, the court's guardianship judgment must include the terms of that agreement. ORS 419B.365(5)(a)(B).

Durable Guardianship[4] Hearing (ORS 419B.366)

Having changed the child's permanency plan to guardianship, the court may, upon motion and a hearing, order a guardianship under ORS 419B.366. At any time, the parent(s) may request that the court vacate a guardianship order issued under ORS 419B.366.

Guardianship Hearing (.366) Snapshot

- Preliminary Matters
  - Mediation
- Legal Issues and Written Findings
  - Inquiry and Notice
  - Standard and Burden of Proof
  - ORS 419B.366 Guardianship Standard
  - Active Efforts
  - Placement Preferences
    - Placement Outside the Placement Preferences
  - Cultural Connection Agreements

Preliminary Matters

Mediation

To order a guardianship, the court must first offer the parties an opportunity for mediation under ORS 419B.517 and, if requested by the tribe, an opportunity to put in place a cultural agreement between the child's tribe and the proposed guardian. ORS 419B.366(4)(a); ORS 419B.517(2); ORS 419B.367(2).

Legal Issues and Written Findings

Inquiry and Notice

The court may not hold a hearing on the motion to establish a guardianship under 419B.366 unless it has made a finding that ODHS:

- has made a good faith effort to inquire as to whether there is reason to know the child is an Indian child, by, at the least, consulting with:
  - The child;
  - The child's parent or parents;
  - Any person having custody of the child or with whom the child resides;
  - Extended family members of the child;
  - Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
  - Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORS 419B.636; ICWA 25 USC §§ 1903(1)(i) & 1912(a). For more information, see the Chapter 3 section on Inquiry.

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[4] Although the word "durable" is not used in the dependency code, it has been used to distinguish guardianships under ORS 419B.366 from permanent guardianships under ORS 419B.365. *See e.g.*, *Dept. of Human Services v. S.M.H.,* 283 Or App 295 (2017). More recently, Oregon appellate courts have used the word "general" to describe guardianships under ORS 419B.366. *See e.g., Dept. of Human Services v. A.D.J.,* 300 Or App 427, 435 (2019).

If there is reason to know the child is an Indian child under ORICWA/ICWA, before holding a hearing on the motion, the court must verify that ODHS:

- promptly sent notice of the child custody proceeding by registered or certified mail, with return receipt requested, to:
  - Each tribe of which the child may be a member or eligible for membership; and
  - The child's parents and/or the child's Indian custodian; or
  - Appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian or tribe cannot be ascertained.
- filed an original or a copy of each notice sent with the Court, together with any return receipts or other proof of service.
- sent copies of the notices to the appropriate Regional Director, by registered or certified mail with return receipt requested or by personal delivery.
- at least 10 days has passed after the later of receipt of the notice by the parent, Indian custodian or tribe, or if applicable, the United States Bureau of Indian Affairs or up to 20 additional days from the date on which notice was received by the parent, Indian custodian or tribe to prepare for participation in the hearing.

ORS 419B.639; ICWA 25 USC §§ 1903(1)(i) & 1912(a). For more information, see the Chapter 3 section on Notice.

Standard and Burden of Proof

The standard of proof is clear and convincing evidence, and the burden of proof is on the party moving to establish the guardianship. ORS 419B.366(4)(a)(C)(i).

ORS 419B.366 Guardianship Standard

To order a guardianship, the court must find by clear and convincing evidence that:

- the Indian child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child (as supported by the testimony of a Qualified Expert Witness);
- a causal relationship between the particular conditions in the Indian child's home and the likelihood that the Indian child's continued custody by the child's parent or custody by the child's Indian custodian will result in serious emotional or physical damage to the Indian child. Evidence that shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior does not, by itself, establish a causal relationship;
- ODHS provided active efforts to reunify the child with their parent(s) and those efforts did not eliminate the necessity for guardianship as continued custody is likely to result in serious emotional or physical damage to the Indian child;
- The child is placed according to the ORICWA placement preferences, as described below, and
- the other requirements for a guardianship under ORS 419B.366:
  - the ward cannot safely return to a parent within a reasonable time;
  - adoption is not an appropriate plan for the child;
  - the proposed guardian is suitable and willing to accept the duties and authority of a guardian; AND
  - guardianship is in the best interest of the Indian Child.

