JCIP'S SHELTER HEARING BENCHCARD NON ICWA *JF2-2*

By Pamela L. Abernethy, Judge-in-Residence

PRIOR TO THE HEARING

Read the court report; make preliminary determination if ICWA applies so you know which model form to use; ensure your court has set up a process to appoint attorneys in advance for parents and children, and that they are provided a copy of report/petition and have an opportunity to meet with clients prior to the hearing.

PRELIMINARY MATTERS

1. Appoint counsel on the record and ask if they will waive reading and advice of rights.
2. Mark report you read prior to hearing as an exhibit and enter into record of case.
3. If child is present, acknowledge him or her first and let parties know if the child should be present for all or just part of hearing.
4. If father missing: Ask parents and children directly:
    - **a.** What language are you most comfortable with?
    - **b.** Do you understand what this hearing is about?
    - **c.** Even though DHS has told you this is not an ICWA case in the report, ask directly, "Is it possible child could be an "Indian child" (member of a tribe or bio child of member and eligible for membership.)
    - **d.** Have you gone over the petition with your lawyer?
    - **e.** If not waived by attorney, read petition and advise parent of rights. See JF0
    - **f.** What family members or other important people should be involved?
5. Ask DHS:
    - **a.** Has paternity been established? Child support?
    - **b.** Is there a putative father? (Acknowledged paternity but not legally established).
    - **c.**
        - i. Has DHS asked mother, age appropriate child and other relatives about identity whereabouts of father and father's relatives?
        - ii. Used search/family finding technology to locate?
        - iii. Checked jail/prison/probation/parole?

6. Determine who else is present and acknowledge them. (You may later want to solicit their input on child's needs, placement and visitation.)
    a. Acknowledge that grandparents and foster parents have right to be heard and tell them you will allow them that opportunity at appropriate time.
        i. If absent, ask worker if proper notice was given to grandparents and to current care provider if not parent.
7. Appoint CASA if available and out of home placement. [Recommend highly for teens and children under age 5.]
8. Determine if there are other pending cases involving child that should be consolidated with this one.

Determine Subject matter jurisdiction under UCCJEA and ORS 419B.100 [Rules of evidence do not apply but facts must be *in evidence* as exhibit, testimony, or by judicial notice]

9. Is this the child's home state or was home state within 6 months of today?
10. Does the petition allege a "current threat of serious harm" to the child under ORS 419B.100 (1) (c) or other jurisdictional basis?
11. If properly alleged, is there a preponderance of the evidence to support?
    a. Report/DHS testimony?
    b. Do parents wish to testify in opposition?
    c. Do grandparents or foster parents wish to be heard?

DETERMINE REASONABLE EFFORTS

12. Has DHS made Reasonable Efforts ("RE")
    a. RE to provide services/support to prevent removal? (Was a prior Differential Response made?)
    b. Was referral of child and child's family made to Strengthening, Preserving and Reunifying Families Program? ORS 418.595?
    c. Since removal, were there RE to make it possible for child to return safely?
    d. It is reasonable efforts to make no efforts in an emergency situation. You still must a RE finding – check last box on JF2 at p. 2.

e. Does report describe the RE efforts sufficiently? [Must be marked as **exhibit** and adopted as court's written findings.]

THE THREE BIG QUESTIONS

CAN CHILD GO HOME TODAY?

13. Is it in child's best interests to go home today because child will not be in current danger of suffering physical injury or emotional harm?

14. How will safety be monitored? Safety plan/Safety Service provider?

15. Enter Orders re Parent(s)

- **a.** Safety Conditions/reference to voluntary entry into necessary services.
- **b.** Enter Juvenile RO JF7? Enter order expelling offending parent from home?
- **c.** Enter order governing conduct of parties e.g. no discussions with child.
- **d.** Order for child support if appropriate.

IF NOT, IS THIS THE BEST TEMPORARY PLACEMENT?

