Pre-trial Hearing and Settlement Conferences

Contents

1. Timing

These appearances are generally set to occur between 30 and 45 days after the petition is filed.

2. Purpose

The petition must be resolved within 60 days, unless the court has made a finding that good cause exists to continue the hearing. ORS 419B.305. Note that the time-lines are different if an Indian child, as defined by the Indian Child Welfare Act (ICWA) and Oregon Indian Child Welfare Act (ORICWA) is involved. Please consult the Oregon Indian Child Welfare Act (ORICWA) Benchbook for additional information. The purpose of the pre-trial hearing is to allow a parent to admit or deny allegations in the petition, provide required notices, attempt to settle the case (in some districts), and to ensure that discovery and other issues are proceeding in a timely manner.

3. Service of summons and petition

The court may not make an order establishing jurisdiction until after the summons and petition have been served in accordance with ORS 419B.812, 419B.823, 419B.824, 419B.827, 419B.830, 419B.833 and 419B.839. ORS 419B.815(1).

A. Methods of service

Personal service, substituted service, office service and service by mail (with receipt signed) are allowed under ORS 419B.823; ORS 419B.824 (1) – (4). *See* ORS 419B.833 for proof of service requirements.

B. Alternative service

The court may order service by mail, posting or publication if the parent can not be served by the methods provided above. The court shall order the method or methods most reasonably calculated to notify the parent of the existence and pendency of the action. ORS 419B.824 (5) – (6).

C. Actual notice

If the court finds the parent received actual notice of the substance and pendency of the action, the juvenile code provides the court shall disregard certain errors relating to the form of summons, issuance of summons or who may serve the summons. The court shall disregard any error in the *content* of the summons that does not materially prejudice the substantive rights of the party to whom summons was issued. The statute also allows the court to disregard any error in the *service* of summons that does not violate the due process rights of the party against whom summons was issued if service is made in any manner complying with ORS 419B.812 to 419B.839. *See* ORS 419.836.

D. Parent lives abroad

If a parent is in a foreign country, service of a dependency petition must be made consistent with the Hague Service Convention, which was created in 1965 to provide a standardized method of service of process for signatory countries. Each contracting "state" (country) designates a

Central Authority to receive requests for service. The Central Authority or other "appropriate agency" designated by the Central Authority carries out service in accordance with its nation's laws or by a method requested by the sending state unless the method is incompatible with its laws. After attempting service, the Central Authority for the receiving state completes a certificate of service either stating that the document has been served, including the method, place, and date of service and the person to whom the document was delivered, or that the document was not served and the reasons which prevented service. The certificate is forwarded to the requesting party.

I. Exclusions and waiver

The Convention does not apply when the address of the person to be served is not known. Article 1. Oregon courts have also held a parent can waive the requirement of service under the Convention by appearing in the proceeding and failing to object. *See Dept. of Human Services v. M.C.C.*, 275 Or. App 121 (2015)

E. Putative father

A putative father is entitled to notice if he meets the criteria in ORS 419B.875 (1)(a)(C) (has assumed or attempted to assume responsibilities of parenthood), unless a court has found him not to be the child's legal father. *See* ORS 419B.839 (1) & (4). Note the court has subject matter jurisdiction to make a paternity determination pre-jurisdiction. *Dept. of Human Services v. C.M.H.*, 369 Or 96 (2021)

4. Parent response

Unless the court specifies how admissions or denials are to be made pursuant to ORS 419B.800, admissions and denials may be made orally in court or in writing. ORS 419B.869(1). Allegations that are not admitted or denied are considered denied. ORS 419B.869(2).

A. Admissions.

I. Process

- Put admissions on the record
- Make sure the parent understands the consequences of the admission (see sample colloquy below)
- Have the parties fill out and sign an "Admissions to Petition" form (available on the JCIP Model Forms webpage)
- If jurisdiction is established as to both parents, fill out the model Jurisdiction Judgment (and Disposition Judgment if ready to decide disposition under ORS 419B.325(2)).

II. Sample admit colloquy with parents (adapted from Circuit Judge Pro Tem Heidi Strauch)

- ODHS has filed a petition that describes what it thinks is going on with your child(ren) and asks the court to take jurisdiction over your child(ren).
- If the court takes jurisdiction then ODHS would have the authority to say where your child lives, who s/he sees, what services s/he gets, etc. ODHS would also have the

authority to say when you would be able to visit and require you to participate in services with the initial goal of reunifying you with your child(ren).
- Have you read the petition and talked to your attorney about it?
- You have the right to a trial where ODHS would try to prove what they've said in the petition. They would put on evidence and call witnesses. You would have the chance to challenge that evidence with your lawyer helping you – to question ODHS's witnesses, call your own witnesses, speak for yourself, and present other evidence.
- At the trial, if I find that ODHS has proved what the petition says, the court would take jurisdiction and have the authority over you and your child(ren) that I've just described.
- So, you have the right to a trial, but you don't have to have a trial. You may waive your 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 will take jurisdiction over the child(ren).
- Your lawyer tells me you want to admit today, is that true? You understand that if you admit you will not have a trial – that you are giving up that right – and I will take jurisdiction?
- If yes, read the allegation and ask the parent if it is true.
- Make a finding that it is a knowing and voluntary admission and that the admission supports the finding of jurisdiction.

III. If one parent contests

If both parents have been served and appear, but only one admits and the other contests, the court may not establish jurisdiction over the child until the allegations have been resolved as to the second parent. *Dept. of Human Services v. W.A.C.*, 263 Or App 382 (2014). In this instance, the court should take the parent's admissions on the record, receive that parent's admission form as an exhibit and order the admitting parent to appear for disposition at a date when the non-admitting parent will next appear to resolve the petition.