ORS 419B.366(4)(a). For more information see the Chapter 3 section on Active Efforts.

Practice Tip: Active Efforts After a Change in Permanency Plan

At a guardianship hearing, under both ORS 419B.365 and 419B.366, as well as a termination of parental rights trial, the court is required to find that ODHS provided active efforts to promote reunification of the child with their family for the entire duration of the case, not just until the permanency plan was changed.

Placement Preferences

- The court must find that the guardianship placement is in accordance with the ORICWA placement preferences, or that there is a good cause exception to deviate from the placement preferences as described in more detail below. This means that the child must be placed in the order of preference established by the Indian child's tribe.
- If the Indian child's tribe has not established placement preferences, the Indian child must be placed in the following order of preference:
    - With a member of the Indian child's extended family;
    - With other members of the Indian child's tribe; or
    - With other Indian families.

ORS 419B.366(4)(a)(C)(iii)**.** For more information see the Chapter 3 section on Placement Preferences.

Placement Outside the Placement Preferences

A party may move the court for authority to make a placement contrary to the placement preferences. The court may make such an order only if it determines, and issues a writing order memorializing, that good cause exists to depart from the placement preferences.

- If there are objections to the motion, the court must hold a hearing.
- The standard of proof is **clear and convincing evidence, and the burden of proof is on the party requesting the exception to the placement preferences.**
- ORICWA specifies what may not be considered good cause. These factors are described in detail in the chapter 3 section on Placement Preference.

ORS 419B.654(3); ORS 419B.366(4)(a)(C)(iii). For more information see the Chapter 3 section on Placement Preferences.

Cultural Connection Agreements

If an agreement to maintain the child's connection with the tribe has been negotiated between the Indian child's tribe and the proposed guardian, the court's guardianship judgment must include the terms of that agreement. ORS 419B.367(2).

Tribal Customary Adoption

A "tribal customary adoption" is the adoption of an Indian child, by and through the tribal custom, traditions or law of the child's tribe. Parental rights are not terminated as part of the tribal customary adoption permanency plan. However, tribal customary adoption is a viable option for a child whose parents' rights have been previously terminated.

Tribal Customary Adoption Snapshot:

- Preliminary requirements
- Approval of home study
- Order or judgment establishing tribal customary adoption
- Legal effect of order or judgment establishing tribal customary adoption

Preliminary requirements

- The juvenile court must find that tribal customary adoption is in the child's best interests (as described in ORS 419B.612); and
- The tribe must consent to the tribal customary adoption.

ORS 419B.656(2).

Approval of home study

- The court shall accept home study from the tribe if the home study:
    - Includes federal criminal background checks, including reports of child abuse, that meet the standards applicable under the laws of this state for all other proposed adoptive placements;
    - Uses the prevailing social and cultural standards of the Indian child's tribe as the standards for evaluation of the proposed adoptive placement;
    - Includes an evaluation of the background, safety and health information of the proposed adoptive placement and assessment of the commitment, capability and suitability of the proposed adoptive placement to meet the Indian child's needs; and
    - Is completed prior to the placement of the Indian child in the proposed adoptive placement (except where the proposed adoptive placement is the Indian child's current foster care placement).

ORS 419B.656(2)(b).

Order or Judgment Establishing Tribal Customary Adoption

The juvenile court shall accept an order or judgment for tribal customary adoption that is filed by the Indian child's tribe if:

- The court determines that tribal customary adoption is an appropriate permanent placement option for the Indian child;
- The court finds that the tribal customary adoption is in the Indian child's best interests (as described in ORS 419B.612);
- No adult living in the proposed adoptive placement has a felony conviction for child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or a crime involving violence (as described by ODHS rule, including rape, sexual assault or homicide, but not other physical assault or battery); and
- The order or judgment:
    - Includes a description of the modification of the legal relationship of the child's parents or Indian custodian and the child, including contact, responsibilities and the rights of inheritance;
    - Includes a description of the child's legal relationship with the tribe; and
    - Does not include any child support obligation from the child's parents or Indian custodian.