16. Make finding that out of home placement in the best interest of the child.

17. Determine if this foster placement is the least restrictive and most family-like.

- **a.** If not with family, did DHS make *diligent efforts* to place with relatives?
- **b.** Did DHS make *diligent efforts* to place siblings together?
- **c.** If not, order DHS to investigate relatives or family friends; set second shelter. Consider asking relatives and friends present for input.

18. What is the ability of the proposed caregiver to meet the child's physical, emotional, developmental and educational needs, including the child's need to continue in the same school or educational placement?

19. Grant temporary custody -- usually granted to DHS but statute allows grant of temporary custody to "suitable person. "

- **a.** Ask DHS, grandparents and foster parents (if present) about child's specific needs, favorite people, toys, comfort items.
- **b.** Order DHS provide immediate appropriate treatment/services for child to address trauma, physical and mental health
- **c.** Address critical developmental needs of children zero to three.

d. Discuss older child's school placement and plan to meet educational needs and extracurricular interests.

WHAT IS THE VISITATION PLAN AND WHY?

20. DHS policies require preparation of a *Temporary Visit and Contact Plan* when the child first enters care. Ask about it.

21. Once a week in office not enough. The child, parent or guardian and sibling each have a right to visit as often as reasonably necessary to develop and enhance their attachment to each other. Lack of resources not enough to limit visits. *See* OAR 413-070-0860(1) (d) (B) (ii); OAR 413-070-0860(2) (f) (B); OAR 413-070-0870(1).

22. DHS policies require the development of an *Ongoing Visit and Contact Plan* within 30 days. Ask the worker what that might look like.

23. DHS policy requires that when DHS resources alone cannot meet the family contact and visitation needs of the child the caseworker must solicit help from family resources and the community.

a. Ask DHS what it has done to engage relatives/grandparents in assisting with supervision and creating the *Visit and Contact Plan*.

b. Ask relatives and friends present for input. How could they provide support?

24. The Court can order DHS to provide a certain number of supervised or unsupervised visits weekly. ORS 419B.337 (3).

SET THE NEXT HEARING

- Set a **second shelter** if necessary –no more than a few days to week out.
- Set **non-judicial settlement conference** involving attorneys, DHS and clients at 30 days (highly recommended). Set just before 30 day pretrial conference and you can do immediate admit/deny/dispo on the record.
- Set a **pretrial conference** 30 days. (aka *status, pre-hearing, trial readiness*)
- Set a *very firm* **adjudication/disposition** date within 60 days of filing. Rarely, if ever, grant continuances for "good cause" under ORS 419B.305 (1). Pending criminal case is not "good cause" in my view.
- Set **Citizens Review Board** (CRB) hearing at 6 months.

JCIP'S JURISDICTION/DISPOSITION HEARING BENCHCARD JF3, JF4 & JF4B

JURISDICTION

1. Have both parents been found and served?
2. Tribe(s), foster parents, grandparents notified?
3. Do you know or have reason to know the child is an Indian child?
4. Is Oregon the child's home state?
5. Are the petition allegations jurisdictional under ORS 419B.100? Are they admitted or proved?
6. If the jurisdictional basis is 419B.100 (1), (c) is there a present risk of serious loss or injury and a nexus between the parent or guardian's risky conduct and the harm.
7. Have you based your decision on evidence in the record, based on preponderance of or (under ICWA) clear and convincing evidence?
8. One parent admits, other contests: If both parents served and appear, do not take jurisdiction. Instead, take non-contesting parent's admission on the record; continue shelter order, notice both parents to appear at jurisdictional hearing for contesting parent followed by dispositional hearing for both parents.

DISPOSITION: Child is now your "ward."