B. Denials

When a parent contests the allegations and requests a trial, the court is required to provide the parent the following notices by oral or written order (ORS 419B.816):

- Inform the person of the time, place and purpose of the next hearing or hearings related to the petition;
- Require the person to appear personally at the next hearing or hearings related to the petition;
- Inform the person that his or her attorney may not attend the hearing in his or her place (unless the person is the child who has been served);
- If the court has permitted the person to appear telephonically or electronically (ORS 419B.918), advise the person he or she may appear in that fashion.
- Inform the person that if he or she fails to appear as ordered for any hearing related to the petition, the court may establish jurisdiction without further notice, and may take any other action authorized by law including making the child a ward and removing the child from the legal and physical custody of the parent, or other person having legal or physical custody of the child.

A model form of order that complies with the ORS 419B.816 notice requirements is available on the JCIP Model Forms webpage.

5. Parent non-appearance

A. Authority to enter judgment of jurisdiction

If the parent fails to appear and service has been completed, the court has authority to conduct a prima facie hearing and establish jurisdiction without further notice on the date specified in the summons (or order) or on a future date. The court may make the child a ward, remove the child from the legal and physical custody of the parent or other person having legal or physical custody of the child. ORS 419B.803 (jurisdiction over a party who has been served); 419B.815 (4) (a) & (7). Please note that ODHS will also need to submit an affidavit indicating whether the parent is in the military service according to the Servicemembers Civil Relief Act, which applies to dependency proceedings. This is discussed in more depth in the Jurisdiction section of this benchbook.

I. At a subsequent hearing

If the prima facie hearing is set over and the parent subsequently appears, recent case law in the termination of parental rights context calls into question the authority of the court to proceed without the parent. *See Dept. of Human Services v A.D.G.,* 260 Or App 525 (2014).

B. Parent living abroad

If a parent living abroad is subject to the Hague Service Convention and no proof of service has been provided in accordance with the Convention, the Convention allows the court to enter a judgment without proof of service if all of the following are met:

- The document was transmitted by one of the approved Convention methods;
- A period of time of not less than six months, considered adequate by the judge, has elapsed since the date of transmission of the document; and
- No certificate of any kind has been received even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed (where the parent lives). *See* Article 15.

6. Discovery

Parties have 30 days after the petition is filed to complete the discovery required by ORS 419B.305(2). Information that must be disclosed is set out in ORS 419B.881(1), and exceptions to disclosure are provided in ORS 419B.881(5). Disclosure must be made "as soon as practicable following the filing of a petition" and no later than 30 days after the petition has been filed. Remedies for discovery violations are provided in ORS 419B.881(10).

7. Settlement

At any time, at the request of a party or on the court's own motion, the court may order a settlement conference. ORS 419B.890(3). If the case is subject to ORICWA, 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). In addition, the use of mediation "shall be

encouraged" in juvenile dependency cases. ORS 419B.517. Currently, Oregon courts do not receive dedicated funding for mediation and consequently aren't staffed to provide mediation services for resolution of jurisdictional allegations. Courts do, however, provide judicial settlement conferences in some judicial districts, and/or scheduled appearances for parties to work together and try to negotiate a resolution. In the latter circumstance, these appearances may immediately precede the pre-trial hearing, giving the parties an opportunity to put the admission on the record if an agreement is reached. Courts who employ these practices are able to create more docket space for the setting of timely jurisdictional trials.

8. Jurisdictional hearing date

A. Set hearing within 60 days

If a trial date was not set at the time of the shelter hearing, it should be set at this time. Best practice is to reserve sufficient time on the calendar to hear the case in one day, so inquire with the attorneys as to the expected length of the trial. Extensions beyond the 60-day period delay services and potentially, permanency for the child.

- Practice tip: if cases customarily extend beyond the 60-day period meet with your Model Court Team to discuss possible solutions. If lack of judicial resources prevent cases from being heard timely, discuss this issue with your Presiding Judge.

B. Continuances

I. Good cause required

The court may continue the case upon written order supported by "factual findings of good cause." ORS 419B.305 (1).

II. Highest priority on the docket

Once the continuance expires, the case is to be given the highest priority on the court docket. ORS 419B.305 (5).

III. Unresolved criminal allegations

The decision in *Dept. of Human Services v. W.A.C.*, 263 Or App 382 (2014), compels prompt resolution of petitions notwithstanding a pending criminal case. In *W.A.C.*, the court delayed resolution of the allegations as to father for 6 months due to a pending criminal case but took jurisdiction over the child based on mother's conduct. The Court of Appeals held that the court could not take jurisdiction over the child until the petition allegations were resolved as to both parents, if both have been served, summoned and appeared.

Parents can not be ordered to engage in services until jurisdiction is established. ORS 419B.387 allows the court to order services "to correct the circumstances that resulted in wardship." *Dept. of Human Services v. S.P.*, 249 Or App 76, 85 (2012). As a result of the pending case, the parent with pending charges probably can't be a placement resource and the other parent can not be

required to engage in services (except on a voluntary basis) until all allegations are resolved. This makes delaying a case for pending criminal case untenable and not a basis for "good cause."

The harm to the children caused by such delay is not justified by any overarching right of the parent. The court does not violate a parent's due process rights by holding the trial in the dependency case. The parent may be in an uncomfortable spot but he or she is still being provided due process and ODHS still has to prove its case. Moreover, an acquittal in the criminal case does not mean there is no basis for jurisdiction, given the difference in the burden of proof. Therefore, in many cases, the juvenile hearing still would need to occur, even if postponed.