ORS 419B.656(3).

Legal Effect of Order of Judgment Establishing Tribal Customary Adoption

- The court must give full faith and credit to a tribal customary adoption order or judgment that is accepted by the court according to the criteria above. ORS 419B.656(3)(b).

- Any parental rights or obligations not specifically retained by the Indian child's parents in the juvenile court's adoption judgment are conclusively presumed to transfer to the tribal customary adoptive parents. ORS 419B.656(5).

- By operation of law, the court's dependency jurisdiction and wardship terminate as provided in ORS 419B.328(2)(d).

- To ensure the dependency case is closed in Odyssey, the court should enter an order separately terminating jurisdiction and wardship in that matter, in accordance with local practice. See ORS 419B.656(4)

Completing the Adoption Process

- No adoption petition is required after a court accepts a tribal customary adoption order or judgment.
- ASSIS is required. The adoptive parent must file an Adoption Summary and Segregated Information Statement with accompanying exhibits under ORS 109.317.
- No filing fee is required.
- No consent is required from the child or the child's parents.
- The court shall proceed as provided in ORS 109.350 and enter a judgment of adoption.
    - Required statements in judgment:
        - Any parental rights or obligations not specified in the judgment are transferred to the tribal customary adoptive parents;
        - description of any parental rights or duties retained by the Indian child's parents;
        - the rights of inheritance of the child; and
        - the legal relationship with the tribe (both child's and parent's).
- When the adoption is completed, wardship should be terminated in the dependency case. ORS 419B.328.

ORS 419B.656(4).

Relinquishments (Voluntary Release, Surrender or Certificate of Irrevocability)

Whenever a parent gives ODHS or a child caring agency a release or surrender giving the agency control of the child, ODHS or the child caring agency has an obligation to make an inquiry to determine whether there is reason to know the child is an Indian child. ORS 418.270(1). If that child is an Indian child, a request for a hearing must be filed prior to execution of a voluntary release, surrender or Certificate of Irrevocability. These include:

- a voluntary agreement to allow ODHS to act as guardian and place the child outside of the home, and
- a voluntary relinquishment of parental rights for purposes of adoption.

Process for Hearing

Request for hearing
ODHS is required to request the court hold a hearing in which the child's parent may execute the release, surrender, or certificate of irrevocability and waiver. ORS 418.270.

Timing
The hearing must be scheduled no fewer than 10 days following the child's date of birth and no more than 30 days following the date when the petition is filed. ORS 418.270(6)(c).

Hearing requirements (25 U.S.C. §1913(a)).

- The court must explain to the parent, on the record in detail and in the language of the parent:
    - The parent's right to counsel
    - The terms and consequences of the release, surrender or certificate of irrevocability and waiver;
    - Inform the parent that it may be revoked at any time prior to the entry of the judgment of adoption.
- The court must certify that it provided the explanation in the manner described above and that the parent fully understood the terms and consequences of the release, surrender or certificate of irrevocability and waiver.
- The parent must execute the document in person before the court
- The petitioner (ODHS) must file the document with the court.

ORS 418.270(6)(d).

Revocation of Consent

A parent of an Indian child may withdraw consent to the adoption at any time prior to the court's entry of the judgment of adoption. ORS 418.270(6)(d)(A); 25 U.S.C. §1913(c). A revocation can be made by filing a written revocation with the court or by making a statement of revocation on the record in the adoption proceeding. ORS 109.383(5)

Termination of Parental Rights

To make a child available for adoption, the court must first terminate the rights the parent has to the child.

Termination of Parental Rights Snapshot

- Preliminary Matters
    - Application of ORICWA
    - Mediation
- Legal Issues and Written Findings
    - Inquiry and Notice

- Standard and Burden of Proof
- Standard for Termination of Parental Rights
- Active Efforts
- Cultural Connection Agreements

Preliminary Matters

Application of ORICWA

- Unless the court has determined the child is an Indian child, the court must ask, on the record, each individual present whether they know or have reason to know the child is an Indian child.
- The court should also attempt to determine whether the child is an Indian child and ICWA/ORICWA applies.
    - If there is sufficient evidence to show that the child is an Indian child:
        - the court must enter a finding that ORICWA/ICWA applies to the case.

