Appellate Update

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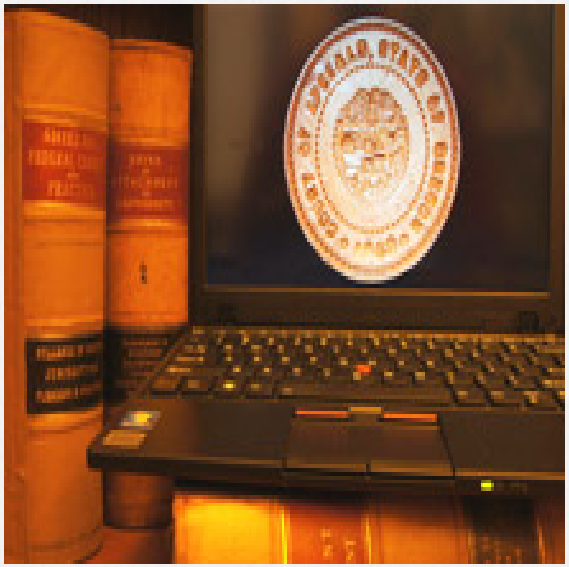
Overview

- ICWA
- Jurisdiction
- Reasonable efforts
- Procedural issues
- Post judgment relief



Indian Child Welfare Act

Applicability

ICWA

- The court is required to inquire whether a child is an Indian child when the court conducts a hearing relating to involuntary child custody. ORS 419B.878
- If a public child-protective agency discovers information which suggests that the child is an Indian child, *that knowledge is constructively imputed to the juvenile court*.
  - *Dept. of Human Services v. S.R.H.*, 278 Or App 427 (2016). (p.8)

Jurisdiction

Admissions

Nexus

Currency

Delegation of Care to Third Party

Admissions

- Father admitted his incarceration presented a danger to the child. Father also proposed to place child in temporary custody of grandmother.
  - Was it a knowing and voluntary admission?
  - Does the availability of grandmother require reversal?

Dept. of Human Services v. T.E.B., 279 Or App 126 (2016) (p.13)

Jurisdiction

- <u>Basic test</u>: ORS 419B.100(1)(c)
  - Child's conditions or circumstances expose the child to a ***current threat of serious loss or injury*** that is likely to be realized.
  - When a petition is based on a parent's conduct, DHS must prove a ***nexus*** between ***the conduct*** and ***a current threat of serious loss or injury.***

Current threat of serious loss or injury

- ***No "nexus" when:***
  - No evidence of drug use while caring for child, or evidence that use impaired parenting
  - No evidence that A was exposed to parents' behavior and no evidence that arguments had turned violent.
  - No evidence that A had seen or heard disagreements, or that such exposure put A at risk of serious harm or injury.

Dept. of Human Services v. A.W., 276 Or App 276 (2016). (p.18)

Current threat of serious loss or injury

- *Allegations no longer "current".*
  - Father attempted suicide in February, 2014
  - He would provide his prescription drugs to mother to help her deal with illicit drug use
  - Father had untreated PTSD
  - Jurisdiction judgment entered April, 2015
    - Parents separated for almost a year.
    - No evidence regarding father's mental health since June, 2014.
    - Father's circumstances had changed substantially since suicide attempt.

Dept. of Human Services v. M.M., 277 Or App 120 (2016) (p. 17)

Current threat of serious loss or injury

- ***Past substance abuse***
  - Repeated DUII convictions between 2002 and 2009 resulting in repeated incarceration
  - Testimony:
    - Stopped drinking and enrolled in treatment
    - Back pain – started drinking again to help sleep
    - Consumption varied every 3 to 5 days when kids were asleep
    - Girlfriend with him "24 hours a day"
  - Court found father's testimony not credible
    - Even small amounts of alcohol a problem for father (admitted alcoholic + prison + depends on alcohol for sleep)

Dept. of Human Services v. J.R., 274 Or App 601 (2015) (p.20)

Current threat of serious loss or injury

- *Mental Health*
  - Extensive history of mental illness:
    - Multiple and lengthy hospitalizations
    - Delusions, hallucinations, paranoia and disorganized thinking
    - Alienation of family and friends.
  - Although mental health managed at time of jurisdiction, inference that mother was likely to interrupt treatment was permissible.
    - *Dept. of Human Services v. S.M.S.*, 279 Or App 364 (2016) (p.12)

Child in care of third party

- Grandparents.
  - Child was removed from her parents and placed with grandparents.
  - At the time of the jurisdictional hearing, no evidence was presented that grandparents were unsafe.
  - The child's placement would continue without juvenile court jurisdiction or DHS involvement.

Dept. of Human Services v. A.H., 275 Or App 788 (2015). (p.19)

Motion to dismiss

- Court must determine:
  - Whether the jurisdictional bases pose a current threat of serious loss or injury to the ward, and, if so:
  - Whether that threat is likely to be realized.
- When plan is no longer reunification, there is a presumption that the child can not safely return home. The parent bears the burden of proving the bases for jurisdiction no longer endanger the child.
- *Dept. of Human Services v. T.L.*, 279 Or App 673 (2016)

Motion to dismiss

- *Unexplained injury*.
  - When a parent has participated in some services, but there is concern the parent hasn't internalized better parenting techniques, the dispositive question is what the parent will likely do.
    - Legally sufficient evidence links the lack of insight to the risk of harm.
    - Totality of circumstances.