1. In-home: Can the child go home today?
    a. Make best interest findings as to why child can be safely returned to parent (usually by giving DHS legal custody and implementing a detailed safety plan.)
2. Out of home: Why can't the child go home today?
    a. Make findings that removal from home in child's **best interests.**
    b. Make findings re DHS **diligent efforts** to place with relatives and siblings
    c. Make findings re DHS **reasonable efforts** to prevent removal and return child safely home.
    d. Is placement least restrictive and most family like?
    e. ICWA Out of home: Why can't the child go home today?
        i. Make all findings above based on clear and convincing evidence.
        ii. Make active efforts findings instead of reasonable efforts findings.

iii. Make additional findings based on **qualified expert witness testimony** that return would result in serious emotional or physical injury/damage.

iv. Is placement in accord with ICWA placement preferences?

3. Grandparents/Relatives

   a. Were diligent efforts made to find grandparents?

      i. If present, give them opportunity to be heard.

      ii. They have right to court-ordered visitation.

   b. What has DHS done to locate relatives?

4. What is the concurrent plan?

   a. What steps has DHS taken on concurrent planning checklist?

5. Review Action Agreement/Letter of Expectation

   a. Rationally related to bases for jurisdiction with specific Conditions of Return?

6. Assign legal custodian and legal guardian.

7. Review Child's Case Plan. Does it address trauma, attachment, health, mental health, education, transition planning?

a. Has DHS ordered appropriate assessments to mental health, to Early Intervention, for medical and dental checkups?

b. Should court order specific exam or treatment?

c. Are foster parents a good match for child's needs?

d. Does foster parent provide trauma informed care?

e. Is child in same school? If not why is new school in child's best interest?

8. Visitation "Family Time"

a. Court may order specific visitation.

b. Parents and siblings have a right to visit as often as reasonably necessary to develop and enhance their attachment to each other.

c. Caseworker must solicit family and community resources if DHS resources alone insufficient.

d. Infants and toddlers deserve special consideration.

9. Order CRB review 6 months from removal

10. Set court review. Recommend 9 months from removal; some courts also review some or all cases at 4 months from removal.

11. Set Permanency no later than 12 months from today.

JCIP'S FULL REVIEW HEARING BENCHCARD JF6

ENGAGE PARENTS AND CHILD AND EXPLAIN HEARING PROCESS

1. Did DHS notify and transport age-appropriate children? ORS 418.201(2).
2. Did DHS notify foster parents and grandparents?
3. Determine who wishes to be heard and tell them how and when that is going to happen.
4. Determine if parents or others should be excluded when children are heard or if children should be heard in chambers. ORS 419B.310.
5. Briefly explain in simple language what the hearing is about:
    a. Can the child go home now?
    b. Is DHS making progress on the concurrent plan?
    c. Did DHS make reasonable efforts to help parents fix the problems that brought the child into care?
    d. How is the child doing? Does his or her plan need changes?
    e. Are parents making progress for return of child? What is timetable for return? Did DHS follow case plan?
    f. How is the visitation ("family time") plan working?

6. Appoint a CASA if child is still out of home and not likely to go home today and no CASA was appointed at disposition. ORS 419B.112.
7. Mark the court report and enter it into the Record of the Case

IS THERE A CONTINUED BASIS FOR JURISDICTION?

8. Motions to Dismiss Jurisdiction:
    a. Apply rules of evidence to motion to dismiss.
    b. DHS has burden of proving case by a preponderance (non-ICWA) or clear and convincing (ICWA) evidence.
    c. Not a retrial of original allegations.

HAS DHS MADE SUFFICIENT CONCURRENT PLAN EFFORTS?

9. Mark and receive completed Concurrent Planning Checklist if in use.

DID DHS MAKE RE/AE?

10. Document RE/AE toward reunification. Efforts must relate to basis for jurisdiction with child's health/safety paramount concern.
    i. Efforts must be made as to each parent
    ii. ICWA Active efforts: DHS must assist client through steps.
11. Document reasonable efforts to finalize permanent plan if plan is not reunification.
12. No RE finding necessary if aggravated circumstances exist.

HOW IS THE CHILD DOING?