    - If there is reason to know that the child is an Indian child:
        - the court must enter a finding that ORICWA/ICWA be applied unless and until the child is determined to not be an Indian child; and
        - the court must order ODHS to use due diligence to identify and work with all of the tribes identified to verify whether the child is an Indian child and prepare a report, declaration, or testimony for presentation to the court at the adjudicatory hearing.

    - If at a previous hearing it was established that there was reason to know that the child was an Indian child, but ODHS presents evidence that they have 1) exercised due diligence to contact all possible affiliated tribes; and 2) the child is not an Indian child:
        - the court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
        - the court should instruct each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child.

    - If there has never been and continues to be no reason to know that a child is an Indian child:
        - the court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
        - the court must instruct each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child.

ORS 419B.636; ORS 419B.500(2). For more information see the Chapter 2 sections on Indian child and Reason to Know.

Mediation

Before it may terminate parental rights, the court must offer the parties an opportunity for mediation under ORS 419B.517 and the opportunity, if requested by the tribe, to put in place a

cultural agreement between the child's tribe and prospective adoptive placement (if known). ORS 419B.529(1)(c); ORS 419B.521(4)(b)(A), (B).

Legal Issues and Written Findings

Inquiry and Notice

The court may not hold a hearing on the petition to terminate parental rights unless it has made a finding that ODHS:

- has made a good faith effort to inquire into whether there is reason to know the child is an Indian child, by, at the least, consulting with:
    - The child;
    - The child's parent or parents;
    - Any person having custody of the child or with whom the child resides;
    - Extended family members of the child;
    - Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
    - Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORS 419B.636; ORS 419B.521(4)(b)(C). For more information see the Chapter 3 sections on Inquiry.

If there is reason to know the child is an Indian child under ORICWA/ICWA, before holding a hearing on the petition, the court must verify that ODHS:

- promptly sent notice of the child custody proceeding by registered or certified mail, with return receipt requested, to:
    - Each tribe of which the child may be a member or eligible for membership; and
    - The child's parents and/or the child's Indian Custodian; or
    - Appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian or tribe cannot be ascertained.
- filed an original or a copy of each notice sent with the Court, together with any return receipts or other proof of service;
- sent copies of the notices to the appropriate Regional Director, by registered or certified mail with return receipt requested or by personal delivery.

ORS 419B.639(2). For more information see the Chapter 3 sections on Notice.

Standard and Burden of Proof

The standard of proof is beyond a reasonable doubt, and the burden of proof is on the petitioner. ORS 419B.521(4)(a), (b)(C)(i).

Standard for Termination of Parental Rights

To terminate parental rights, the Court must find beyond a reasonable doubt:

- Statutory grounds for termination of parental rights as set forth in ORS 419B.502-510;
- Termination of parental rights is in the Indian child's best interest (as that phrase is defined in ORICWA);

- The Indian child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child (as supported by testimony from a Qualified Expert Witness);
    - The evidence must show a causal relationship between the particular conditions in the Indian child's home and the likelihood that the Indian child's continued custody by the child's parents will result in serious emotional or physical damage to the Indian child. Evidence that shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior does not, by itself, establish a causal relationship.
- ODHS provided active efforts to reunify the child with their parent and those efforts did not eliminate the necessity for termination of parental rights because continued custody by the parent is likely to result in the serious emotional or physical damage to the Indian child; and
- The parties were offered mediation and an opportunity to put in place a cultural agreement as described below.

ORS 419B.500; ORS 419B.521(4)(a)–(c).

Cultural Connection Agreements

To terminate parental rights, the court must find that the parties and the prospective adoptive placement (if known) were offered mediation under ORS 419B.517; as well as an opportunity to put in place a cultural agreement between the child's tribe and the prospective adoptive placement.

ORS 419B.521(4)(b)(A), (B).

Adoptions under 419B.529

After parental rights are terminated or relinquished, the juvenile code allows the court to complete an adoption for a child who has been a ward of the court without the filing of an adoption petition, if it is done in accordance with the requirements of ORS 419B.529. This Benchbook provides limited information about the adoption requirements. For additional coverage, please consult the Adoptions chapter for the OJD Family Law Benchbook.