Dept. of Human Services v. J.M., 275 Or App 429 (2015). (p.26)

Reasonable Efforts

Delays in services

Parent cooperation/participation

Reasonable Efforts

- Five and a half month delay in referring father to services not reasonable.
- In determining whether DHS made reasonable efforts, the court considers a parent's lack of cooperation within the context of DHS's conduct and the case circumstances.
  - Although father was initially uncooperative, DHS did not demonstrate any subsequent attempts to provide, or even offer, father services.
  - No explanation as to why DHS made no additional attempts to obtain a release.
  - The fact that the teenage daughter did not want to visit with father doesn't matter in analysis.

Dept. of Human Services v. R.W., 277 Or App 37 (2016). (p. 7)

Reasonable Efforts

- Six month delay in disclosing diagnosis of child's developmental delay to parents. Reasonable efforts considerations:
  - Totality of circumstances
  - Ward's health and safety
  - Burdens the state would bear and what benefit might reasonably be expected to flow
- In this case, the record supports the inference that providing the information earlier would not have made a difference.

Dept. of Human Services v. J.M., 275 Or App 429 (2015). (p.26)

Reasonable Efforts

- When lack of a relationship with mother was part of jurisdiction:
  - four months of efforts to rebuild the relationship not enough to compensate for six months of failure to allow contact or even prepare the children for contact with their mother.

Dept. of Human Services v. S.S., 278 Or App 725 (2016) (p. 31)

Procedural issues

Judicial Notice
Service
Participation
Manner of Appearance
Multiple Petitions

Judicial Notice

- If the court intends to rely on information that hasn't been offered, the court shall:
  - Identify it on the record; and
  - Subject to ruling on objections:
    - Take judicial notice (OEC applies), or
    - Cause material to be marked and received as exhibit.

ORS 419B.253

Judicial Notice

- Taking judicial notice after the hearing without giving the parties opportunity to object is error.

  Dept of Human Services v. A.A., 276 Or App 223 (2016) (p. 11)

Service

- **Defect must be raised promptly.** Parent precluded from raising defect in service (in this case, failure to serve through the Mexican Central Authority) when parent did not promptly raise issues about defects in service or lack of personal jurisdiction.
  - *Dept. of Human Services v. K.G.A.B.*, 275 Or App 121 (2015) (p. 36)

Parent Participation

- When a TPR summons requires the parent to file a written answer and the parent files an answer contesting the petition, the court is required to provide an additional oral or written order providing the parent with notice of items in 419B.820(1) through (5).
- It is plain error to terminate parent's rights based on a nonappearance when the required order hasn't been provided.
  - *Dept. of Human Services v. K.M.J*, 276 Or App 823 (2016) (p. 37)
- *See also* ORS 419B.816 (Notice to person contesting petition to establish jurisdiction)

Parent Participation

- General rules:
  - Court may establish jurisdiction after parent has been summoned and fails to appear personally. ORS 419B.815(7)
  - Court may permit parent to appear by phone for good cause. ORS 419B.918(1).
- In this case, once the parent appeared by phone, court erred in not allowing her to testify and establishing jurisdiction in her absence. *Dept. of Human Services v. R.N.*, 274 Or App 182 (2015) (p. 21)

Parent Participation

- The right to "participate in hearings" in ORS 419B.875(2)(c) includes the right to testify on the party's own behalf.
- Appearance through counsel is not a substitute when a party wishes to offer his or her own testimony.
  - *Dept. of Human Services v. A.E.R.*, 278 Or App 399 (2016) (p. 25)

Party or Witness Appearance by Phone

- Court shall allow telephone testimony for good cause shown, but may not allow the use of telephone testimony if:
  - Ability to evaluate the credibility and demeanor of a witness/party in person is critical to the outcome;
  - The issues to which the witness will testify are outcome determinative; or
  - Failure of a witness or party to appear personally will result in substantial prejudice to a party.

Dept. of Human Services v. K.A.H., 278 Or App 284 (2016) (interpreting ORS 45.400) (p. 14).

Multiple Petitions

- A child can have only one permanency plan.

  Dept. of Human Services v. M.J.H., 278 Or App 607 (2016) (p. 24)

Post Judgment Relief

ORS 419B.923

Inadequate Assistance of Counsel

Motion to Set Aside Judgment

- ORS 419B.923(1): court may modify or set aside order or judgment.
  - Reasons include: clerical mistakes, excusable neglect, newly discovered evidence.
  - Inclusion of those examples limits the scope of the court's authority to circumstances that share a common characteristic with the examples. (defective order; unfair proceeding).

    Dept. of Human Services v. K.W., 273 Or App 611 (2015) (p. 23)

Inadequate Assistance of Counsel

- A parent may raise a claim of inadequate assistance of appointed trial counsel for the first time on appeal when the juvenile court has changed the permanent plan from reunification to guardianship or Another Planned Permanent Living Arrangement (APPLA) after a permanency hearing.

  Dept. of Human Services v. T.L., 269 Or App 454 (2015), *reversed,* 358 Or 679 (2016) (p. 10).