13. Based on court report or DHS testimony, check boxes in **Section 3** re # of placements, schools, and contact with DHS and visits.
14. Elicit testimony from child, foster parents, grandparents, relatives or others as to how child is doing at home and in school.
15. Review and note "child treatment and care" in **Section 5**.
    a. Have all assessments and screenings been completed? What is the follow-up plan?
    b. Infant or toddler: How are child's developmental needs being met?
    c. Trauma/mental health: what is being done to address?
16. Education
    a. Is child in same school? If not, why in best interest?
    b. Special Ed – is there an educational surrogate? Appoint one.
    c. School attendance and grades? Plan to help improve?

d. Efforts to assist child in completing high school? **Make Section 9** findings.
e. Ages 14 and up: Is there a transition plan for independent living for housing, physical and mental health, education, employment, community connections and supportive relationships?
f. Foster Child Bill of Rights: Was child over age 14 provided written in information on getting a bank account, credit report, college tuition waivers, health services w/o consent, how to remain in foster care after 18? ORS 418.202(4).

HAVE PARENTS MADE SUFFICIENT PROGRESS FOR RETURN WITHIN A REASONABLE TIME/TIMETABLE FOR RETURN?

17. Determine case plan compliance based on court report, testimony or other evidence in the record of the case.

    a. Has DHS followed the plan?

    b. Are parents meeting expectations? Explain to parents the specific behaviors, conditions or circumstances that must exist within the home prior to child's return with in-home safety plan.

18. Make findings as to whether substitute care is still necessary and the expected timetable for return within a reasonable time.

19. If child is placed with parent but in DHS legal custody make best interest finding and determine dates of termination of both DHS legal custody and court wardship.

20. If the court disagrees with type of placement provided by DHS, make findings as to why a change is in child's best interests. Order a change in type of placement in **Section 10**.

21. Have ICWA placement preferences been followed or is there good cause to deviate from ICWA placement preference?

HAS DHS MADE DILIGENT EFFORTS TO PLACE WITH RELATIVES/SIBS?

22. Make findings as to relatives and siblings.

23. Make findings as to why the DHS relative placement is not in child's best interests if you want to order that DHS place the child with a non-relative or in another kind of placement.

HOW IS THE VISITATION PLAN WORKING?

24. Do young children have frequent contact with the primary caregiver in order to maintain familiarity, attachment and promote healthy brain development?
25. Does the plan for older children fit with their school schedule and after school activities?
26. Is there Skype and telephone contact with parents, siblings, out of state or out of country relatives who may become placement resources?
27. Are siblings together? If not is there frequent contact between them?
28. Can relatives or community volunteers be utilized to assist in providing more opportunities for visits?

SET NEXT HEARING(S) AND ORDER NEXT APPEARANCE

JCIP'S PERMANENCY HEARING BENCHCARD JF5

ENGAGE PARENTS AND CHILD AND EXPLAIN HEARING PROCESS

1. Who is here? [JF5 @ *Parties appearing & Notification/Participation]*
   a. Did DHS notify and transport age-appropriate children? Did DHS notify foster parents and grandparents?
2. Determine who wishes to be heard and tell them how and when that is going to happen.
3. Determine if parents or others should be excluded when children are heard or if children should be heard in chambers. ORS 419B.310.
4. Briefly explain in simple language what the hearing is about:
   a. Does child have to continue in foster care today?
   b. Is the child's current foster home OK?
   c. How is the child doing at home, at school and [if over 14] in planning for a successful life as an adult?
   d. How is the visitation ("family time") plan working?
   e. Is DHS making progress on the alternate or "concurrent" plan?
   f. Should the plan still be to get the family back together?
   g. Did DHS help parents fix the problems that brought the child into care?
   h. Are parents making progress so the child can go home? When?
   i. If parents are taking too long time to fix their problems, is there another kind of permanent plan like adoption or guardianship that would be better for the child?
5. Mark the court report and enter it into the Record of the Case

IS THERE A CONTINUED BASIS FOR JURISDICTION?