Adoptions Snapshot

- Preliminary Matters
    - Mediation
- Legal Issues and Written Findings
    - Inquiry
    - Placement Preferences
        - Placement Outside the Placement Preferences
    - Cultural Connection Agreements

Preliminary Matters

Mediation

To complete an adoption under ORS 419B.529, the court must offer the parties an opportunity for mediation under ORS 419B.517 and an opportunity to put in place a cultural agreement between the child's tribe and prospective adoptive parent. ORS 419B.521(4).

Legal Issues and Written Findings

Inquiry

If a finding has not yet been made that the child is an Indian child, and a court hearing occurs, the court must ask, on the record, each individual present whether they know or have reason to know the child is an Indian child.

The court may not finalize an adoption under ORS 419B.529 unless ODHS has fulfilled ORICWA's Inquiry requirement. This requires the court to assess and make a finding about whether ODHS has made a good faith effort to determine whether there is reason to know the child is an Indian child, by, at the least, consulting with:

- The child;
- The child's parent or parents;
- Any person having custody of the child or with whom the child resides;
- Extended family members of the child;
- Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
- Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

If there is reason to know the child is an Indian child, the requirements of ORICWA described below must be applied.

ORS 419B.639; ICWA 25 USC §§ 1912 & 1913. For more information, see the Chapter 3 section on inquiry.

When the Child is an Indian Child

If the court determines the child is an Indian child or there is reason to know the child is an Indian child, additional procedural protections apply under ORICWA including notice. These requirements can be found in the Oregon Indian Child Welfare Act (ORICWA), Oregon Laws 2020, ch. 14, and amendments to that law by Oregon Laws 2021, ch. 398. A revision to the Adoption chapter of the OJD Family Law Benchbook will be available soon detailing the requirements.

Revocation of Consent

A parent of an Indian child may withdraw consent to the adoption at any time prior to the court's entry of the judgment of adoption. ORS 418.270(4); 25 U.S.C. §1913(c). A revocation can be made by filing a written revocation with the court or by making a statement of revocation on the record in the adoption proceeding. ORS 109.383(5).

Placement Preferences

- The court must find that the adoptive placement is in accordance with the ORICWA placement preferences. This means that the child must be placed in the order of preference established by the Indian child's tribe if the tribe has established placement preferences.
- If the Indian child's tribe has not established applicable ORICWA placement preferences, the Indian child must be placed in the following order of preference:
    - With a member of the Indian child's extended family;
    - With other members of the Indian child's tribe; or
    - With other Indian families.

ORS 419B.654; 25 USC § 1915(a). For more information, see the Chapter 3 section on Placement Preferences.

Placement Outside the Placement Preferences
A party may move the court for authority to make a placement contrary to the placement preferences. The court may make such an order only if it determines, and issues a written order memorializing, that good cause exists to depart from the placement preferences.

- If there are objections to the motion, the court must hold a hearing.
- The standard of proof is clear and convincing evidence, and the burden of proof is on the party requesting the exception to the placement preferences.
- ORICWA specifies what may not be considered good cause. These are described in detail in the chapter 3 section on Placement Preferences.

ORS 419B.654(3), (4); For more information, see the Chapter 3 section on Placement Preferences.

Cultural Connection Agreements
If an agreement to maintain the child's connection with the tribe has been negotiated between the Indian child's tribe and the prospective adoptive placement, the court's adoption judgment must include the terms of that agreement. ORS 419B.529(1)(c), (5)(b).

Petition to Vacate Adoption Judgment

When consent obtained through fraud or duress

A parent may file a petition to vacate an adoption that was consented to within four years of entry of the adoption judgment when the parent's consent was obtained through fraud or duress.

Hearing required.
The court must set a hearing and provide notice to each party to the adoption and to the Indian child's tribe. If the court finds the parent's consent was obtained through fraud or duress, it must:

- Enter an order reinstating the parental rights of the parent who consented; and
- Include a transition plan for the physical custody of the child.

ORS 109.382.

A parent who has rights restored under this section may assert that parental rights were never terminated without incurring a penalty for perjury or false swearing under the laws of the state. ORS 419B.524(2).

Court notice required
If the court vacates the judgment of adoption, or if an adoptive parent voluntarily consents to the termination of parental rights, ***the court*** must notify, by registered or certified mail with return receipt requested, the Indian child's former parents, prior Indian Custodian, if any, and Indian tribe. ORS 109.383(2). The contents of the notice and provisions for waiver of notice are provided in detail in ORS 109.383(3)

Adoption vacated for reasons other than fraud or duress

Intervention
If a judgment of adoption is vacated for a reason other than fraud or duress, or if the adoptive parent voluntarily consents to the termination of parental rights, the former parent or Indian custodian may intervene and move the court for the child to be returned and for parental rights to be restored.

Service
The moving party must provide notice of the motion for the child to be returned to the custody of the former parent or prior Indian custodian and the time set for filing objections by registered or certified mail, return receipt requested, to:

- Each tribe of which the child is a member or may be eligible for membership;
- The child's parents;
- The child's Indian custodian (if applicable); and
- The appropriate U.S. Bureau of Indian Affairs Regional Director listed in 25 C.F.R. 23.11(b), if the identity or location of the child's parents cannot be ascertained.

The petitioner must file a declaration of compliance, including a copy of each notice sent, together with any return receipts or other proof of service.

If an objection is filed, the court shall set a time for hearing.

Restoration of Parental Rights
The court shall order the Indian child returned to the custody of the former parent or prior Indian custodian or restore parental rights ***unless*** the court finds, by clear and convincing evidence, that the return of custody or restoration of parental rights is not in the child's best interests, as described in ORS 419B.612. If the court reinstates parental rights, the court must hold a permanency hearing within 60 days.

ORS 109.383(6)(d); ORS 419B.470(5).

Petition to Vacate Order or Judgment for ORICWA Violations

To promote compliance with ORICWA, parties to a case may request that any court of competent jurisdiction vacate an order or judgment that was entered after certain identified ORICWA protections were not followed.

A petition may be filed in a pending child custody proceeding or, if none, in any state or local court of competent jurisdiction by:

- The Indian child alleged to be in the jurisdiction of the court (ORS 419B.100 and 109.309);
- The child's parents or Indian custodian from whose custody the child was removed or whose parental rights were terminated; or
- The Indian child's tribe.

Standard for vacating order or judgment
The court must vacate an order or judgment involving an Indian child regarding jurisdiction, placement, guardianship or the termination of parental rights if it finds: (1) that any of the

following provisions have been violated ***and*** (2) the court determines it is appropriate to vacate the order or judgment.

- Applicable provisions:
  - ORS 418.312 (voluntary placement agreement protections),
  - notice (to tribe, parents, Indian custodian, and sometimes, the BIA),
  - 10 day waiting period before hearing (and up to 20 if requested),
  - jurisdiction (state versus tribal)
  - transfer of jurisdiction (to tribal court),
  - the right to counsel,
  - the right to examine certain documents held by ODHS,
  - provision of qualified expert witness testimony,
  - placement preference requirements, and
  - the provision of active efforts.

ORS 419B.651(2)(a).

Return to parent and transition plan

If the vacated order or judgment resulted in the removal or placement of the Indian child, the court must order the child immediately returned to the parent and Indian custodian and include a transition plan for the physical custody of the child, which may include protective supervision under ORS 419B.331. ORS 419B.651(2)(b).

Improper Removal or Improper Retention of the Child

The juvenile court, on its own motion or the motion of a party (orally on the record is permissible), must expeditiously determine whether an Indian child alleged to be within the court's jurisdiction (419B.100) has been improperly removed or improperly retained following a visit or temporary relinquishment of custody. ORS 419B.652(1)

If the court finds that the Indian child was improperly retained or improperly removed, the court shall order ODHS to immediately return the Indian child and dismiss the proceeding unless the court determines by clear and convincing evidence that doing so would subject the Indian child to substantial and immediate danger or a threat of substantial and immediate danger. ORS 419B.652(2).

Appendix

Or Laws 2021, ch 398

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