6. Motions to dismiss.
   a. Apply rules of evidence. DHS has burden of proving case by a preponderance (non-ICWA) or clear and convincing (ICWA) evidence.

b. Not a retrial of original allegations.

IS THE CHILD'S PLACEMENT IN CHILD'S BEST INTEREST? *JF5 2*

7. Must make findings that placement is in child's BI and is least restrictive and family like. If ICWA – follow placement preferences.

8. Must make findings as to DHS diligent efforts to place child with relatives and siblings. [Must make findings as to why the DHS relative placement is not in child's best interests if you want to order that DHS place the child with a non-relative or in another kind of placement.]

HOW IS THE CHILD DOING? *JF5 2, 3 & 6*

9. Elicit testimony from child, foster parents, grandparents, relatives or others as to how child is doing at home and in school.
10. How is the visitation plan working? (See Q's on Review Benchcard)
11. Based on court report and testimony, check boxes in **Section 2** re # of placements, schools, and contact with DHS and visits with family.
12. Review and note "child treatment and care" in **Section 3**.
13. Inquire as to wellness exams, assessments, special medical/mental health/ developmental/trauma needs.
14. Inquire as to education:
    a. Is child in same school? If not, why in best interest?
    b. School attendance and grades? Plan to help improve?
    c. Special Ed – is there an educational surrogate? Appoint one.
15. For ages 14 and over make **Section 6** findings:
    a. Efforts to assist child in completing high school?

b. Transition plan for successful adulthood including housing, employment, community connections and supportive relationships?

c. Was teen provided written in information on getting a bank account, credit report, college tuition waivers, health services w/o consent, how to remain in foster care after 18?

HAS DHS MADE SUFFICIENT CONCURRENT PLAN EFFORTS?

16. Take testimony, review Concurrent Planning Checklist.

FINDINGS WHEN PERMANENT PLAN IS REUNIFICATION *JF5 3 & 5*

17. *Must make written findings if DHS made RE/AE to safely return ward within a reasonable time.* DHS must make efforts as to each parent. AE require DHS to assist client through steps. **Section 3.**
18. *Must make written findings as to whether the parent has made sufficient progress for child to safely return home within reasonable time with health/safety being the paramount concern.* **Section 3.**
    a. Recommend you take testimony on period of time that is reasonable for a child to wait given child's emotional and developmental needs and ability to form and maintain lasting attachments.
19. May determine DHS not in compliance with case plan and order any changes to case plan and date for case progress report or order CRB to review.
20. If order plan continued must describe specific services required and time period in which parent must make progress. **Section 5**
21. If order plan changed to adoption: **Section 5**
    a. Must find child can't safely go home;

b. Must make findings that none of following circumstances apply: (1) Child placed with relative and placement will be permanent; (2) Compelling reason not to file a TPR under ORS 419B.498(2) including parent success in services, another plan better, CRB or court made no reasonable efforts finding.

c. Must order date by which TPR shall be filed and set hearing no later than 6 months from expected date of service.

22. If change plan to something less than adoption, must determine why the ward should not be placed in a higher level in the plan hierarchy when moving down the list from return to parent, adoption, legal guardianship, "placement with a fit and willing relative," APPLA.

FINDINGS WHEN PERMANENT PLAN NOT REUNIFICATION JF5 *4 & 5*

23. Must make written findings if DHS made RE/AE to (1) place child in a timely manner in accordance with the plan and (2) finalize child's permanent placement. ***Section 4***

24. Must order plan continued or changed in **Section 5.**

25. Plan to change back to reunify: Inquiry is if child can be returned home within a reasonable time. Sufficient progress standard does not apply. Court can consider facts extrinsic to jurisdictional basis in evaluating parent if parent has opportunity to respond to evidence.

26. Plan continued: Must make all findings in JF5 **section 5** at every permanency hearing and rule out higher levels in plan hierarchy even when plan stays the same.

SET NEXT HEARING(S) AND ORDER NEXT APPEARANCE

27. Must enter judgment within 20 days and set next annual permanency hearing.